

University Of Calgary

Faculty of Law

Law 703: Legal Research and Methodology

ANNOTATED BIBLIOGRAPHY

(Work In Progress)

Submitted By:

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# Annotated Bibliography

## INTRODUCTION

Following is the annotated bibliography of my proposed research paper and it is still an ongoing process. It includes primary and secondary material related to my proposed research question. Thirteen annotations have been done for the purpose of Law 703 course work.

Topic of my major research paper is “Sand Mining In India: A Call For Change”. The question sort to be answered in my research paper is whether sand should evolve as a major mineral, bringing protection against illegal mining directly under federal government?

## LEGISLATION

- Mines And Minerals (Development And Regulations) Act, 1957.
- Constitution Act 1950.
- Minerals Concessions Rules, 1960.
- Mineral Conservation and Development Rules, 1988.

## SECONDARY MATERIAL: MONOGRAPHS

- Choudhuri, SK. *Environmental Legislation In India: Related Global Issues With Emphasis On Mining* (New Delhi: Oxford & IBH Publishing Co. Pvt. Ltd, 1996).

The author of the book has worked under Indian Bureau of Mines a National Organization under Indian Government for more than three decades. He has served various capacities administering different statutes on development, regulation and conservation of minerals and metals. This book is helpful to anyone intending to explore environmental legislations of India. Mainly, the book is divided into seven parts. Sixth part of the book talks about Mineral Conservation And Mines Safety providing various regimes governing mining in India. This chapter introduces readers to different policies and rules regulating major and minor minerals and regime protecting against environment degradation by mining. Although, various amendments have been done in the last decade but the chapter provides a base for understanding the legal mining structure in India.

As per my research, this chapter provides an insight to relevant legal instruments governing mining and the different regulations governing both the mineral categories. The intended audiences for the book are scholars, researchers, students and mining companies.

- Singh, OP. *Mining Environment Problems and Remedies* (New Delhi: Regency publications, 2005).

### **SECONDARY SOURCE: NEWSPAPER AND MAGAZINE**

- “NGT bans sand mining across country” (6 August 2013), online: Business Standard <<http://www.business-standard.com/>>.
- Bhatia, Satinder. “The Central theme in sand mining”, *The Hindu* (9 August 2013), online: Business Line < <http://www.thehindubusinessline.com/>>.

Satinder Bhatia is a professor at The Indian Institute of Foreign Trade, New Delhi. This article is not envisioned as an academic article but instead is an opinion on the legal issues related to Sand mining in India. The article recommends the alterations that should be brought for regulating sand mining in India. It summarizes that the state governments have taken various steps to curtail illegal sand mining but it still prevails.

It submits that how sand mining might be handled by the Union government by taking the control over it.

This article is useful for my research as major essence of the article is similar to the recommendation made in my proposal for evolution of sand as a major mineral. This article is written for both scholars and researchers.

- Viswanathan, S. “Mining Dangers”, Frontline 19:10 (11 May, 2002), online: Frontline <[www.frontline.in](http://www.frontline.in)>.

### SECONDARY MATERIAL: OTHERS

- Chowdhri, Ankit. “Article 21 of the Constitution of India” (7 April 2011) online: Scribd <[http://www.scribd.com/doc/52481658/Article-21-of-the-Constitution-of-India#force\\_seo](http://www.scribd.com/doc/52481658/Article-21-of-the-Constitution-of-India#force_seo)>.

This article is extremely educational for someone willing to gain knowledge about the judicial interpretations given to Article 21, expanding the scope of the right to life. The author has summarized all the different interpretations ushered by various decided cases. Right to Clean Environment have been held to fall within the preview of Article 21.

The given piece of work could be used to explain that how illegal sand mining is violating the fundamental right to life of every individual. Illegal sand mining comes under the preview of Article 21 as the article provides for the protection against environment degradation caused due to illegitimate use of sand. The targeted audiences for the article could be students, legal practitioners and scholars.

- “Environmental Clearance Confusion Leads To A Spurt In Illegal Mining, India” (22 November 2014), online: Coastal Care <<http://www.coastalcare.org>>.

The referred article precisely submits importance of sand in the construction industry. The article talks about the increase in number of

cases of illegal sand mining in some states, as a result of ban imposed on sand mining. Each order passed now for the license for sand mining, required a prior environmental clearance for all the projects irrespective of their size. On the contrary, this has given way to illegal activities being conducted. States have demanded for decentralization of such an order and it has been stated that there has been more illegal mining because the miners are unable to obtain renewal licences. Also another reason for increasing illegal mining being stated is the increasing gap between demand and supply.

The article provides an insight to steps taken by government and the rejoinder situations, after the steps have been initiated for the curtailment of illegal sand mining. The suitable readers for this work could be legal practitioners, scholars and researchers.

- “Site visit to ascertain the factual position of illegal sand mining in Gautam Budh Nagar, Uttar Pradesh”, online: India Environment Portal Knowledge For change <<http://admin.indiaenvironmentportal.org.in/files/file/Final%20Site%20visit%20report%20of%20Gautam%20Budh%20Nagar.pdf>>.

The present report provides a list of observations prepared by a legal committee comprising three government officials acting on the orders of the Ministry of Environment and Forest. The observations were made after visiting sites in the Gautam Budh district of the Uttar Pradesh. The paper highlights the sand mining scenario in the state of Uttar Pradesh. The legal report included various illegal activities being practiced within the state. Various different damages caused to nearby rivers by such illegal activities have also been stated.

The article is useful for my research because along with the regimes covering illegal mining it lays down directions given by High Court and the Supreme Court of India for prohibiting illegal sand mining. Such directions will be incorporated in my paper for a complete understanding of initiatives taken by the judiciary to prevent illegal mining. The suitable readers for the report are researchers, academics and legal practitioners.

- “Grains of Despair: Sand Mining in India”, online: Centre of Science and Environment <<http://www.cseindia.org/>>.

This article explains the growing demand of sand in the construction industry. It highlights the issues and causes of failure of sand mining regulatory mechanisms in the various states of India such as Tamil Nadu, Madras, Uttar Pradesh, Maharashtra, Kerala, Karnataka, etc. It also includes the basic description of hazardous effects of illegal sand mining on the environment. At the end of the article, a list of present rules and policies of various states has been given. The article concludes that there is a need for an alternate for sand and enacting strict legal measures for preventing illegal sand mining.

The article is relevant to my research as it explains the different reasons for the failure of sand mining mechanism in many of the states. Such reasons for failure will guide me to identify various ambiguities in these regimes. The targeted audience is researchers.

- Joanna, Sugden. “Why India Has a Sand Mafia”, online: (2013) The Wall Street Journal <<http://blogs.wsj.com/indiarealtime/2013/08/06/why-india-has-a-sand-mafia/>>.

The author is the editor of India Real Time, The Wall Street Journal, India. She has written an interesting piece summarizing the situation of illegal sand mining in India. The article highlights the major issues like major involvement of construction industry into illegal sand mining along with politicians themselves. The pressure of demand of sand for the development of infrastructure has been stated as a major reason for growing illegal sand mining. Light has been thrown on the punishments, which are lined down for illegal mining.

The article is useful for my research because it recognizes the involvement of politicians themselves into illegal sand mining, which is one of the concerns in my research paper for evolving sand as a major mineral. It recognize the importance of degree of punishments necessary. Practitioners, researchers and academics could be the suitable readers for this article.

- Menshah, John Victor. “Causes and Effects of Coastal Sand Mining in Ghana”, online: (1997) Singapore Journal of Tropical Geography <<http://onlinelibrary.wiley.com.ezproxy.lib.ucalgary.ca/store/10.1111/1467-9493.00005/asset/1467->

9493.00005.pdf?v=1&t=i3pf6uy6&s=ce64eab4bbc32e4f61aa292dfe6ca31779a2bf93  
>.

- Padmalal, D & K-Maya & S-Sreebha & R-Sreeja. “Environmental effects of river sand mining: a case from the river catchments of Vembanad lake, Southwest coast of India”, online: (2007) 54:4 Environmental Geology <<http://link.springer.com.ezproxy.lib.ucalgary.ca/article/10.1007/s00254-007-0870-z>>.
- Pereira, Kiran. “Sand Mining- The Unexamined Threat to Water Security” (9 January 2013), online: India Water Portal <[http://www.indiawaterportal.org/sites/indiawaterportal.org/files/illegal\\_sand\\_mining\\_the\\_unexamined\\_threat\\_to\\_water\\_security\\_in\\_india\\_kiranpereira\\_2012.pdf](http://www.indiawaterportal.org/sites/indiawaterportal.org/files/illegal_sand_mining_the_unexamined_threat_to_water_security_in_india_kiranpereira_2012.pdf)>.

Kiran Pereira is a public speaker, writer and a research consultant who specializes in water issues. She describes a case study explaining the lack of knowledge about importance of sand as a mineral. She has clearly listed the finding from the case study and has recognized various different reasons backing illegal sand mining. This case study is good source of knowledge for researchers.

It is being referred for undertaking my research because it recognized the involvement of politicians in illegal sand mining. Further, the case study also stated that no complaints against such illegal activities are registered because the wrong doers create threat in the minds of people living nearby those areas where these activities are executed.

- Philip Elizabeth. “Crusade Against Sand Mafia”, online: (2013) 48:52 Economic & Political Weekly <<http://www.epw.in>>.

This is a very interesting article based on an incident where a woman from the state of Kerala raised voice against sand mafia. The article depicts the action taken by an individual against the menace of illegal sand mining. Author states that how her complaints have been

ignored and how unfavorable the reaction of the politicians was. The suitable audiences could be researchers.

The article is useful for my research for presenting the actions taken by individual against illegal sand mining and presents an incident showing irresponsible behavior of the regulatory authorities towards illegal mining.

- Rai, AK. “A POINT OF VIEW OF MINING IN INDIA”, online: (2006) Mining Engineering Journal <<http://www.sesagoa.com/pdf/Mining%20in%20India.pdf>>.

- “Regulation of Minerals”, online: Directorate of Geology and Mining, Govt. of Maharashtra, Nagpur <[http://www.mahadgm.gov.in/PDF/REGULATION\\_OF\\_MINERALS.pdf](http://www.mahadgm.gov.in/PDF/REGULATION_OF_MINERALS.pdf)>.

This work elucidates key provisions for regulation of minerals in India. This piece provides detailed information about the various legislations governing major and minor minerals. It provides detailed information about matters concerned to mining such as permits, prospecting licenses, mining period and its renewal.

The referred work aids in providing an overview of the regulatory provisions governing mining in India. This article is useful to practitioners, academics as well as to researchers.

- “Sand Mining”, online: C-TEMPO < [http://www.c-tempo.org/studies/Sand\\_Mining.pdf](http://www.c-tempo.org/studies/Sand_Mining.pdf)>.

The article provides an overview about the sand mining in India and the prevailing illegality in the sector. It explained the importance of sand for protection of environment and how illegal mining is causing a risk to ecosystem. It provides a clear definition of sand mining. The article identified the need to use various other alternatives to sand in order to preserve environment.

The piece is helpful for providing an introduction to research proposal and understanding the environmental consequences of illegal sand mining. The article seems to be written for academics and researchers.

- Saviour, M-Naveen & P-Stalin. “Soil and Sand Mining: Causes, Consequences and Management”, online: (2012) 2:1 IOSRPHR < [www.iosrphr.org](http://www.iosrphr.org)>.

At the time of writing this article, the first author was a Research Scholar and the second was a Professor in the Department of social science and Agricultural Chemistry of Tamil Nadu agricultural university. The article explains more about the various kinds of impacts of illegal sand mining such as environmental, physical, ecological, etc. It also talks about the importance of sand mining sector to the country and need for restoration of sand.

Despite the fact that the article does not refer to the legal setup of sand mining directly but it is still helpful in recognizing the loopholes and building recommendations. It helps in understanding structure of sand mining. The article also includes the adopted definition of sand mining given by UNEP. Suitable readers for this work are academics and researchers.

- Umesha, Monica & Abishek-Murthy. “Sand mining: Curbing the Evil to the Environment Through Sustainable Substitution and Legislative Action”, online: (2014) 7:3 OIDA International Journal of Sustainable Development <<http://ssrn.com/abstract=2441706>>.

The authors of the paper were final year students of the LL.B. program at Christ University, Bangalore, India while writing this paper. In this article the relationship between the demand for sand and its various impacts have been discussed. The growing demand of sand was instigating illegal sand mining and extended upto the level where it started degrading environment. In this paper the authors have attempted to recognize certain alternatives of sand for prevention of illegal sand mining.

Reference to this article can help in forming a strong recommendation to adopt any of the suitable alternatives to sand. Adaptation to such alternatives will help controlling excessive sand mining.

# **ADOPTING CITIZEN INITIATIVE REVIEWS IN ALBERTA: BRIDGING THE GAP BETWEEN REGULATORY LICENSE AND SOCIAL LICENSE?**

## **ANNOTATED BIBLIOGRAPHY (IN PROGRESS)**

Garrath Douglas

December 16, 2014

This is a partial annotated bibliography of materials for graduate research. It is a work in progress and should not be taken as an exhaustive review of the relevant literature. The research will contribute to an assessment of the potential to adopt the Oregon Citizens' Initiative Review in Alberta in the context of Alberta's energy and natural resources regulatory framework, specifically that of the Alberta Utilities Commission

### **LEGISLATION**

*Alberta Utilities Commission Act*, SA 2007, c A-37.2.

*Canadian Environmental Assessment Act*, SC 2012, c 19, s 52

*Energy Resources Conservation Act*, RSA 2000, c E-10 (repealed by *Responsible Energy Development Act*, SA 2012, c R-17.3).

*Environmental Protection and Enhancement Act*, RSA 2000, c E-12.

*Hydro and Electric Energy Act*, RSA 2000, c H-16.

*Oil and Gas Conservation Act*, RSA 2000, c O-6.

*Responsible Energy Development Act*, SA 2012, c R-17.3.

### **SECONDARY MATERIALS: GOVERNMENT PUBLICATIONS**

Canadian Environmental Assessment Agency, *Public Participation Guide* (May 2008) online: <[https://www.ceaa-acee.gc.ca/Content/4/6/4/46425CAF-50B2-408D-A2A4-EDFAD2A72807/Public\\_Participation\\_Guide.pdf](https://www.ceaa-acee.gc.ca/Content/4/6/4/46425CAF-50B2-408D-A2A4-EDFAD2A72807/Public_Participation_Guide.pdf)>.

## SECONDARY MATERIALS: ARTICLES

Arnstein, Sherry R. "A Ladder of Citizen Participation" [1969] 35 J American Planning Association 216.

The author identifies eight levels of public participation across a spectrum depicted as rungs on a ladder. "Arnstein's Ladder" of Citizen Participation has become axiomatic in the literature on public participation, and both the International Association of Public Participation (IAP2) and the Organization for Economic Co-operation and Development (OECD) have models based on Arnstein's original classification of levels of participation and opportunities to empower communities to make decisions for themselves. The metaphor of the ladder touches on a spectrum within which gaps and targets may be identified.

Boote, David N & Penny Beile, "Scholars Before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation" (2005) 34:6 Educational Researcher 3.

Boutillier, Robert G. "Frequently Asked Questions About the Social License to Operate" (2014) 32:4 Impact Assessment & Project Appraisal 263.

The author identifies concerns from impact assessment practitioners around the concept of a social license to operate by using a frequently asked questions format. The author provides a comprehensive summary of the differences in expectations from public participatory processes of industry, the public, and regulators, and argues that the concept is in danger of becoming blurred.

Gastil, John & Katie Knobloch, "Evaluation report to the Oregon State Legislature on the 2010 Oregon Citizens' Initiative Review" (2010) Unpublished report, University of Washington, Seattle, WA. <<http://www.la1.psu.edu/cas/jgastil/CIR/OregonLegislativeReportCIR.pdf>>.

Gastil, John, Robert Richards & Katie Knobloch. "Vicarious Deliberation: How the Oregon Citizen's Initiative Review Influenced Deliberation in Mass Elections" (2014) 8 Intl J Communication 62.

This article offers a comprehensive synopsis of the Oregon Citizen's Initiative Review in the context of other deliberative processes such as Citizens' Juries, Deliberative Polls, and 21<sup>st</sup> Century Town Meetings. Framing the Citizen's Initiative Review as small group deliberation that helps a large public make informed and reflective judgments, the article critically analyses the Initiative and makes practical recommendations and recommendations for future research.

Gastil, John & Katie Knobloch, "Did They Deliberate? Applying an Evaluative Model of Democratic Deliberation to the Oregon Citizens' Initiative Review" (2013) 50:2 J Applied Communication Research 105.

Husa, Jaakko. "About the Methodology of Comparative Law: Some Comments Concerning the Wonderland," Maastricht Faculty of Law Working Paper No. 54.

Legrand, Pierre. "The Impossibility of 'Legal Transplants'" (1997) 4 MJECL111.

Reitz, John C, “How to Do Comparative Law” (1998) 46 Am J Comp L 617.

Woolley, Alice. “Legitimizing Public Policy” (2008) 58:2 UTLJ 153.

The author identifies a Canadian ‘democratic gap’, a space ‘devoid of legal principles’ in which there is no assurance that government policy will reflect the public will. Woolley analyses the deliberative model, acknowledging the limitations and weaknesses of deliberative democracy, but argues that the weaknesses should not make the strengths invisible.

## SECONDARY MATERIALS: BOOKS

Barton, Barry. “Underlying Concepts and Theoretical Issues in Public Participation in Resource Development” in Donald N. Zillman, Alistair R. Lucas and George Pring, eds, *Human Rights in Natural Resources Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press, 2002) 77.

Chynoweth, Paul. “Legal Research” in Andrew Knight & Les Ruddock, eds, *Advanced Research Methods in the Built Environment* (London: Wiley-Blackwell, 2008) 28.

Fournier, Patrick, et al. *When Citizens Decide: Lessons from Citizen’s Assemblies on Electoral Reform* (New York: Oxford University Press, 2011).

Fournier et al offer analysis of the 2005 Citizen’s Assembly in British Columbia leading to a precedent that Ontario and the Netherlands could follow. In combination with other studies on the citizen assemblies, this book provides a synopsis of some notable experiments in deliberative democracy, leading to a more complete understanding of the model and its influence on the Oregon Citizen’s Initiative Review.

Macias, Rebeca. *Public Participation in Energy and Natural Resources Development: a Theory and Criteria for Evaluation* (Calgary: Canadian Institute of Resources Law, 2010).

Warren, Mark E & Hilary Pearse. *Designing Deliberative Democracy: The British Columbia Citizen’s Assembly* (New York: Cambridge University Press, 2008).

## SECONDARY MATERIALS: WEB LOGS

Fluker, Shaun. “The Smoking Gun Revealed: Alberta Environment Denies Environmental Groups Who Oppose Oil Sands Projects the Right to Participate in the Decision-Making Process” (3 October 2013), The University of Calgary Faculty of Law Blog on Developments in Alberta Law (blog) online: <<http://ablawg.ca/2013/10/03/the-smoking-gun-revealed-alberta-environment-denies-environmental-groups-who-oppose-oil-sands-projects-the-right-to-participate-in-the-decision-making-process/>>.

The web log post questions the public participation framework in Alberta, characterizing it as one that places too much discretion in the hands of government officials to decide who

participates in energy project approvals. The author further contends that the common feature in statutes governing participation is the narrow scope of persons provided the legal right to participate. This posting and similar articles are pertinent to establishing that when it comes to public participation in resources and environmental decision-making in Alberta, there is something broken to fix.

**UNIVERSITY OF CALGARY**

**FACULTY OF LAW**

**LAW 703: LEGAL RESEARCH AND METHODOLOGY**

**DEPECAGE IN UPSTREAM OIL AND GAS CONTRACTS**

**ANNOTATED BIBLIOGRAPHY**

**BY**

**SAHAR KARIMI**

**17 DECEMBER 2014**

## INTRODUCTION

This project could examine new areas of law, on which there has been little written to date and also be a review of existing areas of law from a different perspective. Dépeçage has already been the subject of academic literature, but the aim of this research is advancing the state of knowledge by presenting the new way of using this subject in the field of upstream oil and gas contracts and concentrate in how to choose the suitable govern law for them. Furthermore this project may involve comparing national law in Canada and France or comparing the approach of civil law and common law.

These are some of the existing academic literature about the topic Dépeçage in general that will form part of the study for LLM thesis.

### Secondary Material: Articles

1. Kennelly, John J. "Aviation - The Need for Uniform Legislation" (1982-1983) 48 J Air L & Com 613.

John J. Kennelly of Chicago, Illinois has served as Chairman (1981-82), of the Aviation and Space Law Committee of the Torts and Insurance Practice Section of the American Bar Association, and he is a former chairman of the Aviation Section. Mr. Kennelly is a fellow of the American College of Trial Lawyers and the International Society of Barristers. He authored *Litigation and Trial of Air Crash Cases*.

This article concentrates in the problems involved in determining what law applies as to the rights of claimants and to the obligations of defendants and mentions Dépeçage as a method of choosing the law which applies to particular issues in litigation. Due to that, it has explained about the theory of Dépeçage and talk about if in the practical law and the way that courts use this theory, which it is very useful to understand about application of Dépeçage without expression of parties. Also, it would help to come up with an idea about how to determine Dépeçage as an implied term in contract.

2. Stevenson, Christopher G. “Depeçage: Embracing Complexity to Solve Choice-of-Law Issues” (2003) 37 Ind L Rev 303.

Christopher Stevenson is an associate with the law firm of Wilson Kehoe Winingham. His practice focuses on aviation litigation, product liability, agriculture incidents, and appellate issues. He’s a graduate of Purdue University’s Flight Program and a former Boeing 727 cargo pilot. Since graduating from Indiana University School of Law - Indianapolis, Chris has used his previous knowledge guides him various aviation cases.

This source is so useful about understanding the concept of Dépeçage as it attempts to explore this theory and offer it as a needed tool for efficient and effective choice-of-law analysis. In part one, it provides examination of the origins of Dépeçage from modern day choice-of-law principals. Following in the second part, it discusses the mechanics of applying Dépeçage to complex litigation, and demonstrates how various courts have used Dépeçage as a successful judicial instrument. Third part explores the reasons why some courts have not embraced depeçage. At the end, it discusses the lack of direction that has left courts in confusion with little knowledge and guidance from higher authority on the application of Dépeçage to choice-of-law.

3. Mettala, Kimmo. “Governing-Law Clauses of Loan Agreements in International Project Financing” (1986) 20 Int'l L.

Kimmo Mettala has studied in the University of Helsinki, currently he is a member of the New York bar association. He has extensive experience in acquisition finance and secured finance, corporate finance, debt capital markets, debt restructurings, public and private company acquisitions and divestitures, investments in the emerging markets and representation of growth companies.

This article is expressly concentrate about governing law clauses. In this article, theory of Dépeçage has been mentioned and the essence of the problem which whether one substantive law governs the entire has been discussed by details which it makes the article so beneficial to understand about the way that Dépeçage has been treated. Furthermore it has describe how parties can in principle divide the various rights and duties by Dépeçage which could have been such an appropriate way to compare the application of Dépeçage in upstream oil and gas contracts with them. Since the author has a strong background in the financial matters, this article would be beneficent in emphasizing the economic theory of Dépeçage.

4. Reese, Willis L. M. “Depeçage: A Common Phenomenon in Choice of Law” (1973) 73 Colum L Rev 58.

Willis L. M. Reese is a professor of Law and director of the Parker School of foreign and comparative Law, Columbia University; Reporter, Restatement (Second) of Conflict of Laws.

The article is about choice of the applicable law frequently depending upon the issue involved. At first it gives a clear definition of Dépeçage in the general and narrative way. Following it has mentioned specific usage of application of Dépeçage which would lead future

cases and future areas of law to that. In the upcoming section it is useful to give some criteria of fields of the law which can be governed by Dépeçage and it would be possible to compare them to the upstream oil and gas contracts. The benefit of this source would be more considerable due to the author's knowledge regarding the restatement of conflict of laws. This would further aid Willis L. M. Reese in order to gain a broad view of the problems arising so that he can fully scope the issues surrounding conflict of laws, having this broad view it helps him gather all aspects of law in to consideration and infer a realistic view in regards to Dépeçage.

5. Ena, Michael. "Choice of Law and Predictability of Decisions in Products Liability Cases [comments]" (2007) 34 Fordham Urb L J 1417.

Michael Ena has been graduated from Fordham University School of Law and worked as a lawyer in New York bar association. This article shows how and why Dépeçage was rejected by the Indiana state Supreme Court. It is further stated that in 2007 choice of law and predictability court also specifically denounced Dépeçage, the doctrine endorsed by the Second Restatement that allowed courts to make choice of law decisions on an issue-by-issue.

When the Supreme Court has spoken on choice of law, it has clearly stated that there are certain restrictions prohibiting arbitrary and unfair decisions on applicable law. In my research this article helps to provide a different point of view in regards to the concept of Dépeçage and its uses while supporting other theories, this in a sense will help broaden the approach to this concept. Also, since the author has been working for oil and gas industries, this would help him to automatically pay more attention to these kind of issues.

6. Hakki, Murat Metin. "Choice of Law, Contracts and the EC's 1980 Rome Convention - A Re-Evaluation in the 21st Century" (2003) 2003 Austl Int'l LJ 156.

Murat Metin Hakki has been awarded law degrees from the University of Southampton, the London School of Economics and Cornell Law School, as well as a Masters of Arts degree in Middle Eastern Studies from Harvard University. He has published articles in various journals and newspapers in Cyprus, Turkey and Greece.

This article provides Dépeçage as a highly unusual and most inconvenient in relation to dispute resolution. In fact it has claimed that the common law has been reluctant to permit two laws to govern separate parts of the contract, no doubt to avoid the possibility of untidiness and irreconcilability arising. This gives the parties the power to alter the previously chosen law or to choose one if they fail to do so at the time of contracting. There is two interesting point in this resource that make it so advantageous to study. One is the critical view to the theory of Dépeçage which may help to investigate it by more attention to its weaknesses and the other is study the position of Dépeçage in the common law which is highly related to the research about the application of Dépeçage in the common law and especially in the upstream petroleum contracts.

7. Ekelmans, M. "Le dépeçage du contrat sur la loi applicable aux obligations contractuelles" (1986) 2 Mélanges offerts à Raymond Vander Elst 243.

Ekelmans is involved in Company Law at national and international level and is specialized in counselling complex domestic and international trade disputes. Also the author has extensive experience in the field of insurance and liability law, and more specifically directors' and officers' liability, professional liability and policy and coverage disputes.

This resource express the scope of the governing law (the *lex causae*) that can be limited because different laws are applied to different issues in the agreement under a doctrine frequently referred to as "depeçage," or because the ability of the parties to stipulate the governing law is limited. This analysis is used with in international law and its agreements within the financial field, in which this financial stage is a key part in upstream oil and gas contracts. Given the article entry we could analytically evaluate Dépeçage in this upstream oils and gas contracts, furthermore due to the author's international background, we could also critique the implementation of Dépeçage in a broader sense of internationally viewed concept. It further mentions loan agreements are between the World Bank, which is deemed to be a subject of international law, and states which also are such subjects, it has authoritatively been suggested that the law governing such agreements is international. The acceptance of Dépeçage within the fiscal system and the loaning ability combined the role of Dépeçage in this system. This way of combining two different legal and economic point of view will help a lot in extending the idea of Dépeçage.

8. Peterson, Courtland H. "Private International Law at the End of the Twentieth Century: Progress or Regress" (1998) 46 Am J Comp L Supp 197.

Courtland H. Peterson has studied at the University Of Colorado, graduating with a BA and an LLB. s. In 1957 he was awarded a fellowship for an advanced comparative law program at the University of Chicago, leading to a Master of Comparative Law degree in 1959. This master of comparative law would help to improve the quality of arguments in this articles.

According to this article, concept of Dépeçage, refer different issues in the same case to different legal systems, has found some acceptance. The source continues that the prevailing methodology in the United States, emerging from the conflicts revolution in the form of the Second Restatement and the eclectic view taken by many American courts, is a curious amalgam of the unilateral and multilateral methods. This case study of Dépeçage would help to find better way to apply them in the upstream oil and gas contracts and also it would help to find advantages and weaknesses of applying Dépeçage in contracts.

9. Nagle, John. "Severability" (1993-1994) 72 N C L Rev 203.

Professor John Nagle joined the law faculty as an associate professor of law in 1998 and became a full professor in 2001. He was the law school's inaugural Associate Dean for Faculty Research from 2004 to 2007. He is the co-author of casebooks on "The Practice and Policy of Environmental Law," "Property Law," and "The Law of Biodiversity and Ecosystem Management.

This article aims to determine that concept of severability and its ramifications for statutes. Mr. Nagle traces the development of the current judicial test for determining when a statute should

be found severable. Also it have been mentioned in the article that such clauses do not necessarily cause a court to reach a particular result. Severability is similar to the *Dépeçage* that exist in the common law legal system. So that this article might be so useful in finding similar concepts to the *Dépeçage* and their application. Although, since there is a strong relationship between upstream oil and gas contracts and environmental law, and in order to the knowledge of author in this field, it could help to see the environmental aspects of applying different governing law in different parts of the contracts.

10. Scoville, Ryan. "New General Common Law of Severability" (2013) 91 Tex L Rev

543.

Professor Scoville holds a J.D. from Stanford Law School and a B.A. in International Studies from Brigham Young University. He teaches and writes in the areas of international and U.S. foreign relations law.

This article determine the new general common law of severability. This clause which is similar to the concept of *Dépeçage* and the article indicates that the doctrine of the severability has varied significantly over time. Whether statutes are to be presumed severable, for example, has changed repeatedly. Also it shows that the Court honors the plain text of severability clauses has varied and precedent has historically differed on whether the test for severability focuses on legislative intent alone, on the effect of severance on the functionality of the statute, or on some combination of both. The Court has not explained most of these shifts. The cases, moreover, have varied in the depth of treatment they give to severance questions, with some opinions deciding without reasoned analysis or citation to authority, and others providing such support. However, the author explain the results and case decisions which have an important role to understand about the concept of severability and compare to the theory of *Dépeçage*.

11. Wells, Christopher P. "Oil and Gas Taxation" (1976-1977) 6 UCLA Alaska L Rev

301.

Christopher P. Wells, have been received degree in law and worked as lawyer. He has been mentioned in the article that oil and gas taxes arbitrary, for a state could achieve the same dollar amount of tax revenues merely by doubling a given tax. It is clear, then, that there can be no successful constitutional challenges, at either the federal or the state level, to Alaska's severance tax based either on a theory of double taxation or of violation of equal protection. Nevertheless, the Alaska legislature has included a severability clause by which any offending portions of the four oil and gas tax chapters could be nullified without destroying the overall tax scheme. These severability clauses would ensure that the state would be guaranteed revenues under at least one of its oil and gas taxes. According to the study of application of severability in the oil and gas contracts in this article it would be a prepared situation to compare *Dépeçage* to it. Furthermore, gathering and analyzing the cases related to the oil and gas contracts which are suitable to applying different governing law will help to extend the research.

12. Movsesian, Mark L. "Severability in Statutes and Contracts" (1995-1996) 30 Ga L

Rev 41.

Mark L. Movsesian is a professor of contract law and the director of the center for law and religion. He writes in law and religion, contracts and international law; his articles have appeared in the Harvard Law Review, the Oxford Journal of Law and Religion, the American Journal of International Law, the Harvard International Law Journal, the Virginia Journal of International Law, and many others.

This article express the established doctrine on the severability of unconstitutional statutory provisions has drawn criticism on almost every conceivable basis. Severability doctrine will retain great practical significance for the foreseeable future. Practical significance is not the only reason the controversy lingers, however. A more profound explanation lies in severability doctrine itself. In determining the severability of unconstitutional statutory provisions, courts have applied essentially the same test they employ to determine the severability of illegal contract terms. In contracts law, severability turns on the intent of the parties to the agreement. Therefor this article talks about a concept similar to the concept of Dépeçage which exist in the common law legal system. This would build an opportunity to digest an area for evaluating the application of Dépeçage in the common law system.

# **Independent Operations in Oil and Gas Joint Operating Agreements: Are they Worth the Risk?**

## **An Annotated Bibliography**

Heather Lilles

### INTRODUCTION

This annotated bibliography was prepared for the Faculty of Law's Legal Research and Methodology Course (Law 703) for the fall term of 2014. It contains a selection of literature relevant to my LLM thesis at the University of Calgary and is a work in progress. It is not intended to be an exhaustive review of the relevant literature.

The focus of my thesis is on the independent operations provisions of two model joint operating agreements ("JOAs") frequently used by Canadian oil and gas companies when engaging in exploration and development of petroleum and natural gas resources in Canada and abroad. These are the Canadian Association of Petroleum Landmen ("CAPL") Operating Procedure and the Association of International Petroleum Negotiators ("AIPN") JOA. Specifically, my thesis concentrates on the contractual mechanisms expressly provided for within the CAPL and AIPN JOAs which are intended to mitigate and allocate risk between the participating and non-participating parties in an independent operation.

### SECONDARY MATERIALS: MONOGRAPHS

Pereira, Eduardo G. *Joint Operating Agreements: Mitigating Contractual and Operational Risks in Exclusive Operations* (London: Globe Business Publishing Ltd., 2013).

This is a short book which focuses on the subject of "exclusive operations" (independent operations is the term used within Canada). It is part of a series of books on Joint Operating Agreements. An analysis of the footnotes reveals that the author focused predominantly on secondary source material from the United Kingdom and Australia. Textbooks were utilized heavily and there is no caselaw.

In the book, the commentary is found within the first few chapters and thereafter the independent operations provisions from a number of different model JOAs are excerpted (including the 2007 CAPL Operating Procedure). Integrating the model JOAs with the commentary may have been a more effective method of analysing the model JOAs, however, given the large number of model JOAs provided in the book, this may have been logistically difficult. As a broad overview of the practical issues companies will face when confronted with an independent operation, the book will be of valuable assistance to landmen and contract managers.

## SECONDARY MATERIALS: ARTICLES

Derman, Andrew B & James Barnes. “Autonomy versus Alliance: An Examination of the Management and Control Provisions of Joint Operating Agreements” (1996) Rocky Mountain Mineral L Foundation Series at 4.03.

The authors of this article were, at the time of publication, corporate counsel to two major oil and gas companies in the United States. Both have written other works on the subject of joint operating agreements. The article was published by the well respected Rocky Mountain Mineral Law Foundation, which is one of the few publishers in the United States that requires peer review of legal scholarship.

Through a review of the provisions of four model operating agreements (three originating from organizations based in the United States and one from an international organization), the authors argue that current US model form JOAs are perpetuating structures and mechanisms that inhibit cooperation, concentrate authority and limit accountability. As an alternative, the authors suggest shifting the balance of power among the parties to a JOA (in the United States) in favour of more co-operation and the possible use of project teams or operating committees.

Despite the dated age of the article, it identifies an underlying factual problem and legal issue which I directly address in my thesis.

Desbarats, Robert P & Donald G MacDiarmid. “Independent Operations: Article X of the CAPL Operating Procedure” (1996) 34 Alta L Rev 602.

This article is somewhat dated relative to other articles considering Canadian joint operating agreements in this review; however, it specifically addresses the independent operations provisions of a model oil and gas JOA which is the primary focus of my thesis. Some of the provisions of the model JOA under review (the 1990 CAPL Operating Procedure), such as those dealing with the older “obligation to consult” and the relatively minor treatment of horizontal drilling, are substantially amended in the 2007 CAPL Operating Procedure. Further, there has been significant caselaw on the operating procedure since the article’s publication. However, as a historical review of the 1990 CAPL Operating Procedure, the article provides a detailed basis of comparison for the 2007 CAPL Operating Procedure. Further, it is (as far as have determined), the only article published in a peer reviewed journal that focuses exclusively on the independent operations provisions of a CAPL Operating Procedure. Thus it continues to add value to the topic of independent operations.

Gordon, Greg. “Risk Allocation in Oil and Gas Contracts” in Greg Gordon et al, (eds), in *Oil and Gas Law: Current Practice and Emerging Trends*, 2nd ed (Dundee, Scotland: Dundee University Press, 2011).

This article is a chapter in a collection of articles on current issues in oil and gas law. The author of the article is also one of the editors of the book and the author of two additional

chapters in the book (unrelated to my thesis topic). This knowledgeable author discusses three vehicles commonly used to allocate risk in upstream and midstream oil and gas contracts: (i) indemnity and hold harmless clauses, (ii) consequential losses, and (iii) overall limitations on liability. (It is noteworthy that the first issue is covered most extensively in forty-eight of the fifty-four pages of the article).

The article is confined in scope primarily to the law of the United Kingdom (“UK”), although some footnotes reference articles published outside of the UK. The Canadian equivalent of this article is noted below, Kangles, “Risk Allocation Provisions”. Both articles provide a useful logical progression from how risk is allocated at common law to interpreting indemnification and indemnity provisions in the specific context of oil and gas contracts. Neither article provides a comprehensive review of the issue in the context of JOAs specifically.

Grant, Brad. “Joint Ventures in the Canadian Energy Industry” (2012-2013) 50 *Alta L Rev* 373.

As the title suggests, this article focuses on the concept of joint ventures in the Canadian energy industry. The scope of the article addresses a number of different forms of joint ventures, while my thesis is confined in scope to consider one specific form of contractual joint venture – the JOA. However, the examination of alternative forms of joint ventures (and the key commercial considerations involved when utilizing each model), provides a useful basis of comparison.

The supporting references are confined (with one exception) to secondary materials from Canada including many online news articles. This is consistent with other articles published by lawyers practicing in large law firms, where the focus of the article is on the practical application of the law and the intended audience is both oil and gas lawyers and potentially other professionals in the energy industry in Canada.

Josephson, Michael D. “How Far Does the CAPL Travel? A Comparative Overview of the CAPL Model From Operating Procedure and the AIPN Model Form International Operating Agreement” (2003-2004) 41 *Alta L Rev* 1.

The author of this article was Senior Counsel, International at Nexen Inc., one of the leading global oil and gas exploration companies. The author’s considerable knowledge and expertise with both the model 2002 AIPN JOA and 1990 CAPL operating procedure is evident in this article. He effectively compares and contrasts the two model agreements, theorizing that while each agreement was drafted for a different operating environment, they share common objectives. Further, the author shows that the differences in the two agreements are due largely to the different industry and regulatory contexts in which the models are most commonly used. While the author considers two older forms of the model agreements, arguably his analysis and conclusions continue to apply to the current versions of the agreements. Although the author’s perspective is a more practical one, focusing on the provisions themselves, rather than the legal theory behind them, the article is both insightful and well organized.

Kangles, Nick et al. "Risk Allocation Provisions in Energy Industry Agreements: Are We Getting it Right?" (2012) 49 *Alta L Rev* 339.

This article addresses the specific issue of indemnities across a number of different oil and gas industry agreements such as purchase and sale agreements, construction and oilfield service agreements and joint operating agreements. The authors argue that parties to these types of agreements include risk allocation provisions (specifically indemnities) to provide for greater certainty and to allocate risk in a different manner than the common law. The article notes that the Canadian common law allocates liability based primarily on causation and fault. However, new 'knock for knock' or mutual indemnities are becoming more prevalent. Jurisprudence pertaining to the oil and gas industry specifically and jurisprudence from the more general Canadian common law is considered in the article. Although consideration of joint operating agreements is only considered briefly, the authors' analysis of indemnities at common law is both timely and comprehensive.

Mahler, Tobias & Jon Bing. "Contractual Risk Management in an ICT Context – Searching for a Possible Interface between Legal Methods and Risk Analysis" (2006) *Scand Stud L* 339.

This article, published in the civil law jurisdiction of Norway, is the most useful secondary source that I have found which addresses the union or interface between legal methods and risk analysis. The authors suggest that there is little academic commentary on legal risk management or legal risk analysis "outside Nordic law" (at n 22). The authors argue that a comprehensive framework for identifying, analysing and addressing risk in a structured way has been developed and used in other disciplines (such as engineering and financial investments). The authors argue that this established framework should be adopted and applied by lawyers engaging in proactive legal analysis.

While the authors apply "legal risk management" to the area of information, confidentiality and technology (which is not within the scope of my thesis), the article fills an important role in helping to define my established thesis criteria of legal risk management. It is unfortunate that the authors do not appear to have advanced their thesis in subsequent literature outside of the area of information, confidentiality and technology.

Mills, Douglas G, Carolyn A Wright & Julie JM Inch. "Exploring the Balance of Power in the Operator/Non-Operator Relationship Under the CAPL Operating Procedure" (2010) 48 *Alta L Rev* 363.

At the time of writing, the three authors were members of the law firm Burnet, Duckworth & Palmer LLP in Calgary, Alberta. The authors conduct a thorough analysis of the evolution of operator duties and liabilities under the evolving versions of the CAPL Operating Procedures from 1981 to 2007 (the "CAPLs") with a valuable and comprehensive review of Canadian caselaw. The authors appear to pursue a number of theories. Arguably their predominant thesis is that additional liability and remedies exist

outside of the express terms of the CAPLs. Specifically, additional liability may arise from the common law principles of negligence, fiduciary duties and the duty of good faith. A helpful chart is produced which compares the specific duty of the Operator, the related clause in the CAPLs, and the standard of care owed by the Operator. The authors' contend that the Operator must meet the standard of care under each version of the CAPL in order to obtain indemnification from the non-operators. I will use this article's analysis and conclusions respecting the relationship between Operator and Non-Operator as a useful comparison when analysing the relationship between participating and non-participating parties.

Pittman, Miles, Jacklyn Hesje & Adam Lamoureux. "Gross Negligence in Canadian Energy Contracts" (2013) 51 Alta L Rev 283.

At the time of publication of the article, the authors were all members of a major law firm in Calgary, Alberta. This article specifically addresses the concept of gross negligence in the context of Canadian oil and gas contracts. The author's affirm and build upon the Douglas Mills article, "Exploring the Balance of Power", by providing a very organized and comprehensive analysis of the interpretation of gross negligence in the context of the Canadian oil and gas industry. The article concludes that the gross negligence standard, as defined in the 2007 CAPL Operating Procedure, continues to provide uncertainty and may be a high bar for non-operators to show.

The article also provides a framework for analyzing situations of gross negligence in the context of oil and gas industry contracts in Canada and "elsewhere". However it appears that the primary focus of the authors' research (as ascertained from the footnotes), is centered on Canadian jurisprudence and secondary materials. The article does briefly consider the AIPN model Operating Procedure, a few non-Canadian secondary sources and the Macondo Deepwater Horizon oil spill in the USA.

Spurn, Craig, Jana Prete & Melissa Zerebeski. "The 2007 CAPL Operating Procedure" (2007) 46 Alta L Rev 427.

At the time of publication of the article, the authors were all members of a major law firm in Calgary, Alberta. They have provided an in-depth review of the 2007 CAPL Operating Procedure, noting the significant changes from the 1990 CAPL Operating Procedure and the rationale behind the changes. Legal oil and gas practitioners and other industry personnel will find their detailed review of the 2007 CAPL Operating Procedure helpful when negotiating and potentially modifying the 2007 CAPL's specific provisions, however as a cohesive article, it is lengthy and unavoidably dry reading. The article notes the CAPL Drafting Committee's goal of moving away from a 'standard-based' to a 'norm-based' approach and the authors argue that the 2007 CAPL is superior to previous versions because it provides greater certainty for the parties to the JOA.

There is a section in the article which identifies many of the key issues involved in independent operations which will be very useful as a starting point to further develop my thesis.

Sweeney, David H et al. "Fracturing Relationships: the Impact of Risk and Risk Allocation on Unconventional Oil & Gas Projects" (2013-2014) 9 Texas J Oil Gas & Energy L 289.

The most significant oil and gas development in recent years is the discovery and development of unconventional shale gas plays. Commensurate with the significance of this new resource, a number of articles have been written on how to most effectively adapt existing model JOAs to accommodate shale gas plays.

This organized article, published in the well respected Texas Journal of Oil, Gas and Energy Law, effectively challenges the assumption that current model JOA forms should be adapted for use with shale gas plays. The authors suggest that existing model JOAs from the United States ("US") are rooted solidly in norms that are appropriate for conventional operations. Further, the authors argue that the fundamentally different lifecycle and risk profile of shale gas plays is so markedly different from conventional resources that existing contractual mechanisms (such as provision for independent operations in current model JOAs), are inapplicable to shale gas plays in the US.

While my thesis will not significantly address shale gas plays or JOAs from the US, the authors provide a thorough analysis of the factors involved in determining whether independent operations are appropriate or not, based on risk-based criteria. This analysis has the potential to be quite useful with respect to providing a framework for assessing independent operations based on risk management criteria.

# Annotated Bibliography

An Examination of the Overlapping Jurisdiction between the AUC and the ERCB with respect  
to the Regulatory Approval of New Power Projects in Alberta

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Law 703: Graduate Seminar in Legal Research and Methodology

**Indra L. Maharaj**  
**Student ID: 10098132**  
**December 17, 2014**

**An Examination of the Overlapping Jurisdiction between the AUC and the ERCB with respect to the Regulatory Approval of New Power Projects in Alberta**

This annotated bibliography is prepared as a component of the requirements for a graduate course in legal research and methodology (LAW 703). This course is part of the mandatory requirements for the course-based LL.M. program at the University of Calgary. My research is at a fairly preliminary stage so this annotated bibliography should be viewed as a work in progress.

My research topic addresses a topic of provincial concern in the power and energy regulatory regimen in Alberta. The problem I have identified is this. There is an apparent overlap in the jurisdiction of the Alberta Utilities Commission (“AUC”) and the Energy Resources Conservation Board (“ERCB”) with respect to the approval for construction and operation of new power generation projects in Alberta. The problem is two-fold: first, the regulators each have an obligation to fully assess the environmental impact of a project in the context of their own tests for approval and, second, the proponents have to respond to different but overlapping regulatory requirements with respect to a single project, creating confusion, unnecessary cost and delay in the approval process for a facility. In the current regulatory regimen, the regulators risk establishing different thresholds for reporting on the same impact and, thus, regulatory clarity and efficiency are both compromised. The solution may be to create a unified power development regulator, along similar lines as the Alberta Energy Regulator, to address all regulatory aspects for a power generation project.

My research questions are: There is an overlap in jurisdiction between the Alberta Utilities Commission and the Energy Resources Conservation Board in the regulation of power generation projects, particularly with respect to the assessment of the environmental impacts of the project. Does the current regulatory regimen meet the requirements of natural justice, particularly the right to be heard and the right to know the case that must be met? If not, would a single regulatory body, based on the Alberta Energy Regulator, solve the problem or is there another apparent solution to the situation?

## LEGISLATION

*Alberta Utilities Commission Act*, SA 2007, c. A-37.2.

*Electric Utilities Act*, SA 2003, c. E-5.1.

*Energy Resources Conservation Act*, RSA 2000, c E-10, as repealed by *Responsible Energy Development Act*, SA 2012, c. R-17.3.

## GOVERNMENT POLICY REPORTS

Alberta, *Energizing Investment – A Framework to improve Alberta’s Natural Gas and Conventional Oil Competitiveness*, (Edmonton: Department of Energy, March 11, 2010)

This policy document is an early reflection of the dissatisfaction in the Alberta energy marketplace with the current regimen for regulation. There is a section titled “Improving our Regulatory System”, beginning at page 16 of the report, which addresses the early issues – complicated regulatory regimen, too many regulators involved, regulatory delay and lack of support of innovation. This is a short but interesting policy report and adds to the development of the history and the drivers for regulatory restructuring in the energy sector. This report is a key part of ensuring that all the pieces of the development of policy changes is captured.

Alberta, *Enhancing Assurance: The First 90 Days*, (Edmonton: Department of Energy, June 2010)

This policy document is essentially a preliminary report that connects the *Energizing Investment – A Framework to Improve Alberta’s Natural Gas and Conventional Oil Competitiveness* report to the final *Enhancing Assurance – Report and Recommendations of the Regulatory Enhancement Task Force to the Minister of Energy* report.

Alberta, *Enhancing Assurance – Report and Recommendations of the Regulatory Enhancement Task Force to the Minister of Energy*, (Edmonton: Department of Energy, December 31, 2010)

This is the key report about the design of the unified energy regulator. This report outlines the results and recommendations of the study that preceded it. This will be a key report for understanding this topic and determining whether the rationale justifying the unified energy regulator would apply to a unified power regulator.

Alberta, *Regulatory Enhancement Project – Technical Report*, (Edmonton: Department of Energy, December 2010)

Alberta, *Enhancing Assurance – Developing an Integrated Energy Resource Regulator – A Discussion Document*, (Edmonton: Department of Energy, May 2011)

## JURISPRUDENCE

To be completed as research develops

### SECONDARY MATERIALS: ARTICLES

Barton, Barton, “The Theoretical Context of Regulation” in Barry Barton, Alastair Lucas, Lila Barrera-Her, hard copy on file.

This article is a very well-known article by a highly respected professor and academic, Barry Barton. This article is a literature review and sets the stage for a solid background understanding of the principles of regulation and the theory that supports it. In fairness, this article is dense. It will take a few reads to understand Professor Barton’s position but it will be well worth it. This article has a high level of credibility based on its author’s credentials and reputation. I expect to use this article mostly as a basis for establishing the background for regulation and to establish some of the normative baselines for a discussion of regulatory reform.

Driedzic, Adam, “Single Regulator or Franken-Child?” (2012) Vol. 27 No. 3 *ELC News Brief*.

This short article is an interesting view on whether the creation of the unified regulator for energy resource development applications is akin to the creation of Frankenstein’s monster. It is short and pithy and, frankly, much of its value lies in the collection of the references to the key policy documents that underpin the consolidation of the regulatory authorities involved in approving the development of energy resources in Alberta. I like this perspective because it is not the voice of an objective, professionally neutral, distant lawyer, analysing the legal correctness of the proposal. It is the voice of a lawyer for the Environmental Law Centre. He has an opinion and he expresses it well.

Fluker, Shaun, “The Jurisdiction of Alberta’s Energy and Utilities Board to Consider Broad Socio-Ecological Concerns Associated with Energy Projects”, (2005) 42 *Alta. L. Rev.* 1085.

This article is extremely relevant to my paper and addresses many of the key issues that I am discussing. In addition, this article has inherent credibility because Professor Fluker is a well-established lawyer, writer, and legal commentator. This article sets out the history of the AEUB, a topic that I have highlighted as part of the stage-setting for my paper, and focuses on the need for consideration of the social and environmental impacts of a project as well as the AEUB’s interpretation of section 3 of the *Energy Resources Conservation Act*, which sets out the considerations that the Board must take into account when determining whether a project is in the public interest. This concept is mirrored in the *Alberta Utilities Commission Act* at section 17 and was mysteriously absent in the *Responsible Energy Development Act* (until it showed up in the regulations). In order to understand the impact of the overlapping jurisdiction between the AUC and ESRD in the current power generation facility approval process, one must have a clear idea of the

basis for the test that creates the overlap, and the high level of importance that is clearly being placed upon the assessment of the environmental impacts of a project if the consideration shows up in every regulator's required activities, as well as a clear understanding of the way that the regulator and the courts are interpreting the test.

This article is particularly helpful in this regard as it has a section specifically dedicated to the AEUB interpretation of section 3 of the *Energy Resources Conservation Act*, as well as a section dedicated to the judicial consideration of this key section. Another key advantage of this article is that it directed me to Professor Fluker's thesis titled "The Alberta Energy and Utilities Board: Ecological Integrity and the Law (LL.M. Thesis, University of Calgary, 2003) [unpublished]. I will spend some time reading Professor Fluker's thesis in order to gain an understanding of the courts view of the AEUB's interpretation of section 3 of the *Energy Resources Conservation Act*.

Gage, Andrew, "Public Rights and the Lost Principle of Statutory Interpretation" (2007) 15 J.E.L.P. pp 107.

A preliminary reading of this article indicates that it is an interesting take on the concept of using statutory interpretation principles to further define the scope and meaning of public rights. I found the article to be a little hard to read so it will need some time to sink in. However, I do believe that due consideration must be given to the principles of statutory interpretation in the context of understanding the scope of the jurisdiction of both the AUC and ESRD at this point as it pertains to the approval of power generation projects in Alberta. Without clearly understanding the scope of that jurisdiction, there can be no real assessment of whether there is an overlap. I expect to use this article for the concept of applying the principles of statutory interpretation to the clarification of legislation directed at protecting and preserving the "public interest", as the criteria where there is apparent overlap is the criteria that must be considered in assessing the public interest.

Harrison Q.C., Rowland J. & Lars Olthafer & Katie Slipp "Federal and Alberta Energy Project Regulation Reform – At What Cost Efficiency?" (2013-2014) 51 Alta. L. Rev. 249.

The beauty of this article is that it is written by practitioners. For me, I find credibility in the fact that it is not a purely academic dissertation. It addresses some of the practicalities of the change in federal, mostly CEAA, regulatory regimes and the provincial change in bringing in the AER. This article is very useful because it addresses many of the issues that stem from the pure legalities, like the lack of practicality of rules not being clearly established at the beginning of a regulatory change and being brought in through regulations. From the point of view of my research, being focused provincially, the discussion of the change and importantly, the impact of the change to a single window regulator is directly on point. I may be able to generalize some principles from the discussion of the federal changes but my focus is provincial. This article has a section specifically titled "Drivers for Change" that is key to my research. As well, there is a discussion about the policy foundation for the move to a single window regulator. A large part of my research will entail examining the AER and providing recommendations based on the success, or lack thereof, of moving from a multi-regulator platform to a unified

regulator driven by government policy as it pertains to power generation facility regulation.

Hierlmeier, Jodie L., “‘The Public Interest’: Can It Provide Guidance for the ERCB and NRCB?” (2008) 18 J.E.L.P. 279.

This article is particularly relevant because it was written shortly after the creation of the AUC and ERCB from the remnants of the AEUB, after the summer 2007 scandal. This author systematically addresses the concept of the “public interest” which is concept that underpins all of the natural resources regulatory regimes in Alberta. The concept of the “public interest” is clarified through words in the empowering legislation like “social and economic impacts” and “impact on the environment” which leads to the research question that I would like to address which is the impact of the overlapping jurisdiction regarding the consideration of the environmental impacts of a project. This article will assist me in grounding that discussion in the bigger concept of “public interest”. I am heartened by the fact that this article is written by Staff Counsel for the Environmental Law Centre. I feel that it has inherent neutrality, an attribute that I find credible in assessing legal concepts that impact people.

Low, Cecilia A., “Energy and Utility Regulation in Alberta: Like Oil and Water?” (2009), online: Canadian Institute of Resources Law <<http://www.cirl.ca/OP>>.

This article is particularly interesting with respect to the outline of the history of regulatory expansion and contraction in Alberta. It has a well-written high level summary of the theory of regulation and the history of regulatory agencies expansion and contraction in Alberta. It also addresses the characteristics of good regulation and the types of regulation. This article also addresses in reasonable detail the purposes behind regulation in the energy industry and the policy drivers.

This article will be particularly helpful with respect to understanding the reasoning behind the 2008 split of the Alberta Energy Utilities Board (“AEUB”) into the Alberta Utilities Commission (“AUC”) and the Energy Resources Conservation Board (“ERCB”), with separate empowering legislation. The author addresses some of the obstacles created by a two-board model, referring to the AUC and ERCB. The issue of lack of regulatory clarity and risk of inefficiency was identified early on and, is what I expect to discover through my research. In fact, this article may provide some insight into the risks and obstacles posed by having two regulators attempting to regulate a single energy development.

Low, Cecilia A., “The Provincial Energy Strategy – An Integrated Approach: The Challenges Raised by a Two-Board Model for Energy and Utility Regulation” (2009), online: Canadian Institute of Resources Law <<http://www.cirl.ca/OP>>.

This article is interesting because it provides a more detailed look into the development of the two-board model from the single board model in Alberta. It reviews Alberta’s Provincial Energy Strategy, which was released in 2008, and which moved Alberta forward from the 20<sup>th</sup> century policy position to the 21<sup>st</sup> century. This article addresses the report of the United Nations Development Program, the United Nations Department

of Social and Economic Affairs and the World Energy Agency to develop energy systems to support sustainable development on a world-wide basis.

This article is particularly relevant because it looks at the respective roles of the Alberta Utilities Commission and the Energy Resources Conservation Board. It gives specific context for the regulation of energy in Alberta through the two key regulators that are the subject of my paper. It will be particularly useful to understand the author's perspective on the public interest concerns raised by the movement from the Alberta Energy Utilities Board to the separate jurisdiction of the Alberta Utilities Commission and the Energy Resources Conservation Board and the lack of uniformity in their assessment of the public interest in energy developments.

Low, Cecilia A., "The "Public Interest" in Section 3 of Alberta's *Energy Resources Conservation Act*: Where Do We Stand and Where Do We Go From Here?" (2011), online: Canadian Institute of Resources Law <<http://www.cirl.ca/OP>>.

This article is interesting in that it addresses the meaning and scope of the mandate of the Energy Resources Conservation Board ("ERCB") as set out in s.3 of the *Energy Resources Conservation Act* ("ERC Act"). The ERCB must consider the social and economic effects of the project and its impact on the environment. However, the actual scope of "public interest" is not defined in the ERC Act. Interestingly, the key components of this test are identical to the mandate given to the Alberta Utilities Commission ("AUC") in s. 17 of the *Alberta Utilities Commission Act* ("AUC Act"). Section 17 of the AUC Act states that the Commission must make its decisions in the public interest and then it states that the public interest means a consideration of the social and economic effects of the project and its impact on the environment. It provides a solid review of the Supreme Court of Canada and Alberta Court of Appeal cases that have considered the meaning of "public interest".

May, Peter J., "Regulatory regimes and accountability" (2007) 1 Regulation & Governance 8.

This article is useful because it steps back and looks at the theory of regulation. It is an article that I will expect to pair up with a reading of Professor Barton's article "The Theoretical Context for Regulation". This article is written by an American Professor at the University of Washington. In reading this article, Professor May addresses various regulatory theories and accountability at a fairly high level so I believe that this article, paired with Professor Barton's article, will give me sufficient material to explain the basis for regulation and the "when is regulation right" criteria in my paper. The purpose of this discussion is simply to get me to the real issue which is the overlapping jurisdiction so this article, while fairly high level, is pitched functionally for me.

Mullan, David J., "Natural Justice and Fairness – Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?" (1982) 27 McGill LJ 250.

This article falls outside the date range for my literature review. However, Professor Mullan is a well-known expert in the area of administrative law. It is worthwhile to include any article by him in any discussion touching on the area of administrative law. In particular, this article addresses the concept of natural justice and administrative

decision-making which is the essence of my research paper. I believe that this article will assist me in establishing some of the key first principles that are set out in the beginning section of my paper. While this paper does not address the specific overlap in jurisdiction that power generation proponents face in Alberta, this article is a solid foundation regarding the principle of natural justice and how it impacts administrative decision-making.

Vlavianos, Nickie, "The Legislative and Regulatory Framework for Oil Sands Development in Alberta: A Detailed Review and Analysis" (2007), online: Canadian Institute of Resources Law <<http://www.cirl.ca/OP>>.

This paper provides a perspective on the AEUB positioning prior to the dissolution of the AEUB in the summer of 2007. In comparison to other authors, I find Professor Vlavianos to be particularly persuasive because she is not only academically on point for Alberta, she also tends to have a realistic understanding of the perspective of industry. As a practitioner, I find this refreshing as it is difficult for non-practicing professors to truly appreciate the practicalities of the practice and to express the law in that context. Professor Vlavianos accomplishes this goal in her writings and, hence, I favour her work.

In addition, this article demonstrates the pervasiveness of the public interest test in energy and power regulatory authorities in Alberta. Again, the AEUB is required to consider the "social and economic effects of the project and the effects of the project on the environment" as set out in section 3 of the *Energy Resources Conservation Act* (which has since been repealed). What is interesting is the fact that the test from the AEUB was clearly continued into the AUC and so the cases, authorities and principles determined prior to the creation of the AUC/ERCB split will still have relevance to the discussion in my paper. I also expect to see a provincially relevant selection of footnotes in this paper.

Wenig, Michael M. & Jenette Paschwatta, "Developing a "Comprehensive Energy Strategy" with a Capital "C"" (2008), online: Canadian Institute of Resources Law <<http://www.cirl.ca/OP>>.

This article is interesting because it approaches the energy industry in Alberta from a policy perspective. It relies on the proposition from Vaclav Smil's book *Energy at the Crossroads* (Cambridge: MIT Press, 2005) that we are at a crossroads in energy management and in this century must approach the management of energy in a totally different way than last century. The authors address the concept of why an energy strategy needs to be comprehensive. The authors develop the perspective that Alberta is also at a turning point in energy use and management. Our regulatory structure must follow this change or development in energy policy in order to move Alberta forward in the global energy scene. This article also has a good section on regulatory, fiscal and policy parameters of energy management systems. This will be particularly relevant for my paper.

**SECONDARY MATERIALS - WEBSITES**

[www.auc.ab.ca](http://www.auc.ab.ca) – Alberta Utilities Commission

[www.aer.ab.ca](http://www.aer.ab.ca) – Alberta Energy Regulator

[www.energy.alberta.ca](http://www.energy.alberta.ca) – Alberta Department of Energy

**SECONDARY MATERIALS - BLOGS**

**UNIVERSITY OF CALGARY  
FACULTY OF LAW**

**LAW 703: LEGAL RESEARCH AND METHODOLOGY  
ANNOTATED BIBLIOGRAPHY (WORK-IN-PROGRESS)**

**LEGAL AND INSTITUTIONAL IMPERATIVES FOR DESIGNING EMISSIONS  
TRADING SCHEME: LESSONS FROM THE WESTERN CLIMATE INITIATIVE**

**TOKODE OLUSHEGUN OLAYINKA  
17<sup>TH</sup> DECEMBER, 2014**

## **ANNOTATED BIBLIOGRAPHY**

### **LEGAL AND INSTITUTIONAL IMPERATIVES FOR DESIGNING A REGIONAL EMISSIONS TRADING SCHEME: LESSONS FROM THE WESTERN CLIMATE INITIATIVE**

This annotated bibliography describes a work in progress concerning an important evaluation requirement of LAW 703, also known as Legal Research and Methodology. The research leading to this bibliography is ongoing, thus, it should not be considered as an exhaustive literature review of the project.

I am conducting a legal research on the lessons that a Non-Annex 1 (developing) country like Nigeria can draw from the initiatives of some states in the US and Quebec in Canada in establishing the Western Climate Initiative to reduce the emissions of the GHG. Even though Nigeria is a Non-Annex 1 country party to the UNFCCC, it is a party to the Kyoto Protocol 1997, which means that the country is not under any International obligation to reduce its greenhouse gas. As a potential beneficiary of one of the flexibility mechanisms under the Protocol, that is, the Clean Development Program, it has a responsibility to take necessary measures to reduce its emissions. One of such measures it can adopt is to engage in emissions trading scheme. And to design and implement a scheme, it needs to learn from the regions that have successfully designed and implemented emissions trading scheme. One of such is Western Climate Initiative which was created in 2007 by some western states of the North America including five states in US and four provinces of Canada: the Western states of Arizona, California, Montana, New Mexico, Oregon, Utah, Washington, and British Columbia, Manitoba, Ontario and Quebec of Canada with various Indian nations, US and Mexican states, and Canadian provinces as interested observers.

The question sought to be answered in my research paper is: in view of the diverse socio-economic and infrastructural challenges of Nigeria, what legal and institutional regulatory imperatives are required to design an effective emissions-trading-scheme to enable its participatory contribution to the reduction of GHG emissions?

### **PRIMARY MATERIALS - INTERNATIONAL CONVENTION**

Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997 (entered into force on 26 February 2005), online: UNFCCC <[http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php)>.

*United Nations Convention Framework Convention on Climate Change*, 1992 (entered into force 21 March 1994 and has 196 parties as at March 2014), online: UNFCCC\_ <<http://unfccc.int/essentialbackground/convention/items/6036.php>>.

### **PRIMARY MATERIALS - LEGISLATION**

*Constitution of the Federal Republic of Nigeria 1999 (as amended) available at online:* <<http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>>.

*Nigerian's Companies and Allied Matters Act, chap. 59 laws of the Federal Republic of Nigeria 1990, available online at:* <<http://www.nigeria-law.org/CompaniesAndAlliedMattersAct.htm>> [assessed 3 November 2014].

### **SECONDARY MATERIALS - MONOGRAPHS**

**Birnie, Patricia, Alan Boyle & Catherine Redgwell, *International law & the Environment*, (Oxford, New York: Oxford University Press, 2009).**

The authors of this book are Professors and practitioners of International Law as well as specialists in international environmental law. The book is the major literature recommended for the course at the University of Calgary. It provides background information on the issue of the United Nations Framework Convention on Climate Change and discusses extensively the

flexible mechanisms of Kyoto protocol with emphasis on emission trading as an important factor to reduce greenhouse gas emissions. It also treats other related issues such as supervision and compliance, the Kyoto protocol in changing circumstances and the negotiating context. The information derived from the book is significant for my research paper as it gives me guidance in all aspects of climate change.

**Tietenberg, Thomas H. *Emissions Trading: Principles and Practice*, 2nd ed (Washington, DC: RFF Press book, 2006).**

The author has written several books and articles on the different aspects of carbon and emissions trading. He is an accomplished author and renowned authority on the subject. The book provides a comprehensive examination of the principles and practice of emission trading. It discusses the conceptual framework, the history and evolution of emissions trading, the consequences and monitoring and enforcement. It provides information about the nature of domestic and international enforcements processes, which are valuable to my paper. It gives a better understanding of the concept and practice of emissions trading and it will be helpful in my research paper in the consideration of different perspectives of emissions trading design.

**Olawuyi, Damilola S. *The Principles of Nigerian Environmental Law (Ukraine: Business Perspectives, 2013).***

The above book is one of the few published environmental law resources in Nigeria. The author, Damilola Olawuyi is a Nigerian scholar and holds a doctoral degree in energy and environmental law from the University of Oxford, United Kingdom. During his Master of law degree program at the University of Calgary, he wrote his thesis on one of the three flexible mechanisms of the

Kyoto protocol, the clean development mechanism. The other two are joint implementation and emissions trading. Therefore, his view on the subject is authoritative and respected. The book provides local and international information on the history, problems, legal and regulatory frameworks of the environmental law, its development and governance in Nigeria. The author devotes a whole chapter to discuss the issue of Climate Change as it affects Nigeria in particular and developing (Non-Annex 1) countries. It also discusses the global legal and institutional instruments to combat climate change including the UNFCCC and Kyoto protocol with respect to its flexibility mechanisms of clean development mechanism and emissions trading and their effects in developing countries like Nigeria. The author discusses African regional initiatives to address climate change, related the mechanisms of Kyoto protocol to the Nigerian peculiar situation and provides valuable recommendations especially on the regulatory and institutional aspects, which are very vital to the research paper.

**Weishar, Stefan E. *Emissions Trading Design: A critical overview* (Cheltenham UK: Edward Elgar Publishing Limited, 2014).**

The author is a professor of Law and Economics at the University of Groningen, The Netherlands. The book is an introduction to emissions trading design. It focuses specifically on emissions trading which is the theme of my research paper. It reviews current policy and academic debates on emission trading. It also discusses both advantages and disadvantages of emissions trading, its designs variants and its implementation issues, and presents policy considerations that are important to designers of emission trading scheme. It is written from both legal and economic perspectives and addresses several issues of how an emissions trading scheme can be designed, the special issues to be considered and with whom emissions trading system can be linked. By focusing on the practical design and implementation elements, it gives

an insight that will be very useful to my major paper.

## **SECONDARY MATERIALS: COLLECTION OF ESSAYS**

**Freestone, David & Charlotte Streck, eds, Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work (New York: Oxford University Press, 2005).**

This book, which is a collection of scholarly papers from several authors and scholars on the legal aspects of implementing the Kyoto Protocol Mechanisms, is very relevant to my research paper. It focuses mainly on the legal effects of the three Kyoto protocol flexible mechanisms, which include emissions trading. The first chapter addresses the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Kyoto Mechanisms, as well as Climate Change in business. The second chapter is titled, The Kyoto Flexible Mechanisms: General Issues. The first article titled, “the Legal ownership and nature of Kyoto Units and EU allowances” discusses the Cornerstones of Emissions Trading with the following subtitles, among others, the ethical dimension, the basic concepts, emission credits, nature and legal ownership of emission rights. The seventh chapter of the book is titled, “Article 17 of the Kyoto Protocol: Emissions Trading” has several articles which discusses emissions trading from the perspectives of different jurisdictions both developed and developing like Canada, EU, Australia, Chile, among others. All these articles provides important and vital information for my research paper.

**Freestone, David & Charlotte Streck, eds, Legal Aspects of Carbon Trading (New York:**

**Oxford University Press, 2009).**

Like the previous book, this book is directly relevant to the topic of my research paper. It is also a collection of several articles on the topic of carbon trading. For example, the first chapter contains an article by David Freestone titled, “The international Climate Change Legal and Institutional Framework: An overview” which is arm of my paper. There are several other articles in the remaining chapters of the book, which are relevant and important to the contents of my paper. The chapters such as, The Kyoto Protocol Mechanisms, International Emissions Trading (III), Carbon Trading outside Kyoto: Regional Schemes (IV), Carbon Trading outside Kyoto: National and sub-national schemes (V) and Voluntary markets (VI) contain articles which discusses issues that are crucial and fundamental to the theme my paper.

## **SECONDARY MATERIALS - ARTICLES AND CHAPTERS IN BOOKS**

**Mulugetta, Yacob, “Climate Change and Carbon Trading in Africa” in Trucha Reddy ed, *Carbon Trading in Africa: A critical Review* (Pretoria, South Africa, 2011).**

**Philibert, Cedric. “How Could Emissions Benefit Developing Countries” (2000) 28 Energy Policy 947.**

The author, being an economist, treated the topic from the economic perspective. He considered two different set of rules, which he believes will make the system workable, with both advantages and drawbacks. He advocated a system whereby parties to the Convention on Climate change may consider building a regime where developing countries are allocated emissions budgets, on some provisions of the Kyoto Protocol and in respect with the principles of the Convention. He drew a parallel between emission budgets and emission limits and advocated for a negotiation by developing countries for emission budgets. On the legal issue, the

author however wondered how emission budget for developing countries could be negotiated, by building on the Climate (Change) Convention and Kyoto Protocol provisions, if Parties wished to do so. This paper is relevant to my topic because emission budget is crucial to emission trading. The author concluded that involving developing countries in emissions trading through the negotiation of emission budgets would provide them substantial capital inflows through emissions trading therefore stimulating their economic growth.

**Radu, Ana Maria. “Alberta’s Reduction Strategy - Assessing The Environmental Integrity of Emissions Trading Schemes” (March 2014) [unpublished, archived at University of Calgary - Canadian Institute of Natural Resources Law].**

The author of this paper was a research fellow at the Canadian Institute of Natural Resources Law. She relates Alberta’s carbon policy with the world emissions trading schemes and advocates for linking of emissions trading schemes. She is of the view that linking ETS will reduce the risk of leakage. This is important to my paper in that, it is not enough to design ETS, but it is also necessary to link it. According to the author, leakage occurs when regulatory dispositions in one area cause source activities to shift or leak to unregulated areas over time. She explores the concept of environmental integrity and asserts that linking ET Schemes is directly dependent on the environmental integrity of each system. She lists the criteria of environmental integrity as: Effectiveness, Comprehensiveness, Transparency and Fairness, and Offsets eligibility. This paper is very relevant to my research paper in the sense that in designing an ETS for Nigeria, one must consider the issue of environmental integrity and the criteria, which the author listed in her paper. She reviews the current state of cap and trade schemes in some jurisdictions like EU ETS, Quebec’s CTS, California CTS, New Zealand’s ETS and Norway’s ETS using those criteria to analyze their differences and similarities

**Gray, Kevin & Joyeeta Gupta, “The United Nations Climate Change Regime and Africa” in Beatrice Chaytor & Kevin R. Gray, eds, *International Environmental Law and Policy in Africa* (The Netherlands: Kluwer Academic Publishers, 2003) 60.**

The first author of this article is the research fellow in Public International Law and British Institute of International and Comparative Law in London, UK and the second, is head of the program on International Environmental Governance, and interim head of the Department of Environmental Policy Analysis at the Institute for Environmental Studies at the Vrije Universiteit in Amsterdam. This article reviews the issue of Climate Change generally and the United Nations Climate Change regime within the context of Africa. This article is helpful because it focuses on the African countries participation in and contribution to climate change program.. I will derive specific information concerning climate change situation in Africa with particular reference to Nigeria. For example, the article discusses the impact of climate change on African countries generally and the measures being adopted to mitigate the effect within the framework of the UN Convention including emissions trading which is topic of my paper. He argues that although Africa’s contribution to the climate change problem is fairly negligible, however, this does not negate the importance of effective implementation of the Climate Change Agreement or the Kyoto Protocol because African countries have the most at stake due to the failure of industrialized countries to meet their obligation. He advocated for a common position in Africa in the implementation of the flexible mechanisms of the Kyoto Protocol, which includes emissions trading.

**Grant Boyle, “A review of Emerging GHG Emissions Trading in North America: Fragmentation or Progress” (2008) 46 *Alta. L. Rev.* 173.**

Since the main thrust of my research question is to draw important lessons from the experience of the WCI for the legal and institutional framework necessary for the successful designing and implementation of emissions trading scheme, this article which is a the review of the GHG emissions trading in the North America is important to my paper. WCI is a multijurisdictional collaborative project of North America involving some states of the US and Canada, therefore its review, whether a fragmentation of progress, is important to draw important reference in designing a similar program in Nigeria. The author reviewed the goals of WCI and concluded that it is not yet clear how this goal will translate into regulatory obligations for capped emitters at the state or provincial level or percentage of offsets will be provided. This is the issue to be answered by my second research question.

**Emily Richman, “Emissions trading and the Development Critique: Exposing the Threat to Developing Countries” (2003) 36 *N.Y. U. J. Int’l. L. & Pol.* 133.**

The author is a lawyer and law teacher at the New York University Law school. The article discusses the theoretical aspect of emissions trading and the prospect of bringing development to developing countries. It analyses the development effects of emissions trading. The author identifies the benefits of emissions trading to developing countries. She also identifies potential harms of emissions trading to developing countries so that the regulators are aware of all of the

costs and benefits of trading and possibly reshape emissions trading into a more development friendly program. It is relevant to my research paper, which will recommend possible benefits and harms of emission trading to policy makers. This article provides scholarly information about different perspectives of emissions trading and it is helpful for my research paper.

### SECONDARY MATERIALS - REPORTS IN WEBSITES

Western Climate Initiative, “Design Recommendations for the WCI Regional Cap-and-Trade Program” *Design for the WCI Regional Program* (2008) online: <http://www.wci-inc.org/<http://www.westernclimateinitiative.org/the-wci-cap-and-trade-program/program-design>>

**Emissions Trading Worldwide: International Carbon Action Partnership (ICAP) Status Report, 2014. Online:** <  
<https://icapcarbonaction.com/component/attach/?task=download&id=152>

Apart from being one of the most recent resources on the subject, the report, dated January 2014, offers me an overview of emissions trading scheme. It provides information that focuses on planned and operating Emissions Trading schemes in some developed and developing countries and regions like North America which is very important to answer some of my research questions. There is also an article contained in the report, “The Regional Greenhouse Initiative: Lessons from a successful Cap-and-Invest Model” by Jared Snyder of the New York State Department of Environmental Conservation. The issues raised in that article are very relevant to draw important lessons for recommendation in my paper. Other topics of interest in the report are, China’s First ETS: a brief introduction to the Shenzhen Carbon Market by China Emissions Exchange, Global Trends in Emissions Trading and Tokyo Cap-and-trade program: A driving force to deliver substantial CO<sub>2</sub> reductions by Tokyo Metropolitan Government, Bureau of Environment.

UNIVERSITY OF CALGARY  
FACULTY OF LAW

LAW 703: LEGAL RESEARCH AND METHODOLOGY

**ANNOTATED BIBLIOGRAPHY OF RELEVANT LITERATURE (IN PROGRESS)**

ASSESSING ABORIGINAL CONCERNS OVER PROPOSED OIL SANDS PROJECTS IN  
ATHABASCA AND COLD LAKE: ARE IMPACTS ON ABORIGINAL PEOPLE BEING  
UNDERSTOOD, MISUNDERSTOOD OR IGNORED?

BY GARY PERKINS  
December 17, 2014

## INTRODUCTION

This annotated bibliography reflects the progress of my literature review for my primary research question: Do regulatory reviews and decisions about Athabasca and Cold Lake oil sands project proposals accurately assess the potential effects of development on the rights, practices and cultures that Aboriginal groups in the area believe are important? Primary sources, such as legislation and jurisprudence, will also be consulted in the course of my research but, in accordance with the instructions given for this annotated bibliography, those are not identified or addressed in this document. Although my research paper will not consider issues relating to the Crown's duty to consult with Aboriginal people, that issue is discussed in many of my secondary materials. This is inevitable because consultation and impact assessment issues arise from a common fact situation; namely, that proposed development has the potential to affect Aboriginal rights and interests.

I propose to use qualitative content analysis to evaluate whether administrative decision-makers who have considered oil sands project proposals accurately understand and appreciate the concerns about oil sands development that are expressed to them by Aboriginal groups that participate in the decision-making process. The secondary sources referred to below will be consulted to gain a comprehensive understanding of the impact assessment process, and how Aboriginal concerns and traditional knowledge are represented in that process. This understanding will be used to help devise the methodology for the content analysis exercise.

## SECONDARY MATERIALS: MONOGRAPHS

Berkes, Fikret. *Sacred Ecology*, 3rd ed (New York: Routledge, 2012).

Dr. Berkes began his career as a marine scientist, working in the 1970's with Cree groups fishing James Bay. Their ability to intuitively manage the fishery in a sustainable way sparked his interest in traditional ecological knowledge ("TEK"), and his book draws on his personal experience as his interests expanded from marine science into the social sciences. He is currently the Canada Research Chair of the Natural Resources Institute at the University of Manitoba.

The first edition of *Sacred Ecology*, published in 1999, is recognized as one of the leading works on TEK. In the preface to the third edition, Dr. Berkes refers to an "explosion" of literature on the topic in recent years, stating (with a sense of resignation) that the 150 new references in the third edition is only a fraction of the literature that emerged since 2008. The book is, nevertheless, still an excellent resource as a general reference source on TEK. In the first three chapters he defines TEK and describes its

transcendence from academic circles to practical applications for resource management. The middle chapters discuss the application of TEK in contemporary resource management systems. Dr. Berkes's view that TEK and western science should complement each other as resource management tools, and not rival each other, emerges in this part of the book. The final chapters include case studies that illustrate how local knowledge emerges and a discussion of the challenges in trying to unify TEK with western resource management science. One theme that runs throughout the book is that traditional resource management practices by indigenous groups closely resemble adaptive management systems in western science, indicating they are in harmony rather than conflict. This is particularly relevant to my research, given that oil sands project proposals rely heavily on adaptive management as a strategy to ensure ecological sustainability over the lifetime of a project.

Canadian Environmental Assessment Agency, Cumulative Effects Assessment Working Group. *Cumulative Effects Assessment Practitioner's Guide* (Ottawa: CEAA, 1999).

This guidebook was prepared on behalf of the Agency by individuals who were considered to be some of the brightest practitioners and academics on the subject of cumulative effects assessment: George Hegmann, Chris Cocklin, Roger Creasey, Sylvie Dupuis, Alan Kennedy, Louise Kingsley, William (Bill) Ross, Harry Spaling, and Don Stalker. Even though it is now slightly dated, it is still an essential resource for anyone wishing to understand how cumulative effects are or should be assessed by project proponents, opponents, reviewers and decision-makers. The guide describes best practices for undertaking each step of a cumulative effects assessment for a project that is destined for a regulatory review. The importance of the work for my research project is that the guidance it provides to decision-makers provides valuable insight on why decision-makers might rely on or ignore certain kinds of information (e.g., accounts from traditional land users) when they review an environmental impact assessment.

Lambrecht, Kirk N. *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013).

The author of this book was formerly counsel for Canada's Department of Justice, and in that capacity he participated in numerous regulatory proceedings involving resource projects proposed within the traditional territories of Aboriginal groups. The stated purpose of the book is to describe how Aboriginal consultation can be integrated with environmental assessment and regulatory review processes, to ensure "at a minimum" that project planning, approval and regulatory oversight take meaningful account of Aboriginal concerns. The book's central premise is that the project approval process has three essential functions: planning, approval and control; and that an environmental

impact assessment informs decision-making throughout the process, especially during the planning stage. The claim advanced by the author is that Aboriginal consultation can be effectively integrated into the project approval process if proponents, the Crown, regulators and courts each take responsibility for their respective roles. Chapter three of the book, on the principles of environmental assessment and regulatory review, is particularly relevant to my research as it describes the role an environmental assessment plays in the project approval process and it identifies where Aboriginal consultation can plug into that process. Overall, this book provides a useful perspective on how Aboriginal concerns about project development are or can be identified and addressed in the project approval process. The author draws heavily on court and regulatory decisions and that part of the material is best suited for lawyers, however, proponents and environmental assessment practitioners (especially those advising Aboriginal groups) will also understand and benefit from the insights provided in the book.

Woodward, Jack. *Native Law* (Toronto: Carswell, 1989).

The author of this text on Aboriginal law is widely considered to be the foremost expert on Aboriginal law in Canada. He is the founding partner of one of the most influential Aboriginal law firms in Canada, and he developed and taught the first course on Aboriginal law at the University of Victoria. The text itself has been described as “landmark” in the field of Aboriginal law. It is offered in both a bound volume and a loose-leaf version, with the loose-leaf service updated at least annually. The book treats the full spectrum of Aboriginal law issues and would be useful to a person seeking general information, or for someone researching a particular Aboriginal law question. It provides commentary that ranges from basic concepts to comprehensive analyses of discrete issues. The parts of the book that will be most useful to my research project are: chapter 5 on Aboriginal and treaty rights; chapter 13 on hunting, fishing, gathering and trapping; and chapter 14 on culture and religion. That information will help me identify the rights and practices that are important to Aboriginal people and integral to their cultures.

#### SECONDARY MATERIALS: ARTICLES

Baker, Douglas C. & James N. McLelland. “Evaluating the Effectiveness of British Columbia’s Environmental Assessment Process for First Nations’ Participation in Mining Development” (2003) 23:5 *Environ Impact Asses* 581.

At the time this paper was published, Douglas Baker was an Associate Professor of the School of Environmental Planning at the University of Northern British Columbia, and James McLelland was an environmental assessment consultant. The authors attempted to

measure the effectiveness of First Nations' participation in British Columbia's (then) relatively new environmental assessment process by applying three generic criteria to the assessment process: procedural, substantive, and transactive effectiveness. Although the authors presented three case studies of First Nations participating in an environmental assessment proceeding, their goal was to measure the effectiveness of the *process itself* and not the effectiveness of the Aboriginal groups' participation. The authors concluded that in all three cases the process failed to provide effective participation for the First Nations. Their research was focused on the machinery of assessment and not its function or outcomes, which will be the focus of my research. The paper is nevertheless useful as an example of how one may go about measuring the effectiveness of a process that is designed to accept and assess Aboriginal concerns about proposed industrial development.

Booth, Annie L. & Norman W. Skelton. "Improving First Nations' Participation in Environmental Assessment Processes: Recommendations from the Field" (2011) 29:1 Impact Assessment and Project Appraisal 49.

The authors are an associate professor and a research associate, respectively, in the Ecosystem Science and Management Program at the University of Northern British Columbia. The article is the product of a research project that studied 'what worked and did not work' to engage Aboriginal groups in environmental assessments for certain projects in British Columbia. The authors made six recommendations, mostly encouraging government and proponents to communicate better with First Nations and to treat those groups, and their Aboriginal rights, with greater respect. The research and the authors' conclusions suffer from the fact that Aboriginal participation in the project was apparently much greater than that of either government officials or project proponents. The two First Nations that responded to the research questions also collaborated on the grant proposal, and negotiated the research methods with the authors. Semi-structured interviews were conducted with 27 First Nation members, while three project proponents and an unspecified number of government officials were interviewed by telephone (the authors stated that CEAA—Canada's environmental assessment agency—failed to respond to their interview requests).

Despite these shortcomings, the research and the report mirror my own research proposal and therefore are of interest to me. The authors conducted a content analysis to identify key themes and ideas, which is the same type of analysis I have proposed for my research. Their conclusion that the commonly-employed traditional use study does not deliver the data necessary to understand critical impacts of industrial development on First Nations goes to the heart of my research question and deserves consideration. Finally, the authors quote extensively from their interviews with Elders, Chiefs and

Councils, and these quotes provide useful insight into Aboriginal groups' views of the environmental assessment process.

Bosgoed, Gary; Blaine Collett & Dion Willier. "Aboriginal Engagement and Development of Northern Projects" (Paper delivered at the Arctic Technology Conference, Houston TX, 12 February 2014) OTC 2541, online: < <http://dx.doi.org/10.4043/24541-MS>>.

This paper was delivered at an Ocean Technology Conference (OTC) event in Texas. Its authors are with the Edmonton office of WorleyParsons Canada, a firm that provides engineering, procurement, construction, consulting and advisory services to a broad range of oil sands project proponents. I was interested in their perspective on how proponents should engage Aboriginal communities in connection with project proposals because proponents gather and provide to decision-makers much of the information about project impacts on local communities that is eventually reviewed during decision-making. In this sense proponents act like a filter through which Aboriginal concerns are passed, and so the way they conduct that consultation is important. The paper starts by providing general information about Canada's Aboriginal people and noting the unique "cultural and economic landscape" of Aboriginal people in Canada. The meat of the paper identifies the need for a proponent to develop an Aboriginal engagement strategy and the authors set out a five-phased engagement process that parallels the project development process. The advice is typical of what one might expect from project engineers, however, the authors deserve credit for a number of more enlightened comments that one may not typically expect from project engineers. The authors emphasize the need for proponents to first acknowledge and then continuously demonstrate respect for Aboriginal history, traditions, Elders, spirituality, culture and ancestry, in order to build a lasting trust with Aboriginal communities. They advocate proponents providing employment and education opportunities for local Aboriginal groups, in particular for the youth of those communities. They state that relationship building does not stop at the conclusion of project execution, when project engineers and advisors fade from the picture, but continues indefinitely as the proponent (now the operator) and Aboriginal communities are encouraged to keep finding ways to maintain and grow relationships. The sage advice provided by the authors was a refreshing surprise from what I had expected to learn from a trio of engineering/project management consultants.

Dunstan, Adam. "What was Damaged?: Taking Sacred Ecology into Account in Environmental Impact Assessment" (2012) 22:4 Indigenous Policy Journal, online: <[www.indigenouspolicy.org](http://www.indigenouspolicy.org)>.

The author is a PhD candidate in the Department of Anthropology at the University of Buffalo, and a self-described cultural anthropologist. This short paper focuses on a

particular kind of impact that environmental change has on indigenous people: the effect human-induced changes in the environment (such as disaster, pollution, or development) have on the beliefs, feelings, and practices by which indigenous communities connect with their environment. The paper is divided into three parts. The first part discusses the connection with the environment that indigenous communities have through beliefs and practices that are essential to their cultural identity. This is the “sacred ecology” referred to by the author, and it is the same concept that Dr. Berkes discusses in his book by that name. The author argues that environmental change threatens these connections and causes indigenous cultures to change in ways that are difficult to understand or predict (due to the complex nature of cultural change). The second part of the paper presents an example from the author’s own field work involving artificial snow-making in a mountain area sacred to the Navajo people. The paper also references similar examples from other researchers. In the final part of the paper, the author argues that any analysis of the impacts of a past, present, or proposed future alteration of the environment that does not consider effects on an indigenous community’s beliefs and practices towards the environment will be inadequate. He urges environmental managers to include sacred ecology as one of the several ecologies that are analyzed in an impact assessment. The author’s claim is supported by a number of references to similar works, and so the article is (and those works are) worth further consideration.

Paci, Chris; Ann Tobin & Peter Robb. “Reconsidering the Canadian Environmental Impact Assessment Act: A Place for Traditional Environmental Knowledge” (2002) 22:2 *Environ Impact Asses* 111.

This paper may seem to get off on the wrong foot by incorrectly naming in its title the federal statute it proposes to examine (the correct name was the *Canadian Environmental Assessment Act*, without the “Impact”). But things improve as the authors tackle an issue that doggedly persists in Canadian environmental assessment law: how to integrate TEK into formal impact assessments. The theme of the paper is that Canadian governments (i.e., the federal government and British Columbia) are resisting international pressure to recognize Aboriginal land claims and to include indigenous groups in government policy-making that affects First Nations’ traditional lands. The aspect of policy-making the authors explore that may assist my research is the integration of TEK into regulatory environmental impact assessment regimes. The paper provides a useful discussion of TEK: how it is the product of Aboriginal groups’ historical stewardship of the land and how it can provide essential and valuable input to the impact assessment process if it is properly and respectfully integrated. An interesting attribute of the paper is that its authors come from three very different perspectives. One was an academic at the University of Northern British Columbia, one worked for a British Columbia First Nation, and the third worked for the Government of British Columbia’s Ministry of Energy and Mines.

## SECONDARY MATERIALS: OTHER

Alberta, Aboriginal Relations. “The Government of Alberta’s Guidelines on Consultation with First Nations on Land and Natural Resource Management” (Edmonton: 28 July 2104), online: <<http://www.aboriginal.alberta.ca/1036.cfm>>.

Athabasca Cree First Nation. “Submission of the Athabasca Cree First Nation” (Hearing submission delivered to the Joint Review Panel for the Jackpine Mine Expansion Project, 1 October 2012), online: <<http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=81951>>.

This document is the substantive, written submission filed by the Athabasca Cree First Nation, which is a Treaty 8 First Nation, in the regulatory review proceeding that considered Shell Canada Limited’s proposal to expand its Jackpine oil sands mine project. The entire submission is several thousand pages in length if the numerous expert reports that were filed in support of the Aboriginal group’s intervention are included. The submission describes how the proposed project, together with existing oil sands development in the Athabasca area, is expected to affect the First Nation and its members. In addition to the many technical reports provided by consultants, the submission includes statements from Elders about how oil sands development has already affected traditional ways of life in the region.

This material is an excellent example of a First Nation documenting in a comprehensive way, for a regulatory decision-maker, the perceived impacts from existing and proposed oil sands development. Both western science and TEK are invoked to explain project-specific and cumulative impacts on the First Nation. One especially interesting part of the material is the traditional resource use management plan (known as “TRUMP”) proposal that is described in the submission. The TRUMP proposal is characterized as a cumulative effects management framework for treaty rights that broadens the conventional approach to traditional land use assessments. It does this by considering how impacts on the exercise of treaty rights affect the social, economic, and cultural health and well-being of the First Nation’s members. This approach transcends the quantitative, key resource impact analysis that typifies many environmental impact assessments. The TRUMP proposal is intended to better address Aboriginal peoples’ fundamental concern about industrial development: how it affects the values and traditional ways that are at the core of their being.

Canada, Office of the Auditor General of Canada. *Report of the Commissioner of the Environment and Sustainable Development: Assessing Cumulative Environmental Effects of Oil Sands Projects*, ch 2 (Ottawa: OAG, October 2011).

This report was prepared by Canada’s Commissioner of the Environment and Sustainable Development after an audit his office conducted in response to concerns that the federal government was not properly considering cumulative environmental effects of oil sands

projects in northern Alberta, as required by the (then) *Canadian Environmental Assessment Act*. The sources of concern cited by the Commissioner include the report on water monitoring for the lower Athabasca River basin made by Canada's Oil Sands Advisory Panel in December, 2010, and a petition filed by Environmental Defence Canada for information from federal departments and agencies on the status of follow-up action on recommendations in several joint panel reviews of oil sands mine projects. The Commissioner also stated that the oil sands area had the highest concentration of major mining projects (producing, under construction or proposed) in Canada. Although stated to be about oil sands in northern Alberta, the report is actually focused on the minable oil sands projects located north of Fort McMurray. The Commissioner concluded that information gaps in environmental impact statements had hindered cumulative effects analyses that were undertaken by federal government departments and joint review panels. He identified gaps in the subject areas of water quantity and quality, fish and fish habitat, land and wildlife, and air emissions. The report made two recommendations for improving cumulative environmental effects assessments, which the Canadian Environmental Assessment Agency subsequently accepted.

Aboriginal groups in Athabasca and Cold Lake consistently state that cumulative effects from oil sands development pose the greatest threat to the natural resources and traditional ways that sustain their cultures and well-being. This report confirms that environmental impact assessments have, historically, failed to collect sufficient information to allow a proper analysis of the potential for cumulative effect impacts on key natural resources. This factor may contribute to Aboriginal concerns not being understood or considered by decision-makers, and I will need to account for it in my research.

Canadian Environmental Assessment Agency. "Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the *Canadian Environmental Assessment Act, 2012*" (Ottawa: CEAA, November 2013), online: <<http://www.ceaa-acee.gc.ca>>.

This guidance document, issued by the Canadian Environmental Assessment Agency, states it is intended to provide a framework for the consideration of Aboriginal traditional knowledge (ATK) in cases where a responsible authority has decided it is both desirable and appropriate to include ATK in its review (pursuant to the discretion afforded under s. 19(3) of the Act). The guidance is specifically written for environmental assessment practitioners. Although stated to be "for information purposes only" and "not intended to replace any existing legislative process or requirements," lawyers and EA practitioners understand that they ignore such guidance statements from the Agency at great peril to their clients. This document begins by explaining what ATK is and how it can assist an environmental assessment, and then it sets out six principles guiding the use of ATK in the assessment process. The first five of these are common-sense principles that reflect the need for proponents to respect the sensitive nature of ATK and to collaborate with Aboriginal groups when collecting and presenting ATK. The final guiding principle encourages practitioners to bring ATK and western knowledge systems together, especially when those complement each other. If the two systems cannot be reconciled,

the document advises practitioners to “juxtapose what is suggested by each knowledge system . . . and demonstrate how each type of knowledge has been considered in the EA.” The sixth guidance principle represents an endorsement of Dr. Berkes’s view that TEK complements western science and should work in harmony with it, rather than fight against it.

Canadian Environmental Assessment Agency & Alberta Energy Regulator. *Report of the Joint Review Panel Established by the Federal Minister of the Environment and the Energy Resources Conservation Board, Decision 2013 ABAER 011: Shell Canada Energy, Jackpine Mine Expansion Project, Application to Amend Approval 9756, Fort McMurray Area* (Ottawa: CEAA, 9 July 2013), online: <<http://www.ceaa-acee.gc.ca>>.

National Energy Board. “Consideration of Aboriginal Concerns in National Energy Board Decisions” (Calgary: NEB, October 2011), online: <<https://docs.neb-one.gc.ca/ll-eng/llisapi.dll>>.

---. *Report of the Joint Review Panel for the Northern Gateway Project* (Calgary: NEB, December 2013), online: <<http://gatewaypanel.review-examen.gc.ca/clf-nsi/hm-eng.html>>.

West Coast Environmental Law Association. “Legal Backgrounder: The Crown’s Approach to Treaty 8 First Nations Consultation on the Enbridge Gateway Pipeline” (4 June 2009), online: <<http://www.wcel.org/sites/default/files/publications/>>.

**UNIVERSITY OF CALGARY**

**FACULTY OF LAW**

LAW 703: Graduate Seminar in Legal Research & Methodology

Fall 2014

Annotated Bibliography in Progress

**Gender Equality and Sustainable Use of Rural Land: The  
Importance of Use and Access Rights of Women**

BY  
**GEETA SHEORAN**  
DECEMBER 17, 2014

## **ANNOTATED BIBLIOGRAPHY**

**(IN PROGRESS)**

This is an annotated bibliography for my research project as an LL.M. (course based) candidate at the Faculty of Law, University of Calgary. It is a work in progress and should not be taken as exhaustive of the literature relevant for my research.

The question central to my research is whether stable and equal access and use rights of rural land by women will ensure better protection of land?

The following sub questions will be addressed to logically answer the central question:

1. What is the role of gender in the sustainable use of land?
2. What are the gender equality issues that hinder the effective translation of the ability of women in achieving sustainable use of land?
3. Whether use and access of land is a key gender issue for sustainable development of land to achieve positive results?

This annotated bibliography is divided into three parts: (a) international instruments; (b) monographs; and (c) articles.

### **PRIMARY MATERIAL: INTERNATIONAL INSTRUMENTS**

*Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993), online: United Nations Treaty Collection  
<<http://www.cbd.int/doc/legal/cbd-en.pdf>>.

Gender Plan of Action, 22 September 2006 online: UNEP  
<[http://www.unep.org/roa/amcen/Projects\\_Programme/climate\\_change/PreCop](http://www.unep.org/roa/amcen/Projects_Programme/climate_change/PreCop)>

[15/Proceedings/Gender%20strategies/Unep%20Gender%20Plan%20of%20Action\\_5\\_Feb07.pdf](http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf) >.

United Nations, *The Beijing Declaration and the Platform for Action: Fourth World Conference on Women* (New York: Department of Public Information, United Nations, 1996), online:

<<http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>>.

*United Nations Millennium Declaration*, A/RES/55/2, 2000

<<http://www.un.org/millennium/declaration/ares552e.htm>>.

## SECONDARY MATERIAL: MONOGRAPHS

Howard, Patricia L. *Women and Plant World. An Exploration*, (London & New York: Zed Press and Palgrave-Macmillan, 2003).

Patricia Howard, author of chapter one and the editor of the book, is a Rural Sociologist, Political Ecologist and Ethnobotanist. She is currently working as a Research Professor in the Netherlands. Since 2000 her research is focused on Biological Diversity Studies and Ethnobotany. Chapter one of this book is relevant to my research wherein the author argues that to preserve biological diversity, the benefits of conservation should principally accrue to those who create and sustain the biological diversity. The author has explored some of the factor responsible for the loss of biological diversity particularly with respect to their relation with women, plants and gender. The chapter explores the relationship between gender and biodiversity conservation with frequent references to the provision of the Convention on Biological Diversity especially Article 8(j), one of the instruments that I will be dealing with.

Lim, Hilary & Anne Bottomley. *Feminist Perspectives on Land Law*, (London: Routledge-Cavendish, 2007).

The former author is Principle Lecturer at the School of Law, University of East London while the latter is Lecturer In Law at the University of Law. The book is a collection of twelve essays. Essay eleven of this collection is relevant to my research as it discusses the difficulties the women encounter in the use and access of land. Professor Jonnette Watson Hamilton has peer-reviewed this book and has culled out an important aspect discussed in the chapter i.e. it is not only access but also the capacity to utilize the access that is crucial. Essay four of the book also focuses on women's access to material resources. I am yet to go through the book and have only read the review by Professor Watson Hamilton at this stage.

Maria, Mies & Vandana Shiva. *Ecofeminism* (Melbourne: Spinifex, 1998).

Both the authors are feminist legal scholars. The former is a Professor of Sociology in Germany and the latter is a renowned environmental activist best known to be representing the most radical ecofeminist perspectives. The book

comprises 20 chapters in seven parts. The book is highly relevant to my research since I will largely be dealing with the writings of ecofeminists. Chapter 3 at page 38 provides methodological guidelines for feminist research. Chapter 11 titled “Women’s Indigenous Knowledge and Biodiversity Conservation” discusses the relationship between women and biodiversity. The book provides interesting insights into ecofeminist perspectives.

### SECONDARY MATERIAL: ARTICLES

Agarwal, Bina. “Rural Women, Poverty and Natural Resources Sustenance, Sustainability and Struggle for Change” online: (1989) 24:43 *Economic and Political Weekly* < <http://www.jstor.org/stable/4395522> >.

Bina Agarwal is a prolific writer and has written extensively on land; gender and property rights; and environment and development. She is currently working as the Director and Professor of Economics at the Institute of Economic Growth in the University of Delhi. The author has argued that poor and tribal peasant women have been important in providing family subsistence inspite of facing several odds including unequal access to land. The article is divided into six sections. Section III is of particular relevance to my research wherein the author highlights the unequal and declining access of women to land and explores the constrains that women face in claiming such access in India, a developing country. In Section IV the author discusses the impact that environmental degradation has on women and their status and concludes with the broad contours of a solution to the problem.

---. “Who Sows? Who Reaps? Women and Land Rights in India.” (1988) 15:4 *The Journal of Peasant Studies* 531.

The author notes the immense significance of women’s direct access to land in a developing country, India. The author has engaged in doctrinal study of women’s past and existing rights to land and has identified the various hurdles that women are facing in claiming and controlling land. The author has addressed four questions out of which the first question of direct relevance to my research i.e. what are the implications of women’s lack of access to agricultural land? Implications for both cropping pattern as well as gender relations have been discussed in the article. Even though majorly doctrinal, the article is useful in developing an understanding of access issues in developing countries.

Deakin, Natasha Hammond. “Sustainable Development, Agriculture and Women in Vietnam” (2005) 9:2&3 *Asia Pac J Envtl L* 267.

The author is a well-known environmental lawyer in Australia. This article identifies and discusses the key challenges that ecofeminists face in their struggle of improving the quality of life for women and the environment. This article is of direct relevance to my research for two main reasons. Firstly, it

analysis ecofeminism and secondly because the key challenges identified by the author are relevant to the proposed chapter two of my research paper.

Deda, Paola & Renata Rubian, "Women and Biodiversity: The Long Journey from Users to Policy-Makers" (2004) 28:3 Natural Resources Forum 201.

Paola Deda was a Programme Officer of Sustainable Use and Tourism at the UN Secretariat on the Convention of Biological Diversity in Montreal, Canada at the time of writing this article. Currently the author is serving as the Section Chief in the Joint UNECE/FAO Forestry and Timber Section. The latter author was a Programme Assistant of Legal Affairs, Sustainable Use and Tourism at the Secretariat. She is currently working as a Programme Analyst at the UNDP Asia Pacific Centre. In this article the authors have evaluated the gender equality initiatives by the governments of some countries using the case of Convention on Biological Diversity. The authors have identified the gap between policy and effective implementation. The authors claim that if women controlled the use of natural resources more, they would make more efforts to conserve them. Convention of Biological Diversity is one of the instruments that I will be examining as part of my research. Since this article is analyzing the character of the gender equality initiatives under this convention, it will assist in the understanding of the policy and the gaps.

Hessing, Melody. "Women and sustainability: Ecofeminist perspectives" (1993) 19:4 Alternatives 14 online:  
<http://ezproxy.lib.ucalgary.ca/login?url=http://search.proquest.com/docview/218789985?accountid=9838>.

The author is a Sociologist and a member of the academia. At the time of writing the article, she was teaching sociology at Douglas College in New Westminster, BC. In this article, the author has explored the ecofeminist perspectives on the concept of sustainability. The author canvasses the views of radical, liberal and socialist ecofeminists and identifies the sustainability goals set by them, the limitations identified by them and the solutions they extend. This article presents a helpful overview of the view of sustainability endorsed by ecofeminists. It also culls out the complementary understanding of sustainable development among ecofeminists in spite of a diversity of opinions. Understanding the ecofeminist perspective on sustainability is crucial to my research and provides the theoretical framework for my paper.

Maragia, Bosire. "Gender Struggles in Homosocial Settings: Reconstructing Gender and Social Equity for Sustainability in Post Colonial Societies" (2007-2008) 16 Am U J Gender Soc Pol'y &L 335 at 339.

The author was working for the U.S. Federal Government at the time of writing the article. He is law graduate with a career in academia. The author argues that sustainable development can be translated into actionable policy only by understanding how resources are accessed, acquired and distributed. He further

argues gendered practices and norms that affect acquisition and use of resources must be addressed if sustainable development is to be achieved. The author has also reviewed the definitions of gender and gender equality. Thus, this article touches upon several of the issues that are pertinent to my research.

Mehra, Rekha. "Women, Land and Sustainable Development" (1995) ICRW, online: [www.icrw.org/sites/default/files/publications/Women-Land-and-Sustainable-Development.pdf](http://www.icrw.org/sites/default/files/publications/Women-Land-and-Sustainable-Development.pdf).

The author was the Director of Economic Development at the International Centre for Research on Women at the time of writing the article. She is a leading gender expert with experience in developing countries including Asia and Africa. In this article the author has highlighted the important linkages between women's land rights, land development and sustainability. The author has accessed women's restricted rights to land, its impact on productivity and sustainability, causes of the limited access and possible solutions to the problem. Since use and access rights of women are key to my paper, the analysis of the author in this article is very useful for my research.

Momsen, Janet Henshall. "Gender and Biodiversity: A New Approach to Linking Environment and Development" (2007) *Geography Compass*.

The author is a Professor and Chair of the Geography Graduate Group at the University of California, Davis. She is an alumna of Oxford University and a Ph.D. in Geography from London University. Her research focuses on sustainable development and gender issues in relation to agriculture. The author has reviewed the historical approaches to biodiversity conservation. The author has highlighted the growing focus on agrobiodiversity, a branch of biodiversity. Literature demonstrating the interest in the role of gender in agrobiodiversity conservation has been assessed. The author has further discussed the importance of a gendered approach to agrobiodiversity conservation for ensuring food security. This article is important for its content and also for the references that the author has cited as part of her review.

Sami, Kevin. "Women and Climate Change: An Opportunity to Address Gender Inequality" (2011) 6:1 *Yale Journal of International Affairs* 99.

The author was a graduate student of environmental management program at Yale School of Forestry and Environmental Studies at the time of writing. Even though not a prominent scholar, his discussion about the relationship between gender equality and climate change lends to the idea that I am arguing for in the paper. The inverse relationship between gender equality concerns and environmental concerns that I seek to establish partly flows from his discussion in this article. This article is therefore relevant to that extent for my research.

UNIVERSITY OF CALGARY  
FACULTY OF LAW

LAW 703: Graduate Seminar in Legal Research and Methodology

**Annotated Bibliography**

**(Gross Negligence and Willful Misconduct in Joint Operating Agreements: A Comparison  
Study between the CAPL Operating Procedures and the AIPN Joint Operating  
Agreements)**

By

Zahrasadat Sheykholeslamshoostari

December 23, 2014

## MODEL FORMS

Association of International Petroleum Negotiators, *1995 Model International Joint Operating Agreement* (Houston, Texas: Association of International Petroleum Negotiators, 1995).

———. *2002 Model International Joint Operating Agreement* (Houston, Texas: Association of International Petroleum Negotiators, 2002).

———. *2012 Model International Joint Operating Agreement* (Houston, Texas: Association of International Petroleum Negotiators, 2012).

Canadian Association of Petroleum Landmen, *Operating Procedure* (Calgary: Canadian Association of Petroleum Landmen, 1981).

———. *Operating Procedure* (Calgary: Canadian Association of Petroleum Landmen, 1990).

———. *Operating Procedure* (Calgary: Canadian Association of Petroleum Landmen, 2007).

## JURISPRUDENCE

*Adeco Exploration Co v Hunt Oil Co of Canada*, 2007 CarswellAlta 1953 (QB).

*Bernum Petroleum Ltd v Birch Lake Energy Inc.*, [2014 ABQB 652](#).

*Erehwon Exploration Ltd v Northstar Energy Corp.*, 1993 CanLII 7238 (AB QB).

*Morrison Petroleums Ltd v Phoenix Canada Oil Co* (1997) 198 AR 81 (QB).

## SECONDARY RESOURCES: ARTICLES

Josephson, Michael D. “How Far Does the CAPL Travel - A Comparative Overview of the CAPL Model Form Operating Procedure and the AIPN Model Form International Operating Agreement” (2003-2004) 41 Alta L Rev 1.

- The author compares the key aspects of the Canadian Association of Petroleum Landmen (CAPL) Operating Procedures (CAPLs) with the Association of International Petroleum Negotiators (AIPN) Joint operating Agreements (AIPN JOAs). He identifies the rationale behind the differences between the two models and concludes that the AIPN JOAs, while they are intended for international stakeholders, should deal with the issues addressed by the CAPLs. This article is largely related to my research. In particular, the introduction and

the third part of this article is directly useful for my research. However, this article deals with the 1981 and the 1990 CAPLs and with the 1995 and the 2002 AIPN JOA. It means that I will need to refer to other resources as well in order to learn about new versions of the CAPLs and the AIPN JOAs.

Mills, Douglas G; Carolyn A. Wright & Julia J. M. Inch. "Exploring the Balance of Power in the Operator/Non-Operator Relationship Under the CAPL Operating Procedure" (2010-2011) 48 Alta L Rev 363.

- This article investigates the evolution of different rights and obligations in the CAPLs, particularly the 1981 CAPL, the 1990 CAPL, and the 2007 CAPL. The author examines how the CAPL drafting committee engaged in modifying the parties' rights and obligations in the CAPLs and how courts interpreted them. It is concluded that the evolution of the CAPLs speaks to the constant changing needs of the industry. Parts one, two, and three of this article provides me with general information on the history of changes in the CAPLs and industry practices in regards to the operator and non-operator relationship. Parts four and five are directly relevant to my research as they talk about the operator's liability towards the non- operators in the CAPLs. The final section of this article contains some suggestions for the drafting committee in terms of modifying the provisions regarding gross negligence and willful misconduct, which is generally helpful for me.

Pittman Miles; Jaclyn Hesje & Adam Lamoureux. "Gross Negligence in Canadian Energy Contracts" (2013-2014) 51 Alta L Rev 283.

- This article compares gross negligence and willful misconduct in the 2007 CAPL with other model joint operating agreements in Canada. In the authors' view the proposed definition under the 2007 CAPL is narrow and they suggest modifications to the contract drafting committee. This Article provides a helpful history on the courts' interpretation of gross negligence and willful misconduct in the Canadian legal history, particularly in the

oil and gas decisions. This article is largely relevant to my research, unless those parts that analyzes other Canadian model joint operating agreements.

Spurn, Craig; Jana Prete & Melissa Zerebeski. "The 2007 CAPL Operating Procedure", (2008-2009) 46 Alta L Rev 427.

- This article provides a detailed analysis and overview on the provisions of the 2007 CAPL and the key changes from the last version of the CAPL Operating Procedure. The authors claim that the new model has been able to provide a "norm-based" contract rather than a "standard-based" one. Also, the authors argue that the 2007 CAPL has been able to respond to current needs of the industry. This article is an investigation on the most important parts of the 2007 CAPL. Section four of this paper is directly relevant to my work. This part provides analysis on gross negligence and willful misconduct in the 2007 CAPL.

### **SECONDARY RESOURCES: ONLINE RESOURCES**

Association of International Petroleum Negotiators. *2012 Model JOA Comparison* (Association of International Petroleum Negotiators, 2012)

- This document provide a precise comparison between the 2012 AIPN JOA and the 2002 JOA. This comparison does not include any analysis or annotations about the changes in the 2012 AIPN JOA. However, it shows the changes in terms of language used in the 2012 AIPN JOA versus the 2002 AIPN JOA. This comparison is useful for my research, as I can easily follow and find the changes that the AIPN drafting committee provided in their last version of model JOA.

Canadian Association of Petroleum Landmen. *Text Red-lined to November 2006 Draft* (Calgary: Canadian Association of Petroleum Landmen: 2007), online: CAPL < [www.landman.ca/pdf/operating\\_procedures/2007/final/Coded%20Comment%20Matrix%20%28November%202006%20Draft%29.pdf](http://www.landman.ca/pdf/operating_procedures/2007/final/Coded%20Comment%20Matrix%20%28November%202006%20Draft%29.pdf) >.

- The CAPL drafting committee released a draft of the 2007 CAPL (known as the 2006 CAPL Draft) among the oil and gas companies in the Western Canadian Sedimentary Basin, in order to receive their feedback on the provisions and changes made in the 2006 CAPL draft. The Text Red-lined to November 2006 Draft shows some of the oil and gas companies' comments on the 2006 CAPL Draft and also provides the drafting committee's reply to those companies. This document is of a great importance and use to my research. In particular, it will benefit my research by providing the industry practices on gross negligence and willful misconduct through the oil and gas companies. In addition, by reading the drafting committee's answers to those companies, the rationale and purpose behind changes in gross negligence and willful misconduct definition will be elaborated to me.

———. *2007 Operating Procedure Annotations* (Calgary: Canadian Association of Petroleum Landmen, 2008), online: CAPL: <  
[landman.ca/pdf/operating\\_procedures/2007/final/2007%20Operating%20Procedure%20Annotations%20%28Final2008%29.pdf](http://landman.ca/pdf/operating_procedures/2007/final/2007%20Operating%20Procedure%20Annotations%20%28Final2008%29.pdf)>.

- The 2007 CAPL Annotation elaborates on the provisions of the 2007 CAPL and briefly explains the evolution of each provision. This document shows the CAPL drafting committee's reasons and rationale behind the changes in the 2007 CAPL. The annotations on the definition of gross negligence and willful misconduct, and on the limitation of the operator's liability is directly relevant to my research project.

MacLean, Jim. *Modification to 1990 Operating Procedure* (Calgary: Canadian Association of Petroleum Landmen, 2007), online: CAPL <  
[www.landman.ca/pdf/operating\\_procedures/2007/final/Modifications%20to%201990%20Oper%20Proc%20%28Aug%2016%202007%29.pdf](http://www.landman.ca/pdf/operating_procedures/2007/final/Modifications%20to%201990%20Oper%20Proc%20%28Aug%2016%202007%29.pdf)>.

- Jim Maclean is the principal draftsman of the 2007 and the 1990 CAPLs. The author firstly shows the changes in the 2007 CAPL and then he provides some brief and precise

explanations on the rationale and purposes behind those changes. The explanations of the changes on the definition of gross negligence and willful misconduct, and the limitation of the operator's liability is significantly useful for my research.

———. *Overview of 2007 CAPL Operating Procedure*, (Calgary, Canadian association of Petroleum Landmen, 2007).

- This document also briefly explains what has been changed in the 2007 CAPL and why those modifications were provided. The explanations of the changes on the definition of gross negligence and willful misconduct and on the limitation of the operator's liability is directly relevant to my research.

Tupper, David; Sean Fraser & Scott Nicole. "Alberta Court Sheds Light on Gross Negligence Standard Required of Oil & Gas Operators" (19 November 2014), LEXOLOGY (blog), online: < [www.lexology.com/library/detail.aspx?g=75f229f0-ea15-4c97-bda4-bb129ec6c903](http://www.lexology.com/library/detail.aspx?g=75f229f0-ea15-4c97-bda4-bb129ec6c903) >.

- This post is a case comment on the most recent case happened about gross negligence and willful misconduct in the 2007 CAPL. The authors provide a summary on the case. They discuss about the importance of the case for the oil and gas companies. They analyze the case and conclude that the court applied the standard of "marked departure from the standard of care" for the interpretation of gross negligence. This case and the comments on it is of great importance for my research. As this case is the only one that contains arguments on gross negligence and willful misconduct in the 2007 CAPL. The authors' conclusion on the interpretation of the gross negligence and willful misconduct does not comply with some other scholar's opinion. This disagreement creates the heart of my analysis on the interpretation of gross negligence and willful misconduct in the 2007 CAPL.

**UNDERSTANDING THE DYNAMICS OF STANDING UNDER THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT 2012: AN INTERPRETIVE LEGAL ANALYSIS**

**ANNOTATED BIBLIOGRAPHY  
(WORK-IN-PROGRESS)**

Nitin Kumar Srivastava  
LL.M. Candidate, University of Calgary  
17 December 2014

This is an annotated bibliography for my major research paper as an LL.M. candidate at the University of Calgary. It is a work-in-progress and should not be taken as exhaustive of the relevant literature.

The fundamental question of the research is how should the newly introduced qualifications of “directly affected and having relevant information and expertise” in the definition of ‘interested party’ be interpreted that stands in harmony with the overall purpose and objective of the CEAA 2012? This annotated bibliography is classified into the following sections (a) legislation and subordinate legislation (b) jurisprudence and regulatory decisions (c) government publications, and (d) secondary and other materials. For the purpose of the LAW 703 assignment, only twelve entries are annotated.

**LEGISLATION AND SUBORDINATE LEGISLATION**

*Canadian Environmental Assessment Act*, SC 1992, c 37.

*Canadian Environmental Assessment Act*, SC 2012, c 19, s 52.

*Environmental Assessment and Review Process Guidelines Order*, SOR/84-467.

*Federal Court Act*, RSC 1985, c F-7.

*Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19.

*Regulations Designating Physical Activities*, SOR/2012-147.

*National Energy Board Act*, RSC 1985, c N-7.

## JURISPRUDENCE AND REGULATORY DECISIONS

Alberta Energy Regulator, *Report of the Joint Review Panel – Shell Energy Canada Jackpine Mine Expansion Project, Application to Amend Approval 9756, Fort McMurray Area*, 2013 ABAER 011 (Calgary: Alberta Energy Regulator, 2013) online: AER < <http://www.aer.ca/documents/decisions/2013/2013-ABAER-011.pdf>>.

*Bell Express Vu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559.

*Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524.

Canadian Environmental Assessment Agency, *Report of the Federal Review Panel - New Prosperity Gold-Copper Mine Project*, (October 2013) (Ottawa: Canadian Environmental Assessment Agency, 2013) online: CEAA < <http://www.ceaa-acee.gc.ca/050/documents/p63928/95631E.pdf>>.

The federal Minister of the Environment established a three-member Review Panel for the New Prosperity Gold-Copper Mine Project under the former *CEAA* 1992 on May 9, 2012. The panel was continued under the new *CEAA* 2012. The panel consists of Dr. Bill Ross (chair), Dr. George Kupfer and Dr. Ron Smyth. This panel decided that the New Prosperity Project would result in several significant adverse environmental effects, including the certain adverse cumulative effects. The Panel ruling on the interested party status (in Appendix 3 of the report) is of prime concern for the purposes of my paper because it is the first and the only interpretation of the standing provisions of the new *CEAA* 2012. In its ruling, the panel mentioned that the Agency does not have any policy guidance on the issue, hence they are guided by the general principles established by case law on interested party standing, the Panel's Terms of Reference, and the new Act. In its interpretation, the panel located "directly affected" close to the public law situation rather than private law situation and therefore held that a "generous and liberal approach" is to be followed in determining the interested party status. This report is the prime example for the purposes of my paper. It will be considered as a single case study on the statutory interpretation of the new standing provisions of the *CEAA* 2012. A large segment of the legal analysis in my paper is focused on evaluating the reasoning this ruling of the panel on the interested party status. Since it is the only interpretation of the new Act and in the absence of any deliberations by the courts on this issue, this piece of document becomes highly important for my current research purposes.

*Canadian Union of Public Employees LOCAL 30 v Alberta (Public Health and Advisory Board)*, [1996] AJ No 48 (CA), 178 AR 297, 34 Admin LR (2d) 172.

*Cheyne v Alberta (Utilities Commission)*, 2009 ABCA 94.

*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

*Forest Ethics Advocacy Association and Donna Sinclair v National Energy Board*, 2014 FCA 245 (CanLII).

*Friends of Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 1992 CarswellNat 649, 1992 CarswellNat 1313.

*Graff v Alberta (Energy and Utilities Board)*, 2007 ABCA 20.

*Kelly v Alberta (Energy and Utilities Board)*, 2008 ABCA 52; *Kelly v Alberta (Energy and Utilities Board)*, 2009 ABCA 161 (*Kelly #2*).

*Mining Watch Canada v Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 SCR 6, 2010 CarswellNat 55.

*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 1998 CarswellOnt 2.

*Sawyer v Alberta (Energy and Utilities Board)*, 2007 ABCA 297.

## GOVERNMENT PUBLICATIONS AND OTHER MATERIALS

### A. PARLIAMENTARY PAPERS

House of Commons, Standing Committee on Environment and Sustainable Development, *Statutory Review of the Canadian Environmental Assessment Act: Protecting The Environment, Managing Our Resources* (March 2012) (Chair: Mark Warawa), online: <<http://www.parl.gc.ca/content/hoc/Committee/411/ENVI/Reports/RP5300807/envirp01/envirp01-e.pdf>>.

### B. DEBATES

*House of Commons Debates*, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, No 146/115 (2 May 2012) at 7471 and 7472 (Hon. Joe Oliver, Minister of Natural Resources).

*House of Commons Debates*, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, No 146/117 (4 May 2012) at 7600, 7602 (François Choquette), 7573 (Claude Gravelle) and 7596, 7599 (Mathieu Ravnignat).

*House of Commons Debates*, 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, No 146/138 (11 May 2012) at 9127 (Peggy Nash).

### C. OTHER GOVERNMENT PUBLICATIONS

Canada, Canadian Environmental Assessment Agency, “Operational Policy Statement Addressing “Purpose of” and “Alternate Means” under the *Canadian Environmental Assessment Act*, 2012” (December 2013) Catalogue No: En106-77/2014E-PDF (Ottawa: Canadian Environmental Assessment Agency 2013) online: CEAA <[http://publications.gc.ca/collections/collection\\_2014/acee-ceaa/En106-77-2014-eng.pdf](http://publications.gc.ca/collections/collection_2014/acee-ceaa/En106-77-2014-eng.pdf)>.

———, “Public Participation Guide: A Guide for Meaningful Public Participation in Environmental Assessments under the Canadian Environmental Assessment Act” (2008) vol 9 No 2 CEAA 161, Catalogue No En106-80/2008E-PDF (Ottawa: Canadian Environmental Assessment Agency, May 2008).

Canada, Library of Parliament Research Publications, *Federal Environmental Assessment: Public Participation Before and After Bill C-38*, by Kristen Courtney (Ottawa: Industry, Infrastructure and Resources Division, HillNote Number 2012-30E, 30 May 2012) online: <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/2012-30-e.htm>>.

Canada, Parliamentary Information and Research Service, “Canada’s Changing Federal Environmental Assessment Process”, by Penny Becklumb & Tim Williams, Publication No. 2012-36-E (Ottawa: Library of Parliament, Parliamentary Information and Research Service, 28 August 2012) online: Library of Parliament, <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/2012-36-e.pdf>>.

———, “Federal Environmental Assessment: Overview of the Law and Recent Issues”, by Penny Becklumb & Tim Williams, Publication no. 2011-87-E (Ottawa: Parliamentary Information and Research Service, Library of Parliament, 12 September 2011), online: Library of Parliament <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/2011-87-e.htm>>.

Canada, Natural Resources Canada, “An open letter from the Honorable Joe Oliver, Minister of Natural Resources, on Canada’s commitment to diversify our energy markets and the need to further streamline the regulatory process in order to advance Canada’s national economic interest” (9 January 2012) (Ottawa: Natural Resources Canada, 2012) online: NRC <<http://www.nrcan.gc.ca/media-room/news-release/2012/1/1909>>.

Office of the Auditor General of Canada, “*Report of the Commissioner of the Environment and Sustainable Development*” (2014) Catalogue No FA 1-2/2014-1-4E-PDF (Chapter 4: Implementation of the *Canadian Environmental Assessment Act*, 2012) online: OAG <[http://www.oag-bvg.gc.ca/internet/docs/parl\\_cesd\\_201410\\_04\\_e.pdf](http://www.oag-bvg.gc.ca/internet/docs/parl_cesd_201410_04_e.pdf)>.

This is the most recently issued government documents by the Commissioner of the Environment and Sustainable Development released by the Office of the Auditor General of Canada in October 2014. The relevance of this report for the purpose of my paper is due to the observations and recommendations made by the government on the *Canadian Environmental Assessment Act 2012* in Chapter 4 of the Report. The Chapter is primarily focused on the ‘Implementation of the *CEAA 2012*’. The document not only provides an audited assessment of the changes made in the Act, but it also identifies the gaps in the federal EA regime reconstructed after the 2012 amendment. Section 4.31 of Chapter 4 is focused on ‘Public and Aboriginal Participation’ under the new Act. It also identifies the absence of guidance from the CEA Agency to the review panel in deciding who can participate in hearings in Section 4.37. The report instructs the responsible authority (RA) for providing meaningful public participation by addressing the concerns about the capacity to participate rose by some Aboriginal and stakeholder groups. Along with the above observations, the report also made specific recommendations to the CEA Agency for ensuring the removal of the hurdles and gaps in proper implementation of the Act. I will be concentrating only on Chapter 4 of the report, as it is relevant for the purpose of answering my research question. Other chapters do not have any significance for the fulfilling my paper objectives, are therefore excluded.

## SECONDARY AND OTHER MATERIALS

### A. BOOKS

Beaulac, Stephane, *Handbook on Statutory Interpretation- General Methodology, Canadian Charter and International Law* (Markham, Ont: LexisNexis Canada, 2008).

The author has been, since 2001, a professor at the Faculty of Law, University of Montreal, where he was the Program Director of the Graduate School (J.D.) on North American Common Law (2012-2014). He has taught courses on public international law and statutory interpretation. He obtained his Ph.D. in international law from the University of Cambridge, England; he also has an LL.M. in comparative public law and a specialized degree in legislative drafting and statutory interpretation. He was also a law clerk at the Supreme Court of Canada, with Madame Justice Claire L’Heureux-Dube. Professor Beaulac is a rapporteur for Canada of the case-law using international law domestically with Oxford University Press and was, from 2005 to 2008, director of the Quebec Journal of International Law. Beaulac is an author, co-author, collaborator or the editor of many books.

He authored this current book under the mentorship of Professor Pierre-Andre Cote, Professor Emeritus at the University of Montreal. The book contains updated amalgamation of excerpts from legal writing on the general methodology of interpretation. The book includes extracts from Driedger, Ruth Sullivan etc. and also provides analysis of relevant Canadian case laws. Along-with the general discussion on the methodology of statutory interpretation, the chapters also include observations on the “Modern Principles” of interpretation (Driedger) and its judicial endorsement. This is particularly relevant for my current research purposes. Further chapters that illustrate various methods of statutory

interpretation with special focus on the contemporary methods are also significant for my paper. Chapter 2,3 and 4 of the book are directly relevant for the purposes of my research project. The information in these chapters is very significant for the interpretative exercise that I planned for my project to answer the research question. For example, what is the practice in Canada with regard to the use of parliamentary debates as an aid to statutory interpretation? This book will help to achieve the answer and also guide me to apply it on my research questions, as I have planned to employ this exercise in my analysis.

Carter-Whitney, Maureen, *Environmental Regulation in Canada* (Markham, Ont: LexisNexis Canada, 2008) (loose leaf revision 26).

Craik, Neil A et al, *Public law: Cases, Materials, and Commentary*, 2nd ed (Toronto: Emond Montgomery, 2011).

Doelle, Meinhard, *Canadian Environmental Protection Act & Commentary* (Markham, Ont: LexisNexis Canada: 2008).

Doelle, Meinhard & Chris Tollefson, *Environmental Law: Cases and Materials*, 2nd ed (Toronto: Carswell, 2013).

Driedger, E.A, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983).

Hobby, Beverly & Kirk Lambrecht, *Canadian Environmental Assessment Act: An Annotated Guide* (Toronto: Canada Law Book, A Division of Thomson Reuters Canada Limited, 2011) (loose leaf revision 14).

Holder, Jane, *Environmental Assessment: The Regulation of Decision Making* (Oxford: Oxford University Press, 2004).

The author is a Professor of Environmental Law at the University College London (UCL) United Kingdom. She has published a number of articles on environmental assessment and related issues. She is also the lead editor of the *International Journal of Law in Context*. This book is divided into eight chapters analyzing various aspects of law, governance and environmental assessment of the United Kingdom and European Union. For the purposes of my current research, the theoretical discussion in Chapter 6 of the book is very relevant. This chapter concisely produces the debate on “participation and protest”. In addition to outlining the requirements of public participation in environmental assessment, the author examines the claims on EA by mapping instrumental and dignitarian theories of participation onto information and cultural theories of environmental assessment. The author

further discusses about the apparent consensus about the benefits of decision-making by deliberations in terms of outcomes and linking environmental justice with environmental democracy and also contrasts it with practical experience of participation in the EA of engaging the ‘unheard voices’. The discussion provided in chapter 6 and 7 of the book provides necessary arguments and analysis on the gap between ideal and practical experience of participation. The discussion also provides views and justifications for the development of restrictive information disclosure and consultation provisions on the basis of application of deliberative democracy to new governance approaches to regulation to address costly delays. The references made in the footnotes and bibliography provide for an additional source of relevant secondary literature valuable for my paper.

Northey, Rodney, *The 1995 Annotated Canadian Environmental Assessment Act and EARP Guidelines Order* (Scarborough, Ont: Carswell Thomson Professional Publishing, 1994).

The author is a practicing Environmental Lawyer and an Environmental Law specialist based in Toronto, Ottawa. At the time of writing this book, he was associated with McCarthy Tétrault, Toronto and is currently a partner in Growling Lafleur Henderson LLP, Toronto. He has other books published on environmental and municipal law and is currently a Course Developer and Instructor of Environmental Protection Law within Osgoode Hall Municipal Law (LL.M.). For the purposes of my current research his above-mentioned work becomes relevant as it provides a detailed review of the legal history of federal policy and law since 1974 till 1994, which also includes annotations of all major panel review hearing reports and judicial case laws. The annotations on legal interpretation, definitions and meaning of the words and phrases used in the EPAR Guideline Order and CEAA 1992 are openly critical of my paper. It also provides me the critical analysis of the approaches between EPARGO & CEAA 1992. Hence the commentary added to the relevant case law on the issue provides a valuable resource for my research purposes.

Saunders, J. Owen, ed, *Managing Natural Resources in a Federal State: Essays from the Second Banff Conference on Natural Resources Law* (Toronto, Calgary & Vancouver: Carswell, 1986).

At the time of editing this collection of essays, the editor of this volume was a research associate at the Canadian Institute of Resources Law (CIRL) and Adjunct Associate Professor at the Faculty of Law, University of Calgary. This collection contains contribution of 21 eminent authors; mostly professors from the Canadian Universities. The majority of the essays represent the Canadian perspective of the difficulties that the management of natural resources poses for a federal system. Few American and Australian scholars have also incorporated their aspects of the commonly shared problems. The essays arise out of the Second Banff Conference on Natural Resources Law, convened by the CIRL in 17th to 20th April 1985. It is an important resource for the purpose of my paper as it reflects the most updated law as of that date. Thematically, the essays are divided into six major headings; admittedly not all parts are imperative to my research question. Only those essays that provide me a better understanding of the federal perspective of the background policy

framework are relevant. The essays provide an impressive overview of the problems federalism generates for natural resource management and further deals with appropriate federal voice in the management of provincial resources, especially focusing on environmental management and resource revenue, the former being relevant to my paper. Further sections of the collection deal with less noticed aspects of federalism that pose obstacles for effective resource management and finally focuses on federal relation with the International community and federal – provincial cooperation. The latter indirectly relates to the current framework of environmental assessment and provides insights to the amendments in the CEAA 2012 (substitution and equivalency). Although some essays tangentially relate to the purpose of my paper, but they are helpful in making the groundwork for better understanding of federal environmental and resource management. I plan to be very selective in picking references from the collection.

Sullivan, Ruth, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Markham, Ont: Butterworths, 2002).

The author is Canada's leading expert in statutory interpretation and legislative drafting. At the time of writing this fourth edition of this book she was Professor of Law at the University of Ottawa. In this edition, she not only explained and analyzed the 'modern principles of construction' developed by Driedger, but also included significant modifications through her commentary and analysis of the case laws that contemplate the application of the modern principle in Canadian context. Her contributions in devising a coherent analytical structure for the body of law identified as statutory interpretation, is commendable. For the purpose of my current research project, her book will be the backbone of the interpretative analysis that I propose to exercise in my paper. The chapters not only include Driedger's modern principle, but also informs me when, where and how the rules of ordinary meaning, technical meaning, original meaning or plausible meaning may apply, and also educates me with the theories of construction. Finally, the book trains me in understanding and applying the multi-dimensional character of statutory interpretation in accordance with the current theory and practice. The analysis pointing out the difficulties in modern statutory interpretation makes me cautious while dealing with different approaches (textualists, intentionalists, legal normativists or pragmatist approach) and the factors for their application. The information from this source is directly beneficial for the major part of my paper.

Sullivan, Ruth, *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law, 2007).

## **B. PAPERS, ARTICLES AND MONOGRAPHS**

André, Pierre, B Enserink, D Connor and P Croal, "Public Participation International Best Practice Principles" (2006) Special Publication Series No 4, (Fargo, USA: International Association for Impact Assessment 2006) online: IAIA <<http://www.iaia.org/publicdocuments/special-publications/SP4%20web.pdf>>.

This article is part of the series of nine special publications of the International Association for Impact Assessment with an objective to educate on different aspects related to the internationally recognized best practices in environmental assessment. Professor Andre is the lead author of this publication. He is a professor in the human environment in the Geography Department of the University of Montreal and specializes in natural resource management and environmental assessment. Various projects have enabled him to develop his expertise, particularly in the sound environment (transport and noise) on the climatic environment (social representations of winter farmers and climate change) and on protected areas. He authored this current publication with the collaboration of Berk Enserink, Desmond Connor and Peter Croal. For my research purposes, this publication not only provides the internationally recognized definition of public participation with its objectives but also offers me three tiers of principles for public participation best practice, namely: Basic Principles, Operating Principles and Operating Guidelines, that will help me in framing the standard criteria for the assessment of the federal public participatory regime under CEAA 2012.

Bond, Allen et al. "Impact Assessment: Eroding Benefits Through Streamlining?" (2014) 45 *Environ Impact Assess Rev* 46.

Carpenter, Sandy, "Fixing the Energy Project Approval Process in Canada: An Early Assessment of Bill C-38 and Other Thoughts" (2012) 50:2 *Alta L Rev* 229.

Doelle, Meinhard, "The Evolution of Federal EA in Canada: One Step Forward, Two Steps Back?" (24 January 2014) online: Social Science Research Network <http://ssrn.com/abstract=2384541>.

———, "CEAA 2012: The End of Federal EA As We Know it?" (2012) 24:1 *J Envtl L & Prac* 1.

The author of this article is the Associate Director of the Marine & Environmental Law Institute and an Assistant Professor at Dalhousie Law School. He is a specialist in environmental law. He has been with the Atlantic Canada law firm of Stewart McKelvey since 1989, serving as Environmental Counsel since 2005. Professor Doelle has written on a variety of environmental law topics, including climate change, environmental assessments, constitutional law, energy law, biodiversity, trade and environment, and public participation in environmental decision making. The objective of the author's commentary in this article is to assess the key changes made to the federal EA process contained in the 2012 Budget Implementation Bill. This article further conducts a comprehensive comparison of the federal EA process that had been in place since the implementation of the original CEAA in 1995 with the federal EA regime established under CEAA 2012. The comparative analysis of the federal process before and after the amendment is directly relevant for my current research purposes. The discussion and analysis on "public engagement in the process" in section 7 at page 15 of the article is openly related to my research question, hence precious for my paper. On the basis of his observations and analysis made in this article, the author

concludes that CEAA 2012 is a major step backward, it makes EA less effective and less fair and it marks the end of federal EAs. His comparative analysis and conclusion are helpful for my assessment of the theoretical debate in my paper. Additionally, the references made in the footnotes of the article provide me access to valuable authoritative sources of books and articles for my secondary search related to my research topic.

Faircheallaigh, Ciaran O', "Public Participation and Environmental Impact Assessment: Purposes, Implications and Lessons for Policy Making" (2010) 30:1 *Environ Impact Assess Rev* 19.

Gibson, Robert B, "In Full Retreat: The Canadian Government's New Environmental Assessment Law Undergoes Decades of Progress" (2012) 30:3 *Journal of the Impact Assessment and Project Appraisal* 179.

The author is a Professor in the Department of Environment and Resource Studies at the University of Waterloo, ON, Canada. He has worked mostly on environmental and sustainability policy issues. His research and writing have centered on decision-making successes and failures in environmental planning, assessment and regulation in various Canadian jurisdictions and on the emerging design and practice of sustainability assessment. He has published a number of books, articles and monographs on the above topics. For the purposes of my current research project his above-mentioned article is of considerable significance. In this article, Professor Gibson took a critical approach towards analyzing the new CEAA 2012. He claims that the new federal EA law under CEAA 2012 negates the decades of progress in Canadian environmental assessment law. To support his claim he critically reviews the key characteristics of the new law in the light of standard best practice design principles, and considers the broader implications. After identifying ten key characteristics of the new law, he then evaluates them in the international context. He concludes, "CEAA 2012 is a global signal that an increasingly bumpy path lies ahead for environmental assessment." His observations and analysis, on the CEAA 2012 as a whole and particularly on "open public engagement and learning" on page 183-184, are noteworthy for my paper.

Harrison RJ, Lars Olthafer & Katie Slipp, "Federal and Alberta Energy Project Regulation Reform: At What Cost Efficiency?" (2013) 51:2 *Alta L Rev* 249.

Kirchhoff, Denis, HL Gardner & Leonard JS Tsuji, "The Canadian Environmental Assessment Act, 2012 and Associated Policy: Implications for Aboriginal Peoples" (2013) 4:3 *The International Indigenous Policy Journal* 1, online: IIPJ <<http://ir.lib.uwo.ca/iipj/vol4/iss3/1/>>

Kwasniak, Arlene, “Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward (2009) 20 JELP 1.

Macias, Rebecca, “Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation” (2010) Occasional Paper No 34, Canadian Institute of Resources Law, University of Calgary, online: CIRL Publications <<http://dspace.ucalgary.ca/bitstream/1880/48390/1/CriteriaOP34w.pdf>>

Salomons, GH & George Hoberg, “Setting Boundaries of Participation in Environmental Impact Assessment” (2014) 45 Environ Impact Assess Rev 69.

At the time of writing this paper, the author (Salomons) was a Ph.D. student in the Department of political science at the University of Alberta. His research areas include public policy (especially environmental policy), democratic theory and long-term policy problems. The corresponding author (Prof. George Hoberg) is a political scientist and a Professor in the Department of Forest Resources Management at the University of British Columbia, Canada. Prof. Hoberg is deeply interested in BC electricity policy and environmental governance of oil sands. Due to the interdisciplinary nature of the topic of environmental assessment and public participation, this paper becomes relevant for the purposes of my research for its theoretical discussion and practical policy implications particularly in the environmental context. The objective of this article is to examine the potential consequences of the change in the public participation process under CEAA 2012 by narrowing the criteria for who can participate in the EA process from any who were interested to those who were directly affected. The author examines the potential consequences of change by exploring other areas of Canadian regulatory law where a similar directly affected test has been applied. The observations and analysis made in this article stands very close to the analysis I wish to insinuate in my paper. This paper also includes theoretical analysis on the role of public participation in electoral democracy, its objectives and evaluation of public participation in the EA process. Further analysis of the directly affected test under other areas of Canadian regulatory law helps me in having a better understanding of the provincial standing regime (especially Alberta) and discussion of public interest standing as observed by the Canadian courts in the environmental context. The paper concludes that limiting participation to those directly affected under CEAA 2012 creates significant risks to the quality and legitimacy of the EA process. The above observations and recommendations made in this paper are very appropriate for my research objective. As this paper is recently published in the Environmental Impact Assessment Review, the references made in this paper provide me an additional source for the most relevant and updated material for my secondary research.

Sinclair, A John & AP Diduck, “Public Involvement in EA in Canada: A Transformative Learning Perspective” (2000) 21 Environ Impact Assess Rev 113.

Sinclair, A John, Alan P Diduck & Patricia Fitzpatrick, “ Conceptualizing Learning for Sustainability Through Environmental Assessment: Critical Reflections on 15 years of Research” (2008) 28 *Environ Impact Assess Rev* 415.

Steward, Jennifer MP & A John Sinclair, “Meaningful Public Participation in Environmental Assessment: Perspectives from Canadian Participants, Proponents, and Government” (2007) 9:2 *JEAPM* 161.

Both the author (Steward) and the corresponding author (Sinclair) are associated with the Natural Resources Institute at the University of Manitoba, Winnipeg, Manitoba. Both have published a number of articles and papers related to environmental law and public participation. The purpose of this article is to establish whether there are points of convergence in opinion among participant, proponent, and government sectors regarding what constitutes appropriate principles and procedures for meaningful public participation in Canada. Through qualitative approach, consideration of the literature and interviews with Canadian public participation practitioners, this article identifies eight key elements, along with sub-components, of meaningful public participation. These essential elements help me in framing the standard on which I intend to examine the current public participatory regime under the CEAA 2012. Although the list of the essential elements of meaningful public participation cannot be considered to be all-inclusive, however, when combined with the International best practice principles of public participation, it becomes a valuable source of information for the purposes of my paper. This article also summarizes the theory of public participation and provides a comprehensive coverage of the literature on the theory of environmental assessment and the value of public participation in the decision-making process. Further, the references (in footnotes) made in the article provide a valuable source of relevant Canadian and International literature on the topic imperative for the purposes of my paper.

Sullivan, Ruth, “Statutory Interpretation in Canada: The Legacy of Elmer Driedger” (2006) Educational monograph, Government of Australia, New South Wales, Australia, online: Judicial Commission of New South Wales, Australia <[http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph4/06\\_sullivan.pdf](http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph4/06_sullivan.pdf)>.

Vlavianos, Nickie, “The Issues and Challenges with Public Participation in Energy and Natural Resources Development in Alberta” (2010) 108 *Resources*, Canadian Institute of Resources Law, University of Calgary, online: Resources, CIRL <<http://dspace.ucalgary.ca/bitstream/1880/47996/1/Resources108.pdf>>.

Willis, J. “Statute Interpretation in a Nutshell” (1938) 16 *Can Bar Rev* 1.

### C. OTHER MATERIALS: BLOGS, NEWSPAPERS ETC.

Bankes, Nigel, “Judicial Supervision of the National Energy Board (NEB): The Federal Court of Appeal Defers to the NEB on Key Decisions” (11 November 2014) ABlawg.ca (blog) University of Calgary, online: < <http://ablawg.ca/2014/11/11/judicial-supervision-of-the-national-energy-board-neb-the-federal-court-of-appeal-defers-to-the-neb-on-key-decisions/>>.

———, “Directly and Adversely Affected: The Actual Practice of the Alberta Energy Regulator” (3 June 2014) ABlawg.ca (blog) University of Calgary, online: < <http://ablawg.ca/2014/06/03/4447/>>.

Fobes, JK, Rachel Fobes & Taylor Hunt, “Federal Government Balking at First Small Step to Rebuild Environmental Assessment” (18 December, 2012) West Coast Environmental Law (blog), online: <<http://wcel.org/resources/environmental-law-alert/federal-government-balking-first-small-step-rebuild-environmental->>.

Gage, A, “Who is Silenced under Canada’s New Environmental Assessment Act?” (27 April 2012) West Coast Environmental law (blog), online: < <http://wcel.org/resources/environmental-law-alert/who-silenced-under-canada%E2%80%99s-new-environmental-assessment-act>>.

———, “Directly Affected” Silences Hunters, Fishers, Landowners... and Environmentalist” (24 April 2012) West Coast Environmental Law (blog), online: <<http://wcel.org/resources/environmental-law-alert/“directly-affected”-silences-hunters-fishers-landowners-and-enviro>>.

Kwasniak, Arlene, “The Fading Federal Presence in Environmental Assessment and the Muting of the Public Interest Voice” (19 October 2011) ABlawg.ca (blog) University of Calgary, online: < <http://ablawg.ca/2011/10/19/the-fading-federal-presence-in-environmental-assessment-and-the-muting-of-the-public-interest-voice/>>.

Powell, BH, “Standing Committee on Environment and Sustainable Development issues its report on the CEAA Seven Year Review” (21 March 2012) Environmental Law Centre (blog), online: <<http://environmentallawcentre.wordpress.com/2012/03/21/standing-committee-on-environment-and-sustainable-development-issues-its-report-on-the-ceaa-seven-year-review/>>.

Saxe, Diane, “New Canadian Environmental Assessments Exclude Stakeholders and Issues” (29 October 2012) Environmental Law & Litigation (blog), online: < <http://envirolaw.com/canadian-environmental-assessment-rules-exclude-stakeholders/>>.

UNIVERSITY OF CALGARY  
FACULTY OF LAW

LAW 703 GRADUATE SEMINAR IN LEGAL RESEARCH & METHODOLOGY

ANNOTATED BIBLIOGRAPHY

FRIENDS WITH “NET BENEFIT[S]”: THE INVESTMENT CANADA ACT AND STATE  
OWNED ENTERPRISES (WORKING TITLE)

BY  
ROBERT SROKA  
DECEMBER 16, 2014

## CONTEXT

This project evaluates the “net benefit” test of the *Investment Canada Act* (ICA) as it pertains to the investment review on acquisitions by foreign State Owned Enterprises (SOEs) in Canada’s resource sector. Through a literature review, followed by a comparative analysis of Canadian and international acquisition examples and investment review frameworks, the paper leads to a law reform proposal for modifying the “net benefit” test.

## SECONDARY MATERIAL

Avery, Angela, Peter Glossop & Paula Olexiuk. “Foreign Investment in Canada’s Oil and Gas Sector: New and Emerging Challenges” (2013) 51:2 *Alta L Rev* 343.

The authors, Calgary practitioners with a leading global oil company and major national law firm respectively, provide a historical overview of Canada’s foreign investment framework and the current regime in the energy sector context. Being practitioners, the authors use this background to provide a roadmap on how to best work through the regulatory framework from the perspective of a prospective acquirer. The article also addresses CNOOC-Nexen, as well as other energy sector reviews and deals that did not make it to the formal review stage. For my purposes, this is an extremely useful work, providing current and directly topical analysis from prominent industry counsel. The de-facto (and detailed) advice to a foreign SOE wishing to make a Canadian resource sector acquisition is a particularly invaluable perspective that is absent from the bulk of legal academic and government works on the subject.

Bergevin, Philippe & Daniel Schwanen. “Reforming the Investment Canada Act: Walk More Softly, Carry a Bigger Stick” (2011) [unpublished, archived at CD Howe Institute].

The authors are strongly against the “net benefit” test in its current form for the usual reasons of subjectivity and lack of clarity, as well as its inappropriateness in certain situations. In place of the “net benefit” test, the authors propose a national interest test. The authors argue that Canada should welcome foreign investment more than the current scheme allows, and then go about comparing Canada’s framework to those found abroad. The intended audience here is likely government and media, with the hopes of having an impact on a broader policy debate. For my purposes, this piece is quite useful in its narrative and building of the case that the “net benefit” test is flawed and needs to be reformed or replaced. While there is no particular focus on SOEs and the policy solutions the authors propose are somewhat different from my ideas, the general roadmap of the piece is quite instructive.

Cohen, Benjamin J. “Sovereign Wealth Funds and National Security: The Great Tradeoff” (2009) 85:4 *Intl Affairs* 713.

The author evaluates the impact over the past fifteen years of the advent of sovereign wealth funds as major sources of foreign direct investment, framing the issue as a debate between two competing objectives: national security and open and efficient markets. The author integrates academic literature as well as “hard” economic statistics from a number of sources to craft his

narrative of debate. Through this narrative, he sets the stage to evaluate a number of policy recommendations that might serve as workable solutions to satisfy both competing interests. The intended purpose and audience here is clearly academic. Since sovereign wealth funds are a significant component of the SOE discussion, as well as a component that represents a grey-area of sorts, this paper is quite useful for a broader internationalized discussion of a subset (sovereign wealth funds) that my research will examine in the Canadian context.

Cornish, Margaret. “Behaviour of Chinese SOEs: Implications for Investment and Cooperation In Canada” (2012) [unpublished, archived at Canadian International Council].

The premise of this article is that Chinese SOEs are misunderstood and should be treated the same as any other foreign investor to extent they act in such a manner. If Canada does not take such a course, the author believes it will be missing a substantial economic opportunity for itself, as well as an opportunity to have a certain degree of influence over these SOEs. The author uses a literature review of both academic and think tank sources to compare Chinese SOEs to non-state foreign investors on a number of fronts. The intended audience is decision makers in government, as well as news media, the latter in hopes that the more significant parts of the article will be see a wider dissemination. The direct reference to Chinese SOEs in the resource sector in a Canadian context is invaluable for my project as it is one of the few recent works that is able to cover each of these aspects (Chinese, SOEs, Canadian resource sector).

Drysdale, Peter. “A New Look at Chinese FDI in Australia” (2011) 19:4 *China & World Economy* 54.

In the context of Australia being the single largest destination for Chinese resource sector foreign investment, the author overviews Chinese flows of foreign investment, largely from SOEs into Australia’s resource sector before comparing treatment of Chinese investment relative to that from other countries. Directed at an Australian academic audience, Drysdale argues that Chinese SOE investment in Australian resources is quite beneficial to Australia, before evaluating reforms to Australian review of SOE investments to project their impact on investment flows. As Australia is likely my most significant comparator country, the analysis here is directly relevant to, and will strongly inform the development of my comparison. The author’s positive opinion on the utility of Chinese SOE resource-sector investment is also of particular note.

Globerman, Steven. “An Evaluation of the Investment Canada Act and its Operations” (2008) [unpublished, archived at Industry Canada].

The author was commissioned to study the ICA by the Competition Policy Review Panel, specifically evaluating whether the ICA’s review process enhances the net benefits of inward foreign direct investment to Canada, concluding that the process fails to achieve this objective. Globerman also examines several reform proposals, finding promise in increased review thresholds and a general lowering of administrative costs. He then addresses concerns about SOEs more generally, taking a cautious approach, but not one informed by the precautionary principle, and advises against differentiated treatment for SOE investments. Globerman’s evaluation of the review process, law reform and attention to SOEs are all directly relevant to my work, however his somewhat dated perspective prevents it from being an ideal piece.

Hale, Geoffrey. "The Dog That Hasn't Barked: The Political Economy of Contemporary Debates on Canadian Foreign Investment Policies" (2008) 41:3 *Canadian Journal of Political Science* 719.

The author looks at the response of the federal government and media to four major transactions where Canadian resource companies came under foreign control, trying to determine what balance and policy objectives a seeming "new" (as of the 2000s) consensus on foreign investment represents. Hale concludes that these four cases represent a larger move away from industrial policy to open neoliberalism. Published in the leading Canadian political science periodical, and providing a strong literature review based narrative, this article is aimed at political scientists specializing in political economy. For purposes of my research, this article provides a look at resource sector deals that also spanned both sides of the change in government in 2006.

Moran, Theodore H. "Chinese Foreign Direct Investment in Canada: Threat or Opportunity?" (2012) [unpublished, archived at the Canadian Council of Chief Executives].

Moran broadly surveys global Chinese resource sector foreign investments before moving his focus to such investments in Canada and argues that there is nothing to support fears of Chinese "lock up" of resources. Instead of reviewing and blocking potential Chinese SOE acquisitions of Canadian resource assets based on a "net benefit" assessment, Moran advocates moving the substance of such review to the sphere of a national security test. Paying considerable attention to BHP Billiton's failed bid for Potash Corporation, the author questions the wisdom of denying takeovers in strategic resource sectors by non-SOEs where the only viable alternatives for acquisition are SOEs. The article, aimed most directly at policy makers, is especially useful for its comparison of the relative merits of a SOE review system prefaced on national security concerns as opposed to the economic, competition and industrial-focused "net benefit" test.

O'Sullivan, Barry J. "Canada's Foreign Investment Review Act Revisited" (1980) 4:1 *Fordham Intl LJ* 175.

O'Sullivan evaluates the *Foreign Investment Review Act* (FIRA), the 1973 predecessor to the 1985 *Investment Canada Act*. Speaking in large part to an American academic audience, the author explores the economic nationalist sentiment that led to its passing, as well as the mechanics of the legislation itself. O'Sullivan is inconclusive on the success of the FIRA, although he does note that the FIRA did not damage Canada's international trade relationships, nor was it a definitive solution. His judgments however are based from the economic nationalist perspective that informed the FIRA itself, which substantially contrasts with both the present-day review framework and to a lesser extent, the perceived broader problems with Canadian foreign investment review (too permissive vs. too restrictive). Most important for my purposes is its summary of the review process under the FIRA and the policy concerns behind the process. The article also gains credibility through its common citation in more recent works on Canadian investment review.

Roy, Jason A. “An Event Study Analysis of the Nexen-CNOOC Takeover: Implications for the Canadian Market” (2013) [unpublished, archived at the University of Ottawa Department of Economics].

Using an “event study” methodology, this economics paper looks at the impact of the CNOOC-Nexen transaction on various Canadian stock market sectors, demonstrating that sectors more open to foreign investment and perceived as more crucial to the Canadian economy experienced a greater impact than those more isolated and sheltered from global capital flows. Because the paper directly addresses one of my extended examples and the review process surrounding it that is the core of my work, it is already highly relevant. However, its true value is in providing the economics grounding for my assumptions concerning market impacts of the “net benefit” test. This usefulness is tempered by concerns about the paper’s lack of peer review, concerns that are compounded by my inability to properly assess its validity from an economics perspective.

Woo, Yuen Pau. “Chinese Lessons: State-Owned Enterprises and the Regulation of Foreign Investment in Canada” (2014) 7:1 China Economic Journal 21.

Aimed at a mix of academics and policy makers, the author overviews the development of Canadian foreign investment review as it pertains to SOEs, arguing that discrimination against SOE investment is undesirable and threatens Canada’s appeal as a target for investment. Writing post-CNOOC-Nexen, Woo also criticises moves by the Canadian government to add review barriers to SOE investment as disproportionate to the risk posed by such investments. The article is useful for its very recent perspective, along with its directly relevant analysis to the broader subject of my project, namely SOE investments in Canada’s resource sector. The comparison of treatment of inward directed investments between Chinese and non-Chinese SOEs (in particular those by Malaysia’s Petronas) are somewhat novel in the Canadian-focused literature and thus quite valuable.

Zhang, Angela H. “Foreign Direct Investment from China: Sense and Sensibility” (2014) 34:3 Nw J Intl L & Bus 395.

Through case studies of CNOOC’s attempted acquisition of Unocal in the US and the EU’s antitrust scrutiny of Chinese SOE transactions, the author demonstrates how counterproductive regulatory responses can arise from overstated suspicions of Chinese SOEs. Zhang further outlines that many Chinese SOE investments are far more potentially detrimental to China than the countries of investment, due to squandering of assets arising from the poor governance and lack of transparency that plagues many SOEs. In addition to providing pertinent comparisons with review processes on Chinese SOEs in the US and EU, this academic-focused piece is useful for its unconventional perspective on risk burden in Chinese SOE investments, as well as its criticism of anti-Chinese SOE investment lobbying by domestic interest groups.

UNIVERSITY OF CALGARY  
FACULTY OF LAW

LAW 703

ANNOTATED BIBLIOGRAPHY  
(partial)

**The Legal Protection of Headwaters in Alberta, British Columbia and Ontario**

Jeff Surtees  
LLM Candidate

DECEMBER 17, 2014

## The Legal Protection of Headwaters in Alberta, British Columbia and Ontario

This partial annotated bibliography was prepared as a class assignment for Law 703 in fall, 2014. It is a work in progress.

My proposed thesis topic is “The Legal Protection of Headwaters in Alberta, British Columbia and Ontario”. I will compare the regime under Alberta law with that in British Columbia and Ontario. I will be looking at the question of how Alberta law and policy could best protect the essential functions of headwaters while balancing the rights and interests of users of these landscapes and those downstream.

### **TREATIES:**

[To be added]

### **LEGISLATION**

[To be added]

### **JURISPRUDENCE**

[To be added]

### **SECONDARY MATERIALS: MONOGRAPHS**

Bakker, Karen, ed, *Eau Canada: The Future of Canada's Water* (Vancouver: UBC Press, 2007).

Dr. Karen Bakker is a professor at the University of British Columbia in the Department of Geography where she is the Canada Research Chair in Political Ecology. She is also a director of UBC's Program on Water Governance. The seventeen chapters of this collection bring together contributors from a wide range of disciplines, connected by the common and interrelated themes of water governance and water management, both critical to my research. Each contributor provides extensive references which will provide a starting point for further research. Of special importance are the chapters on (i) groundwater management (critical for headwaters), (ii) the evolution of water governance in Canada and (iii) the challenges of jurisdictional fragmentation. Ms. Bakker is also the author or coauthor of several articles cited below.

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

David Boyd is former legal counsel to Ecojustice, an adjunct professor at Simon Fraser University and a respected environmental lawyer. Although this book is now eleven years old, it continues to provide an excellent analysis of the strengths and weaknesses of Canadian environmental law and the processes that lead to its creation. Chapter 8, titled “Systemic Weaknesses”, will provide background for my research about the framework into which headwaters protection laws and regulations must fit.

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

As part of my research I will be considering the rights which must be balanced if headwaters are more thoroughly protected. In this work, more recent than *Unnatural Law*, Boyd argues forcefully that Canadians should have a constitutional right to a healthy environment. In the process of making his argument he discusses many different aspects of water regulation and its relationship to human rights. Understanding Boyd's arguments about how such rights may arise, who has them and how the rights of different individuals might be balanced should provide a framework for thinking about the rights of the different headwaters actors I will be considering. His arguments are well thought out and well-presented.

Lucas, Alastair R. & Cheryl Sharvit "Underlying Constraints on Intergovernmental Cooperation in Setting and Enforcing Environmental Standards" in Fafard, Patrick C. & Kathryn Harrison, eds, *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada* (Kingston: Queen's University School of Policy Studies, 2000) at 133.

Through my thesis I hope to propose policy and legislative changes that will better protect headwaters in Alberta. Constitutional responsibility for many aspects of water governance is shared between the provinces and the federal government. It is likely that I will propose standard setting for activities that take place in headwaters. That may involve the two levels of government reaching agreement on what the standards will be in shared areas of responsibility. In this chapter, the authors look at standard setting through federal-provincial agreements and what would be required for the agreement to be precise enough to be enforceable yet vague enough to survive a constitutional challenge.

Pentland, Ralph & Chris Wood. *Down the Drain: How We Are Failing to Protect Our Water Resources* (Vancouver: Greystone Books, 2013).

This book provides general background for the research being undertaken. The authors critically examine whether or not Canada's water is well protected. They look at promises made by Canadian provincial and federal governments over the past twenty-five years and whether those promises have been kept. While the subject matter of the book is protection of all water resources in Canada, two parts are useful for this research: first, the analysis of the process that led to the official but now ignored 1987 federal water policy (which included elements of headwaters management) and the analysis of how the federal government has shifted water management responsibilities to the provinces in recent years.

## **SECONDARY MATERIAL: ARTICLES**

Adams, Paul W. "Policy and Management for Headwater Streams in the Pacific Northwest: Synthesis and Reflection" (2007) *Forest Science* 53:2 104

This article critically examines the successes and failures of policies put in place to manage headwater stream in the Pacific Northwest states of the USA. The

author, a Professor of Forest Engineering, writes from the perspective of a person who is in favor of forestry development. Although the policies examined are based on American federal law, the scientific issues and the uncertainty over whether land use policies have the intended downstream effect are some of the same issues faced in Canada. The conclusions reached by the authors lend support for the primary assumption of this thesis that land uses in headwater areas can have impacts downstream. The author also raises concerns with how the effectiveness of various policies are measured and communicated, something that will be important to understand if the effectiveness of policy changes I will suggest is to be predicted.

Cohen, Alice. "Rescaling environmental governance: watersheds as boundary objects at the intersection of science, neoliberalism, and participation" (2012) 44 *Envt & Planning A* 2207.

This article looks at similar "scale" issues as those examined by Maureen Read and Shannon Bruyneel, below. Cohen examines the fast growing popularity of the watershed approach to environmental governance. She starts with the statement (which she asserts is a fact, proven elsewhere) that watersheds are to some extent a social construct. She then asks why that construct has been created. Her thesis is that the popularity of the watershed as the appropriate scale for environmental governance is that it has elements that appeal to the very different audiences of scientific, neoliberal and grassroots communities, offering something to please everyone. In my thesis I am arguing that the appropriate scale for some environmental governance decisions is even smaller than the watershed. This article encouraged me to think about the boundary issues in ways that were new to me.

Dodds, Walter & Robert Oakes. "Headwater Influences on Downstream Water Quality" (2008) 41:3 *Envtl Mgmt* 367.

A preliminary assumption underlying the importance of my research question is that harm done in headwaters areas is transmitted, and possibly amplified, downstream. This article provides some scientific authority to back up that assumption. The article describes an extensive study of the downstream effect on water quality of differing land uses and eleven types of riparian cover (including trees, barren land, crop land, intensive agriculture) in sixty-eight watersheds in eastern Kansas. The authors provide a statistical analysis and draw conclusions drawn from that analysis, lending support to my primary assumption of downstream harm from activities in headwaters.

Hill, Carey, Kathryn Furlong & Karen Bakker. "Harmonization Versus Subsidiarity in Water Governance: A Review of Water Governance and Legislation in the Canadian Provinces and Territories", (2008) 33:4 *Can Water Res J*.

This article is a review of water protection legislation and related government policies in Canadian provinces and territories as of 2008. The authors argue for increased harmonization of the law covering source water protection. The subject matter of the paper, especially the discussion of why variation is acceptable but

fragmentation is not, is directly related to my research. The article is now six years old but still provides a starting point for looking at existing legislation in the jurisdictions I am studying.

Lizhu Wang *et al.* “Influences of Watershed Land Use on Habitat Quality and Biotic Integrity in Wisconsin Streams” (1997) 22:6 Fisheries 6.

Reed, Maureen G. & Shannon Bruyneel. “Rescaling environmental governance, rethinking the state: A three-dimensional review” (2010) 34 (5) Progress in Human Geography 646.

My thesis will consider the rights of various players in a watershed. To define those players it will be necessary to understand the boundaries between them, both artificial and real. This article discusses the very situation found in many headwaters – that of multiple players, all with different levels of control and influence. The authors discuss how it is important to understand the borders which have been drawn and how some of those borders can be reshaped through redesigned governance practices.

### **SECONDARY MATERIAL: OTHER**

Del Giudice, Laura, Project Manager. “The Natural Functions of Headwater Drainage Features: A Literature Review” (Toronto and Region Conservation Authority, 2007), online <[www.trca.on.ca/the-living-city/water-flood-management/headwater-study.dot](http://www.trca.on.ca/the-living-city/water-flood-management/headwater-study.dot)> .

This literature review provides instruction about how headwater systems physically function and cites references to a wide variety of scientific material. The authors describe the role of headwater systems in flood control, hydrology, water quality, erosion and as fish habitat. They also describe the impacts of urbanization on headwater systems. Most importantly, the article analyses the suggested downstream benefits of twenty-five headwater features and whether or not those benefits are supported in the scientific literature.

De Loë, Rob C. “Toward a Canadian National Water Strategy” (Final report delivered at the Canadian Water Resources Association AGM and conference, 13 May 2008) online < [www.cwra.org/en/resource-center/documents-a-proceedings](http://www.cwra.org/en/resource-center/documents-a-proceedings)>.

Canada does not have a coordinated national water strategy. In this report, Professor De Loë argues that we should have one. He analyses the historical initiatives that have been undertaken by Canadian governments and by non-government actors. He looks at two Canadian provinces and four non-Canadian cases studies, highlighting the things that worked and didn't work. He then describes a possible method for developing a comprehensive Canadian strategy. Since the purpose of my thesis is to recommend policy options for protecting headwaters, this thorough analysis will be helpful in understanding proposals that have been made in the past and the reasons they may have been rejected.

Irwin, Kathy, Bob Bergman & John Boos. *The Stream Permanency Handbook for South Central Ontario*, 2d ed, (Ontario Ministry of Natural Resources, 2013).

Nowlan, Linda & Karen Bakker. "Practicing Shared Water Governance in Canada: A Primer"  
(UBC Program on Water Governance, 2010). online  
<[watergovernance.ca/publications/water-in-canada/practising-shared-water-governance-in-canada-a-primer](http://watergovernance.ca/publications/water-in-canada/practising-shared-water-governance-in-canada-a-primer)>.

### LEGISLATION:

Animal Health Act, SA 2007, c A-40.2.

Health of Animals Act, SC 1990, c 21.

Health of Animals Regulations, CRC 2014, c 296.

Livestock Identification and Commerce Act, SA 2006, c L-16.2.

Premises Cattle Identification Regulation, Alta Reg 200/2008.

Traceability Cattle Identification Regulation, Alta Reg 333/2008.

### SECONDARY MATERIALS: ARTICLES

Boote, David et al. "Scholars Before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation" (2005) 34(6) Educational Researcher 3.

Bowling, MB et al. "Review: Identification and Traceability of Cattle in Selected Countries Outside of North America" (2008) 24 Professional Animal Scientist 287.

Dickinson, David & DeeVon Bailey. "Meat Traceability in Beef Supply Chains: Are Consumers Willing To Pay For It?" (2002) 27(2) J Agric & Resource Econ 348.

This journal article describes results from a sample group composed of consumers in the U.S. and emphasizes consumer preference regarding three meat characteristics. These include: 1) traceability back to farm or animal of origin, 2) transparency regarding absence of growth hormones combined with humane treatment of the animal, and 3) extra meat quality and safety assurances (TTA). TTA describes the current EU meat inspection

system. The article concludes that the survey group result indicates that American consumers are willing to pay extra for TTA meat characteristics including mandatory trace-back that goes beyond distributor or processor to the farm or animal of origin. The article includes tables and graphics to illustrate research and relevant conclusions.

Hobbs, Jill. "Consumer Demand For Traceability" (Paper delivered at the International Agricultural Trade Consortium Annual Meeting, Monterey, CA, 15-17 December, 2002) 1.

Hobbs, Jill et al. "Traceability in the Canadian Red Meat Sector: Do Consumers Care?" (2005) 53(1) Can J Agric Econ 47.

This journal article is significant because it provides insight regarding Canadian consumer demand for beef livestock traceability and consumer willingness to pay. The authors survey consumers to determine demand for food safety in the red meat sector and consumer willingness to pay extra for secure red meat products produced by systems of both traceability and quality verification. The methodology used is similar to the survey methodology employed by Dickinson & Bailey. The authors concludes that Canadian consumers are willing to pay more (nontrivial amounts) for additional traceability and quality assurances for beef products. They attribute this to increased consumer awareness regarding food safety issues in light of recent BSE and e coli events in Canada and U.S. The article includes tables and graphics to illustrate research and relevant conclusions.

Hutchinson, Terry & Nigel Duncan. "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17 Deakin L Rev 83.

LeBlanc, Marc. "Chronology of BSE-Related Events and Government Initiatives" (21 October, 2008) online: [www.parl.gc.ca/contents/LOP/research\\_publications/prb0412-e.htm](http://www.parl.gc.ca/contents/LOP/research_publications/prb0412-e.htm).

This Government of Canada document serves as a very useful chronology of the 2003 and subsequent BSE events in Canada and the U.S. and of federal and provincial government policy and law initiatives imposed to respond to and contain the economic impact of the 2003 and other BSE events. It includes a detailed list of BSE events in North America and specific government and legislative initiatives that followed between 2003 and 2008.

Loppacher, Laura, William Kerr & Van Vliet. "The BSE Crisis in Canada: A Trade Perspective on Sanitary Barriers" (2004) Estey Centre for Law and Economics in International Trade Working Paper 1.

This journal article is significant because it was published in 2004 and it examines and evaluates the global reaction to the 2003 discovery of BSE in Canada. The article describes the reaction by consumers and foreign governments to the discovery as hysteria, and further describes the risk of contracting vCJD (human infection) from BSE as extremely small. The authors argue that over-reaction gave rise to unscientific and foolish measures in an effort to protect consumers in trading countries from a disease that infects cattle but has unknown or misunderstood effects upon human health.

Loureiro, Maria L & Wendy Umberger. "A Choice Experiment Model For Beef Attributes: What Consumer Preferences Tell Us" (Paper delivered at the American Agricultural Economics Association Annual Meeting, Denver, Colo, 1-4 August, 2004) 1.

McEowen, Roger A, Neil E Harl & Robert P Achenbach. *Principles of Agricultural Law*, 15<sup>th</sup> ed (Kelso, WA: Agricultural Law Press, 2011).

This American textbook is updated annually and serves as a valuable secondary resource. It provides a review of current agricultural law and relevant jurisprudence in the U.S.

with emphasis on legal issues that are likely to arise in an agricultural context. The book includes an extensive table of contents, glossary, table of cases, and index and provides case summaries and comment throughout each chapter. It also includes chapters regarding civil, criminal, and regulatory liability specific to agricultural production.

Murphy, RG et al. “Animal Identification Systems in North America” (2008) 24 Professional Animal Scientist 277.

Pouliot, Sebastien & Daniel A Sumner. “Traceability, Liability, and Incentives for Food Safety and Quality” (2008) 90(1) Am J Agri Econ 15.

This journal article illustrates that heightened interest in food safety and traceability systems serves to create incentives for producers and distributors to provide safer food by increasing liability costs. The article concludes that diminished food safety often results from a larger industry of multiple producers and distributors. The authors also suggest that improved traceability systems between consumers and distributors improves liability incentives to produce safer food beginning at the farm level.

Schneider, Susan A. *Food, Farming, And Sustainability*, (Durham, N Carolina: Carolina Academic Press, 2011).

The author teaches agricultural and food safety law at the University of Arkansas School of Law. This textbook and collection of academic papers is significant because it serves as a comprehensive resource regarding agricultural and food safety law in the U.S. It also includes excellent citations of secondary literature and jurisprudence as well as a detailed index, as well as a very extensive table of contents. There is no Canadian equivalent.

Smith GC et al. "Opinions of Those in Cattle, Swine, and Sheep Slaughtering and Rendering Sectors Regarding Aspects of the National Animal Identification System" (2009) 25 Professional Animal Scientist 641.

This peer-reviewed journal article examines opinions from US livestock slaughter and rendering industry members and is significant because it was written post BSE (2003). It concludes that industry members support mandatory animal identification including animal termination record (ATR) submission after animal death as long as the cost is paid for by government (rather than by industry). The article includes detailed tables that summarize opinions of slaughter and rendering industry members regarding mandatory systems of animal identification as well as excellent citations.

Smith GC et al. "Post-Slaughter Traceability" (2008) 80 Meat Science 66.

This peer-reviewed journal article presents a comparative examination of voluntary and mandatory (as well as completely mandatory) traceability programs in 13 countries including US, Canada, EU and Japan. The article further examines individual animal identification (IAID) traceability and compares traceability capabilities from birth to slaughter (Canada) and beyond (EU and Japan). The authors also discuss and compare examples of traceability in specific beef production plants in US, Germany, Italy, and Rancher's Beef in Balzac, Alberta. They describe the Balzac plant as an EU compliant harvesting facility. The article includes tables that compare the status of country traceability programs as well as specific regulatory and legal source references for each jurisdiction. It also includes an extensive bibliography and excellent citations.

Souza-Monteiro, Diogo & Julie A Caswell. "The Economics of Implementing Traceability in Beef Supply Chains: Trends in Major Producing and Trading Countries" (2004 Working Paper 2004-6) 7.

This working paper examines and compares the economics of mandatory and voluntary livestock traceability systems in EU, Japan, Australia, Brazil, Argentina, Canada, and the U.S. with emphasis on breadth, depth, and precision of each. The comparative methodology used is similar to that used in the Smith et al article. The article also examines liability issues surrounding food safety and conclude that the risk of liability creates industry incentives to improve production and processing methods and adopt policies of enforcement and compliance. The authors also conclude that improved animal identification practices prevent both current and future food borne hazards.

Stanford, K et al. "Traceability in Cattle and Small Ruminants in Canada" (2001) 20(2) Rev Science & Tech 510.

This journal article is significant because it was published pre-BSE (2003) and it provides a succinct description (as well as the scientific rationale for) of the national cattle identification and traceability system in Canada from the perspective of the federal regulator and the beef industry participants. The article also discusses and compares the different systems of implementing cattle identification as well as annual operating and administrative costs. The article concludes that recent advances in cattle identification technologies, although expensive, offer advantages including animal welfare and product quality and production efficiency. The article also includes excellent citations including citations for relevant Canadian secondary literature.

Vaillancourt, Julie and Francois Mouton. "Grocery Stores Caught Cheating on Packaging Dates of Meat and Poultry", CBC News (26 November 2014), online:

[www.cbc.ca/news/canada/montreal/grocery-stores-caught-cheating-on-packaging-dates-of-meat-and-poultry-1.2851437](http://www.cbc.ca/news/canada/montreal/grocery-stores-caught-cheating-on-packaging-dates-of-meat-and-poultry-1.2851437)

This news article is of interest because it illustrates that hidden-cameras often play a significant role in exposing food production and food labelling improprieties. In this particular example a hidden-camera investigation revealed label tampering at the retail level intended to mislead consumers regarding the shelf life of meats. The article further describes the practice of repacking meats by butchers and grocery stores as both widespread and common throughout the industry.

Weerahewa, Jeevika, Karl D Meilke & Danny LeRoy, "An Economic Assessment of the BSE Crisis in Canada: Impacts of Border Closure and BSE Recovery Programs" (2007) Canadian Agricultural Trade Policy Research Network (CATPRN Working Paper 2007) 1.

This working paper is significant because it provides an economic assessment of the BSE crisis that resulted following the discovery of a single BSE infected cow in Alberta in May 2003. The article describes the economic impact upon the beef livestock industry as both unprecedented and catastrophic in terms border closures and the cost of federal and provincial BSE recovery programs. The article also evaluates different policy scenarios that are viable in terms of mitigating the impact of future BSE discoveries.

## OTHER MATERIALS:

Agriculture and Agri-Food Canada (2014), online: National Agriculture and Food Traceability System (NAFTS), online: [www.agri.gc.ca/eng/industry-markets-and-trade/traceability/factsheets/national-agri](http://www.agri.gc.ca/eng/industry-markets-and-trade/traceability/factsheets/national-agri)

American Agricultural Law Association (AALA), online: <http://aglaw-assn.org/ag-law-news/>.

Canada Agricultural Review Tribunal (CART), (2014), online: <http://cartcrac.gc.ca/eng/canada-agricultural-review-tribunal/?id=1277928993362>.

This website is significant because it contains links to News, Recent Decisions, and the Upcoming Hearing Schedule. It is also insightful respecting issues of enforcement and compliance with cattle identification regulations. It is irrelevant because the information is current and updated frequently.

Canadian Cattleman's Association, Recommendations for Policy on Traceability Implementation for the Beef Cattle Industry (2010), online: Canadian Cattleman's Association [www.cattle.ca/assets/893-Traceability-Developement-Final\\_Report-291110.pdf](http://www.cattle.ca/assets/893-Traceability-Developement-Final_Report-291110.pdf)

Canadian Food Inspection Agency (CFIA), (2014), online: Canadian Food Inspection Agency [www.inspection.gc.ca/animals/terrestrial-animals/traceability](http://www.inspection.gc.ca/animals/terrestrial-animals/traceability)

This website is useful because it provides current information and news releases (from the federal regulator) respecting livestock identification, food inspection, and livestock traceability in Canada. It also provides links to relevant traceability and food safety policy and regulations.

Canadian Cattle Identification Agency (CCIA), Frequently Asked Questions &

Backgrounders (2014), online: Identification Agency <[www.canadaid/about\\_us/faqs.html](http://www.canadaid/about_us/faqs.html)>

This is a useful industry website because it provides extensive background information (including FAQs and related links) regarding the evolution and current application of cattle identification and traceability in Canada.

**Annotated Bibliography of Animal Identification  
and Traceability Research**

Michael J Swanson QC

Law 703

University of Calgary

Faculty of Law

Description of Research Project:

My research project will describe, compare, and evaluate animal identification and traceability systems in the beef production industry with a view to suggesting feasible reforms to existing animal identification and traceability laws and regulations in Alberta. I will achieve this by relying primarily upon descriptive and comparative methodologies including a review of relevant literature. I anticipate that my research will enable conclusions with respect to the existing legal framework and improvements in an effort to guarantee food safety in the beef production.



UNIVERSITY OF CALGARY

FACULTY OF LAW

LAW 703 LEGAL RESEARCH AND METHODOLOGY

REGULATION OF ENVIRONMENTAL POLLUTION IN THE NIGERIAN OIL AND  
GAS INDUSTRY: THE NEED FOR AN ALTERNATIVE APPROACH

ANNOTATED BIBLIOGRAPHY (WORK-IN-PROGRESS)

BY

FRANCESCA ONYEKA UGBAJA

17 DECEMBER 2014

## ANNOTATED BIBLIOGRAPY

This annotated bibliography is a summary of both the primary and secondary sources that will guide my LL.M thesis project. My thesis which is entitled “Regulation of Environmental Pollution in the Nigerian Oil and Gas Industry: The Need for an Alternative Approach” seeks to identify the weaknesses in the current Nigerian environmental regulatory system in curbing the problems associated with environmental pollution and degradation arising from the economic activities of multinational oil companies, and seeking out plausible and practical alternatives by considering the regulatory regime in the Alberta oil and gas industry. This annotated bibliography is not a comprehensive list but rather a work in progress.

### SECONDARY MATERIALS – MONOGRAPHS

Fagbohun, Olarenwaju. *The Law of Oil Pollution and Environmental Restoration* (Lagos: Odade Publishers, 2010).

The author, Professor Olarenwaju Fagbohun, is a research professor of law at the Nigerian Institute of Advanced Legal Studies, a renowned environmental law analyst and legal practitioner. His book focuses on oil pollution arising from both onshore and offshore exploration and exploitation activities in Nigeria, particularly the Niger-Delta region. The book also provides a comparative review of oil spill contingency plan in other jurisdictions, thereby making it not only a good source for understanding oil pollution in Nigeria, but also providing a glimpse into the regulatory framework for oil spill emergency plans in other jurisdictions. This book is a useful guide for regulators, legal practitioners and scholars in this area of environmental law as it provides a strong foundation on the problem of oil and gas environmental pollution in Nigeria and efforts towards legislative enforcement.

Amokaye, G Oludayo. *Environmental Law and Practice in Nigeria* (Lagos: University of Lagos Press, 2004).

The author is a Ph. D holder and a senior lecturer at the faculty of law, University of Lagos, Nigeria. His research interest spans across various aspect of environmental law including but not limited to environmental enforcement and compliance issues, pollution and toxic control amongst others. His book, though not the first on environmental law in Nigeria has been widely acknowledged among scholars as the most comprehensive text on environmental law in Nigeria. The book is divided into three parts with part one dealing with issues and concept on the environment while part two deals with biodiversity, wildlife conservation, land use and protection of the environment. Part three, concludes the book with techniques for environmental management and environmental litigation remedies. This book therefore presents itself

as a source for a plethora of materials on the subject matter of environmental law in Nigeria which will be immensely useful in this research project.

Benidickson, Jamie. *Environmental Law*, 4<sup>th</sup> ed (Toronto: Irwin Law, 2013)

The author, Professor Benidickson teaches Canadian and international environmental law and water law at the University of Ottawa. With a lot of publications to his credit, his book provides a comprehensive introductory guide to the Canadian environmental law and addresses basic concepts in environmental law from an international and common law perspective. His targeted audience are environmental law students, researchers, regulators and stakeholders generally in the industry. This book will provide the foundational grasp needed for a firm understanding of the Canadian environmental law.

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

This book focuses primarily on federal environmental law and practice with a stint on provincial environmental laws. This is to give a comparative context to the Canadian environmental law in the light of the different provinces and applicable laws. The book also provides an in-depth analysis of the current environmental regime and the future trends on the likely direction of environmental law in Canada thereby providing its audience with a plethora of qualitative information on the Canadian environmental law. The author Professor Doelle, is the Associate Dean, Research, Schulich School of Law, Dalhousie University with vast experience in environmental law while Professor Tollefson, a co-author on the other hand, is the Hakai Chair in environmental law and sustainability at the University of Victoria British Columbia. Both are experienced professors in the field of environmental law.

McCarney, Moira *et al.* *The Comprehensive Guide to Legal Research Writing & Analysis* (Toronto: Edmond Montgomery Publications, 2013)

The book focuses on developing the skills required in legal research, writing, and analysis and using those skills in both the law school and professional environments. It offers students, and researchers practical instruction on how conduct a research, spelling out various factors and considerations to keep in mind prior to, and during the research process. The book was written by acknowledged and experienced team of legal research instructors and librarians and its intended guide the academia in the art of legal research.

## **SECONDARY MATERIALS - ARTICLES**

Akhakpe, Ighodalo. "Oil-Environmental Degradation and Human Security in the Niger-Delta Region of Nigera: Challenges and Possibilities", (November 2012) 8 ESJ, online: European Scientific Journal <[www.ejournal.org/index.php/esj/article/view/570/639](http://www.ejournal.org/index.php/esj/article/view/570/639)>.

Mr. Akhakpe is a lecturer with the Lagos State University, Nigeria. His research interest spans across a number of arears particularly the interests of the Niger-Delta people and the effects of oil and gas exploration activities on their lands. His article presents the deplorable condition of the Niger-Delta people and the Nigerian government's effort towards improving same. As a background to understanding the oil and gas pollution

activities in the Niger-Delta region, this article serves as a research starting point for anyone who wants to gain first-hand knowledge of the current problem and government's efforts and challenges in solving this ever present problem of environmental degradation in the Niger-Delta.

Udoudoh, P Francis. "Oil Spillage and Management Problems in the Niger Delta, Nigeria" (2011) 3 JEMS, online: Journal of Environmental Management and Safety <[www.cepajournal.com](http://www.cepajournal.com)>.

This article focuses on the oil spillage occurrence and how same is being managed by oil companies in the Niger-Delta region. The article recommends that Multinational Oil Companies (MNOCs) with operations in the Niger-Delta region and the Nigerian federal government should work towards precautionary and remedial measures that can minimize the negative effects of oil spills. This article therefore serves as a quick reference material into understanding the efforts made by MNOCs, the government at all levels on the issue of oil spillage and the future of effective clean ups and stoppage mechanisms.

Oshwofasa, Bright Anuta, David & Aiyedogbon John "Environmental Degradation and Oil Industry Activities in the Niger-Delta Region" (2012) 9 AJSR, online: African Journal of Scientific Research <[www.journalsbank.com](http://www.journalsbank.com)>.

This article traces the sociological effects of environmental degradation of oil industry activities in the Niger-Delta region. The authors identified the lack of adequate environmental laws, bad governance and corruption as factors responsible for the nonchalant attitude of MNOCs in acting responsibly and giving due consideration to the environment. The article is targeted towards the academia, regulators, law makers as well as MNOCs with the intention of reshaping their attitude towards environmental degradation in the Niger-Delta region.

Hutchinson, Terry & Nigel Duncan. "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17(1) DLR, online: Deakin Law Review <[eprints.qut.edu.au/54819](http://eprints.qut.edu.au/54819)>.

Professor Hutchinson is an associate professor at the QUT Faculty of Law in Australia, while Professor Duncan is a professor of legal education at the City University London. Both authors are familiar with the legal research and have provided in this article a description of what doctrinal legal research is. The article explains what doctrinal legal scholarship is and how it is done. This paper is a useful guide in clarifying and describing doctrinal methodology mostly used by legal scholars to those outside the profession. It therefore comes in handy in this research project.

Taekema Sanne. "Relative Autonomy: A Characteristics of the Discipline of Law", online: <<http://ssrn.com/abstract=1579992>>.

The author, Professor Taekema is a professor of jurisprudence at the Erasmus School of Law in Rotterdam, Netherlands and the current chair for the Dutch Association of Legal Philosophy. Her article focuses on characterization of legal scholarship as an academic discipline and recommends that legal scholars can concentrate on doctrinal research with emphasis on legal scholarship or purely academic work with interdisciplinary themes. Her paper provides a platform for legal scholars (especially

inexperienced legal scholars) in shaping their research, understanding and defending the research choices made.

Rudolph J Justus. "A Guide to Writing the Dissertation Literature Review" (June 2009) 14 Practical Assessment Research & Evaluation Journal, online <[www.parenonline.net/pdf](http://www.parenonline.net/pdf)>.

The article focuses on writing a high quality dissertation literature review with an explanation on the purposes of the literature review. The article also pointed out the similarities in the steps taken in conducting a literature review and a full research. It concludes with the common mistakes made by researchers and proposes a framework for self-evaluation of a literature review. This article is intended to guide graduate students in the area of writing good literature review.

Booth N David & Beile Penny "Scholars before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation" (August/September 2005) ProQuest Psychology Journals, online: <[www.jstor.org](http://www.jstor.org)>.

The article also focuses on writing a good literature review and explains how important a good literature review is to conducting a good legal research. It suggests criteria for evaluating the quality of dissertation literature review and reports a study that examined dissertations at three universities. The article concludes by stating that the ability to analyze and synthesize the research in the field of specialization should be the focus of a good literature review. This article is intended to provide a spring board for graduate students in the area of writing good literature reviews in their chosen discipline.