

# **STANDARDIZATION OF OIL & GAS PROCUREMENT CONTRACTS IN CANADA**

## **ANNOTATED BIBLIOGRAPHY**

**Carlos Andres (Andrew) Duran**

**LL.M. Candidate, University of Calgary**

**December 17<sup>th</sup>, 2015**

The following annotated bibliography is part of my ongoing major research paper for my course-based LL.M. at the University of Calgary. My defined problem lies within our Canadian Oil & Gas industry, specifically standardized procurement (material, services, consulting) agreements to adequately capture technical, health and safety requirements for both operators and contractors.

These agreements if adopted by all parties will simplify each individual negotiation process, while improving both legal certainty and regulatory compliance by all involved parties. Furthermore, most contractual risks could be duly mitigated beforehand, with significantly lower drafting and administration costs.

My research claim is there is a lack of synergy among Canadian Oil & Gas procurement contracts, considering the isolated initiatives that currently exist. I will determine whether this is intentional or not and how far is the Canadian Oil patch from ever attaining any simplification / standardization / harmonization to their own procurement agreements.

The research methods I will use include interdisciplinary literature review on standardization, comparative review on Canadian Association of Oilwell Drilling Contractors (CAODC) / Canadian Association of Petroleum Producers (CAPP), Petroleum Services Association of Canada (PSAC), Association of International Petroleum Negotiators (AIPN), Cost

Reduction in New Era (CRINE) contract standardization initiatives. I will also utilize face to face interviews with local CAODC/CAPP, & PSAC representatives, towards synthesizing my empirical findings, while providing viable alternatives to my claim in the form of prospective procurement contract standardization recommendations.

## **1) LEGISLATION**

Standards Council of Canada Act, RSC 1985, c S-16.

## **2) JURISPRUDENCE**

*Bakers Helper Bakery Inc. v Tony's Fine Foods Inc.*, [2002] BCJ 684

*Guiliani, a Division of IGM U.S.A. Inc. v. Invar Manufacturing, a Division of Linamar Holdings Inc.*, [2007] ONJ 3591

## **3) SECONDARY MATERIAL: MONOGRAPHS**

Association of International Petroleum Negotiators, “Model Contracts” (2nd Nov 2015),  
online:<<https://www.aipn.org/mcvisitors.aspx>>

Chaffey, Dave. *E-Business and E-Commerce Management*, 4<sup>th</sup> ed (Essex: Pearson Education Limited, 2009).

The source provides a thorough analysis of e-business, as well as e-commerce, business challenges within an globalized organization, hardware and software technologies, social legal economic political technology (SLEPT) factors that impact an organization, privacy

and ethical constraints, porter's five forces, and elements of a supply chain management. Dave Chaffey is an e-business consultant and visiting lecturer at Warwick University and Cranfield School of Management. Any professional or organization looking into entering an e-environment will benefit from the concepts, and recommendations contained therein. I felt it had a good explanation of e-procurement practices, which could indeed simplify any procurement standardization effort.

Dobler, Donald W.; Lamar Lee Jr. & David N. Burt, *Purchasing and Materials Management Text and Cases*, 4<sup>th</sup> ed (New York: McGraw-Hill, Inc., 1984).

Though not the latest edition (5<sup>th</sup> ed was published in 1990), the source was passed on to me by a retiring co-worker and still has great content towards basic understanding of the different functions related to purchasing and materials management. All authors have prior publications in both purchasing and supply management, therefore they have a broad knowledge on those business subjects. It has plenty of information on purchasing, quality, specifications and standardization, contracts, inventory, warehousing and material management useful for business and operations related research. This source by far has the best information on standardization and contracts for my major research paper.

Earle, Gray. "The Great Canadian Oil Patch", 2nd ed (Edmonton: JuneWarren Publishing Ltd., 2004).

This source has very detailed information on the Canadian Oil & Gas industry, all the way from its historical evolution. Industry acclaimed author Earle Gray, is a former Oilweek magazine editor, was related to Canadian Artic Gas consortium (with huge operations in

Alaska) and has published several books, and news articles. All audiences interested in the oil & gas industry will benefit from reading this source, I personally enjoyed reading the historical events that led to the discovery of oil in Canada. It definitely gives a lot of background and perspective in my research to understand how the industry came about.

Leenders, Michiel *et al*, “Purchasing and Supply Management”, 13th (New York: McGraw-Hill Irwin, 2006) [Leenders, “Purch. & Supply Mgmt.”].

This source was my very first approach to both purchasing and supply management during my business school year; I definitely feel it was very useful in understanding concepts such as supply processes, quality, demand, standardization, supply selection, supply law and ethics, as well as strategic purchasing. According to the back cover of the said textbook, Michiel Leenders, D.B.A., is a professor of purchasing management emeritus at the University of Western Ontario. P. Fraser Johnson, is a Ph.D. and also associate professor at the University of Western Ontario. Anna Flynn, is another Ph.D. and vice-president of the Institute for Supply Management (ISM). Finally Harold Fearon, yet another Ph.D., is professor emeritus at the Arizona State University and Founder/Director of the Emeritus Center for Advanced Purchasing Studies. Finally, this source serves as a great background in any supply chain or procurement related business or legal research topic, like mine.

Leenders, Michiel R.; Harold E. Fearon & Wilbur B. England, *Purchasing and Materials Management*, 9<sup>th</sup> ed (Boston: Richard D. Irwin, Inc., 1989) [Leenders, “Purch. & Mat. Mgmt”].

This source was another book passed on by a former co-worker of mine. In comparison to the prior source from two of the same authors (Michiel R. Leenders and Harold E. Fearon), this

one focuses more on materials management, as well as purchasing foreign/public procedures and information flows. The third author, Wilbur B. England, is a professor of marketing emeritus at Harvard University. Finally, this source complements the understanding of purchasing, but with a focus on materials management. Chapter 4 on quality, specification and inspection has a great comparative on standardization v. simplification.

#### **4) SECONDARY MATERIAL: ARTICLES**

Adams, J. N. “The Standardization of Commercial Contracts, or the Contractualization of Standard Forms”, 7:2 *Anglo-Am L Rev* at 136, online:< [http://heinonline.org.ezproxy.lib.ucalgary.ca/HOL/Page?handle=hein.journals/com1wr7&start\\_page=136&id=146](http://heinonline.org.ezproxy.lib.ucalgary.ca/HOL/Page?handle=hein.journals/com1wr7&start_page=136&id=146)>.

This article though again focused primarily on adhesion contracts, does a good job explaining the history behind standard form contracts all the way back to marine insurance policies from the 16<sup>th</sup> century. The correlation between standard terms and the evolution of law is another key finding. As for the author, J. N. Adams, according to the same article he is the Sub-Dean for Higher Degrees at the University of Sheffield. This article can be useful for those interested in background information on adhesion contracts, specifically how they came about in the U.S. As for my research paper, I can see some of those historical details incorporated into my introduction chapter.

Canadian Association of Geophysical Contractors, “Safety & Information Alerts” (31 Oct 2015 12 pm), online:<[https://www.cagc.ca/index.php?DP=safety\\_and\\_information\\_alerts](https://www.cagc.ca/index.php?DP=safety_and_information_alerts)>.

Canadian Association of Petroleum Producers, “CAODC/CAPP Master Contract” (29 Oct 2015 7 pm), online:<<http://www.capp.ca/publications-and-statistics/publications>>.

Enform, “Resources” (29 Oct 2015 8 pm), online:< <http://www.enform.ca/resources/resourceslist/resources-list.cfm>>.

Harker, J. R. “Imposed Terms in Standard Form Contracts (case)” 98:1 South African Law J, online:<[http://heinonline.org.ezproxy.lib.ucalgary.ca/HOL/Page?handle=hein.journals/soaf98&start\\_page=15&id=25](http://heinonline.org.ezproxy.lib.ucalgary.ca/HOL/Page?handle=hein.journals/soaf98&start_page=15&id=25)>.

This article does a good case analysis within the South African jurisdiction on additional contractual terms after the original contract has been agreed to. The closest similarity I can think of is the known battle of forms that would happen during a given transaction were say for example a purchase order has attached terms and conditions, but an acknowledgement is sent back with additional terms to it (which in most cases override what the PO said). This article has indeed a great point for the general audience interested in transactional contracts. In my research paper, I believe this scenario could be mentioned as a consequence of inadequate application of standardized agreements.

Llewellyn, K, N, “The Standardization of Commercial Contracts in English and Continental Law. By O. Prausnitz.” (1939) 52:4 Harvard L Rev 700, online: <[http://heinonline.org.ezproxy.lib.ucalgary.ca/HOL/Page?handle=hein.journals/hlr52&start\\_page=700&id=750](http://heinonline.org.ezproxy.lib.ucalgary.ca/HOL/Page?handle=hein.journals/hlr52&start_page=700&id=750)>.

A critical article on contract standardization, that compares the latter to a sort of mass production process, where terms and conditions are firm and sided apparently to one party

only. The author according to the same article, is a professor of Jurisprudence, at the Columbia University School of Law. Though I disagree, there is merit in both the narrative, and reasoning against standardization, which can be useful for prospective researchers. In my research paper however, I may only cite some of the arguments that relate to the Oil & Gas industry.

Patterson, Mark R. "Standardization of Standard-Form Contracts: Competition and Contract Implications" (2010) 52:2 William & Mary Law Review, online: <<http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3364&context=wmlr>>.

Appearing repetitively in different legal databases I researched, this article is spot on the information it has regarding standard-form contracts, despite its U.S. focus. Mark R. Patterson is a professor of law at the Fordham University in New York City. According to his faculty bios, teaches and does research on antitrust law, patent law, internet law, and contracts. His article is a critical essay on standardization of what most people know as adhesion contracts, goes in great detail on the benefits and risks of its implementation – both from an antitrust and contract law perspective. I believe any prospective researcher would benefit from it, I believe it will be crucial for both to justify my research claim and questions.

Petroleum Services Association of Canada, "PSAC Master Service Agreement" (1st Nov 2015), online:<<http://www.pfac.ca/wp-content/uploads/msa.pdf>>.

Oil & Gas UK Logic, “Standard Contracts” (30th Oct 2015), online:<<http://www.logic-oil.com/standard-contracts>>.

Sales, H. B. “Standard Form Contracts” 16:3 Mod L Rev, online:<[http://heinonline.org.ezproxy.lib.ucalgary.ca/HOL/Page?handle=hein.journals/modlr16&start\\_page=318&id=354](http://heinonline.org.ezproxy.lib.ucalgary.ca/HOL/Page?handle=hein.journals/modlr16&start_page=318&id=354)>.

Another critical article on standard form contracts, but with a focus on the transaction and common law related cases. I personally like the extensive determination of advantages and disadvantages H. B. Sales mentions on standard contracts. I believe this article would be beneficial as well for prospective transactional contract researchers, as well as for my own research paper.

Standards Council of Canada, “About the Standards Council of Canada” (27 Oct 2015 at 11 am), online:<<https://www.scc.ca/en/about-scc>>.[SCC, “About”].

The Standards Council of Canada (SCC), promotes and oversees non-mandatory standardization initiatives in public and private sectors, as well as improvements to commodities included in the National Standards System. The SCC according to the same website is a federal crown corporation with an actual standardization proposal for the Oil & Gas sector, having also hosted a national forum for Canada’s mining, oil and gas sector representatives to discuss strategic priorities. This source is important for any standardization efforts in Canada, since it provides a good framework and industry examples. I chose it because it is a good starting point for my own research problem.

Standards Council of Canada, News, “Help SCC identify standardization priorities for mining, oil & gas sector” (11 July 2012), online: <<https://www.scc.ca/en/news-events/news/help-scc-identify-standardization-priorities-mining-oil-gas-sector> > [SSC, “Standardization priorities Mining, Oil & Gas sector”].

Standards Council of Canada, “Proposed Standardization Solutions Supporting Oil and Gas Sector Priorities” (November 2013), online:<[https://www.scc.ca/sites/default/files/publications/Oil-and-Gas\\_Sector\\_Profile\\_Final.pdf](https://www.scc.ca/sites/default/files/publications/Oil-and-Gas_Sector_Profile_Final.pdf)> [SCC, “Proposed Standardization Oil & Gas sector”].

This already stated SCC source is indeed a good first step towards standardization of critical elements within the oil & gas sector in Canada. Just as an example, SCC’s industry sector profile page mentions three specific areas it focuses on, from “[l]abour mobility barriers...[to] occupational health and safety standards...[and] pipeline import trade flows”. The SCC as mentioned on another source, is Canada’s crown standardization entity, and has a huge impact in industry aspects such as generalities, infrastructures and sciences, health, safety and environmental (HSE), engineering technologies, electronics, information technology and telecommunications, transportation and distribution of goods, agriculture and food technology, materials technology, construction and other special technologies – per stated on their own website. This standardization proposal provides good insight on the current Canadian Oil patch and opportunities that come with such implementation. It also provides sound recommendations and benefits for Canada. Though it does not go into detail on procurement contracts, it does contain related aspects of procurement of qualified services for my research paper.

Standards Council of Canada, Publications – Trade & Policy, “Proposed Standardization Solutions Supporting Oil and Gas Sector Priorities (Industry Sector Profile)” (November 2013), online: <<https://www.scc.ca/en/about-scc/publications/trade-and-policy/proposed-standardization-solutions-supporting-oil-and-gas>> [SCC, “Proposed Standardization Oil & Gas sector – Profile”].

**UNIVERSITY OF CALGARY  
FACULTY OF LAW**

**LAW 703: LEGAL RESEARCH AND METHODOLOGY**

**ANNOTATED BIBLIOGRAPHY**

**ACCESS TO OIL AND GAS INFORMATION IN UGANDA: AN ANALYSIS OF  
UGANDA'S LEGISLATION WITH INTERNATIONAL BEST PRACTICE**

**CATHERINE AKELLO**

**DECEMBER 17, 2015**

## ANNOTATED BIBLIOGRAPHY

(In progress)

This is an annotated bibliography for my research project as an LLM (thesis) student at the Faculty of Law, University of Calgary. This is a work in progress and should not be taken as exhaustive of the relevant literature.

The question sought to be answered in my research is whether laws governing access to oil and gas information in Uganda are in conformity with the best practice/principles set by international instruments concerning the public's right of access to environmental information- in particular the Aarhus Convention.

For the purpose of this assignment, only twelve entries are annotated.

### SECONDARY MATERIALS

Schwarte Christoph, *Access to Environmental Information in Uganda Forestry and Oil Production* (London: Foundation for International Environmental Law Development (FIELD), 2008).

The central theme of this book is public access to and dissemination of forestry and oil production information in Uganda. It is stated by the author states that, the legal framework on access to environmental information in Uganda is still under construction and the existing governance structures do not sufficiently promote accountability and transparency. Chapter V provides a review of the existing legal frame work pertaining to access to environmental information. I am confident that this methodology will help me to capture the complexity of issues involved and to distinguish between the collection and dissemination of and access to information while evaluating the current oil and gas laws, the government's actual efforts in providing access to the general public.

Jerzy Jendrośka, “Aarhus Convention: Towards New International Standards in Access to Information, Public Participation and Access to Justice in Environmental Matters” (Work Paper delivered at the International Immigration and Environmental Conference Poland, Warsaw, 17-21 June 2001).

The author explores the relevance of Aarhus Convention in Environmental matters. The author argues that countries that have decided to grant the public broad information and participation rights and consequential access to environmental justice have benefited a lot from voluntary activities of their citizens willing to protect the environment. This article is relevant to my research since it employs international law (Aarhus Convention) as a standard setting tool for access to environmental information. This is of essence to my research.

Greenwatch, *Access to Information in Africa Project: the case of Uganda* (Kampala: Greenwatch, 2013).

This report traces the history of access to information in Uganda and the events that have steered the access to information campaign as well as the impact of such events. The author reviews selected literature with relevance to access to information in Uganda. Unlike the previous author who mainly, focused on reviewing the existing law, this report provides an assessment of jurisprudence that has an impact on access to environmental information and institutional arrangements including the internal systems in place for public agencies to be able to meet their obligations in terms of access to information. The report is useful to my research as it gives a general understanding of the development of access to information in Uganda, how courts have interpreted primary sources on access to information and the existing institutional weaknesses to be addressed.

Dickens Kamugisha, Edwin Muhereza & Elima Doreen, “Promoting the Application of Access Rights in Uganda Oil sub sector” (2008) African Institute for Energy Governance (AFIEGO) Policy Research Paper No 4.

The authors using selected case studies for lessons to Uganda analyzed the benefits that accrue to a country as a result of applying access rights. They argue that, applying internationally recognized transparency mechanisms in oil exploration and production like publish What You Pay will enhance overall political accountability. I am in

agreement with the author as this argument. The study will enable me make concrete and practicable recommendations for Uganda.

Peter G.Veit, Corole Excel & Alias Zomer, “Avoiding the Resource Curse: Spotlight on Oil in Uganda” (2011) World Resources Institute Working Paper.

The authors of this working paper concerned themselves on how the new rule from the US Securities and Exchange Commission will help to bring transparency to Uganda’s oil industry. In context, the law in the United States requires companies that file annual reports with the U.S Securities and Exchange Commission (SEC) to disclose the payments they make to host governments for the extraction of oil..., the authors argue that this could help shore up transparency around investment in Uganda’s extractive industry and avoid the failures in governance that have exposed other countries to the “resource curse.”

The working paper is very relevant to my research especially in my recommendations. Total and China National Offshore Oil Corporation currently operating in Uganda file their annual reports with SEC, this will make the reports public and enable citizen’s hold the government accountable for fiscal management of resource revenues.

Terrell G Manyak, “Oil and Governance in Uganda” (2015) 5:1 Journal of Public Administration and Governance 40.

This article address critical oil governance gaps/issues in Uganda. The author states that the important governance issues that Uganda should embrace include; to assure the proper fiscal management of oil royalties through transparency and accountability; reimburse citizen’s impacted by oil development; and effectively manage the natural resource and ecological resources that will be impacted by the exploration and production of oil. This article is key in my understanding of governance in oil development.

Rose Mwebaza, “Improving Environmental Procedural Rights in Uganda” (2002)2:43 IUCN Environmental Policy & Law Paper 17.

This article addresses the global context within which environmental procedural rights have emerged at the international level. The author analysis key international instruments relating to Environmental procedural rights, she uses the term environmental procedural rights to apply to three access rights ( access to information, public participation and access to justice) using these terms, the author analysis key international environmental instruments and norms against Uganda’s environmental procedural rights under different laws.

Although, the author did not give any examples of norms or practices under the convention, she nevertheless recommended the Aarhus Convention as the best example of instruments for Uganda can draw lesson from. She argues that if Uganda embraced the principles under the Aarhus Convention, its procedural rights base that is already provided for in its national legislation and policy framework will be strengthened. And that, any regional or international commitment that Uganda undertakes to promote environmental procedural rights would crystallize her environmental rights regime by not only making her accountable to its citizens but also as part of its obligation under these instruments. This article is relevant as it provides my research with insights on access rights at the international level.

Michael Mason, “Information Disclosure and Environmental Rights: The Aarhus Convention” (2010)10:3 Global Environmental Politics 10.

In this article the author examines the nature and scope of information disclosure obligations under the Aarhus Convention. The author argues that, transparency norms in the Aarhus convention have been framed mainly by a market liberal understanding in which information disclosure obligations fall directly on public authorities and only indirectly steer private sector institutions and actors. He further argues that the construction and implementation of Aarhus rights according to this understanding has

weakened the information access rights of citizens and affected public. Therefore a thorough understanding of the nature and scope of information disclosure obligations under the Aarhus convention is essential to my research.

Uzuazo Etemire, “Public Access to Environmental Information: A Comparative Analysis of Nigerian Legislation with International Best Practice” (2014)3 *Transnational Environmental Law* 149.

This is a legal reform article that uses the comparative method to assess certain aspects of Nigerian Freedom of Information Act with international best practices. The targeted audience being Nigerian parliamentarians it focuses its main discussion on the Aarhus convention and the standards there under. The author reaches a conclusion that Nigerian FOIP Act falls short of the standards and best practices under the Aarhus Convention. This article answers one of my questions of what constitutes international best practice in addition to his discussion (in its part 2) of best practice principles and norms under the Aarhus Convention. I am aware of context in which this article is written thus caution will be taken in regard to the author’s analysis.

Jerome Jeffison Yaw Ofori & Päivi Lujala, “Illusionary Transparency? Oil Revenues, Information Disclosure, and Transparency” (2015)28:11 *Society and Natural Resources* 1187.

The article discusses information disclosure and transparency in relation to accountability. The authors used qualitative method to collect and analyze information. They argue that citizens’ access to information or documentation and their ability to process and use the information to demand accountability remains central in achieving transparency and accountability. The concept of transparency is complex, and often debatable, it has been widely acclaimed and advocated to improve natural resource management. This article illustrates oil ownership in the context of agent principal relationship and how this relationship affects effective access to information. The model of agent principle in resource ownership and information flow is very helpful to my research.

Stephen D. Burns, Todd Newbook & Sebastien A. Gittens, “Confidential Information and Governments: Balancing the Public Rights to Access Government Information and an Oil and Gas Company’s Right to Protect its Confidential Information” (2014)37:1 Dalhousie Law Journal 120.

This article analyses the interaction between public access to records and private oil companies. In particular, it discusses how private commercial interests interact with the host government in terms of information disclosure. The authors hold the view point that, there is a tendency in the industry to use the terms “ confidential information,” yet as a heavily regulated industry, oil and gas companies are often required to provide their confidential information to various government authorities by statute. The article goes on to discuss salient features of confidential information and trade secrets used as an exemption in freedom of information legislations. Therefore the discussion in this article on how to balance rights between the public and the industry is very helpful to my research.

Benson Owuor Ochieng, “Implementing Principle 10 and the Bali Guidelines in Africa” (2015) United Nations Environment Programme (UNEP) Issue Paper No 16.

This paper analyses the importance of Principle 10 and the Bali Guidelines also known as (UNEP Guidelines for the development of national legislation on access to information, public participation in decision-making and access to justice in environmental matters) in Africa. It’s important to note that, the UNEP guidelines are in parimateria with Aarhus convention on the obligation of states and stakeholders in implementation process. Using Uganda as one of its case studies, the authors discuss the Uganda’s progress in implementation of principle 10, and the existing gaps. Although this article focused on the implementation, it’s rather a relevant piece of literature in so far as it identifies access to environmental information gaps and challenges within the Uganda context. This is an insight that is relevant for my discussion.

UNIVERSITY OF CALGARY

FACULTY OF LAW

LAW 703: LEGAL RESEARCH AND METHODOLOGY

ANNNOTATED BIBLIOGRAPHY

*The Duty to Consult the Inuit People in Climate Change Policy Making*

BY

FLORA STEVENSON

FALL 2015

*The Duty to Consult the Inuit People in Climate Change Policy Making*

This partial annotated bibliography was prepared as a class assignment for Law 703: Legal Research and Methodology at the University of Calgary in the fall of 2015 and relates to my proposed research paper on *The Duty to Consult the Inuit People in Climate Change Policy Making*.

The Inuit people living in the Arctic are especially vulnerable to climate change. Their aboriginal traditions, culture and ways of subsistence are intrinsically linked to the frozen physical surroundings of the Arctic. The melting ice, snow and permafrost are jeopardizing their ability to exercise their aboriginal rights. Canada's political inaction to meaningfully mitigate climate change contributes to this worrisome scenario. Case law indicates that a duty to consult arises when the Crown has (a) knowledge of aboriginal title, right, or treaty and (b) contemplates conduct that might (c) adversely affect it<sup>1</sup>. My paper will focus on answering whether there is a duty to consult the Inuit people in climate change policy making and what would it look like. In order to do that, I will have to analyze these 3 elements of the duty to consult triggering test and its theoretical foundation in the context of climate change policy making. My paper's main methodology will be doctrinal with literature reviews on each research question to define which cases to read and how to interpret them. An interdisciplinary methodology will also be necessary to investigate the scientific, economic and sociological data on the impacts of climate change in the Arctic.

SECONDARY MATERIAL: MONOGRAPHS

Newman, Dwight. *The Duty to Consult: New Relationships with Aboriginal People* (Saskatoon, SK: Purich Pub, 2009).

Dwight Newman is a renowned Aboriginal Law expert and the main reference for literature review in the topic of the duty to consult in Canada. This book is the starting point of my research as it explores the key elements of the duty to consult, most notably the triggering test and scope. The material is an excellent source for references and interpretation of case law, as well as both theoretical foundation and practical observations about Aboriginal Law “in action”. The author’s writing style is simple, clear and didactic, with some interesting personal comments and recommendations along the book. This source provides a good base on the duty to consult but needs to be complemented by other more recent sources, once it was published back in 2009.

Newman, Dwight. *Revisiting the Duty to Consult Aboriginal People* (Saskatoon, SK: Purich Pub, 2014).

Dwight Newman incorporated recent Canadian case law and international law about the duty to consult in this 2014 revised edition of the book *The Duty to Consult*. The most important chapter to my research paper is “Consultation on

---

<sup>1</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 35.

Strategic Decisions and Legislation”. Unfortunately, the book was published before key 2014 and 2015 court decisions relevant to this topic. However, the author’s recommendations and predictions on future developments in the area continue to be valuable observations. Regardless of the new chapter’s specific content, this important addition shows that the doctrine of the duty to consult is constantly evolving and that scholars in the field have been investigating some of the same research questions from my paper (e.g. Is there a duty to consult in the process of policy making?). This book also needs to be complemented by other more recent sources analyzing court decisions issued after this book’s publication

## SECONDARY MATERIAL: ARTICLES, REPORTS, PETITION AND NEWS SOURCES

Ahmed, Nafeez. “IPCC Reports ‘Diluted’ Under ‘Political Pressure’ to Protect Fossil Fuel Interests”, *The Guardian* (15 May 2014), online: <[www.theguardian.com/environment/earth-insight/2014/may/15/ipcc-un-climate-reports-diluted-protect-fossil-fuel-interests](http://www.theguardian.com/environment/earth-insight/2014/may/15/ipcc-un-climate-reports-diluted-protect-fossil-fuel-interests)>.

This article published by The Guardian points out to one of the main criticisms to the IPCC reports: the political approval process involved in the Summary for Policy Makers (SPM), which requires unanimous line-by-line approval by delegates from all government members of the IPCC. The author indicates that many experts familiar with the topic of climate change and the IPCC reports say that the SPMs are “significantly diluted under political pressure”. This piece of information is very important to my research paper, once it shows that the IPCC SPMs findings might be more conservative than other literature on climate change. As a result, I need to make sure that I check the full version of the IPCC reports, as well as other sources that address the impacts of climate change in the Arctic.

Bast, Joseph. “The IPCC’s Latest Report Deliberately Excludes and Misrepresents Important Climate Science”, *Forbes* (May 31 2014), online: <[www.forbes.com/sites/realspin/2014/03/31/the-ipccs-latest-report-deliberately-excludes-and-misrepresents-important-climate-science/](http://www.forbes.com/sites/realspin/2014/03/31/the-ipccs-latest-report-deliberately-excludes-and-misrepresents-important-climate-science/)>

This article published in the “Opinion” section of the Forbes talks about the independent review made by an international group of scientists part of the Nongovernmental International Panel on Climate Change (NIPCC) investigating the IPCC Fifth Assessment Report. The article compares and contrasts the eight “reasons for concern” in the IPCC Report with the NIPCC findings. The NIPCC and the author of this article clearly fit the category of “climate skeptics” and disagree with each one of the IPCC conclusions. The author strongly argues that the IPCC reports exclude important scientific data and have financial conflicts of interest, to a point that he questions if the reports are based on “science” or “fiction”. I still need to investigate the credibility of the NIPCC, but it seems like this article provides a good reference to a source that represents scientists that believe that global warming is a natural process, not driven by human activity. As a consequence, if climate change is not manmade it also does not need to be

mitigated by change in human behavior to reduce GHG emissions. Also, regarding the triggering test of the duty to consult, there would be no “government conduct” that adversely affects the Inuit. These are important considerations to be investigated in my paper, and intend to undertake a literature review that covers a wide range of positions on the causes and impacts of climate change in the Arctic – from the extremes of this NIPCC report to the Inuit Petition to the Inter American Commission of Human Rights (see annotation below).

Hinzman, Larry D. et al. “Evidence and Implications of Recent Climate Change in Northern Alaska and Other Arctic Regions” (2005) 72 *Climate Change* 251.

This 2005 highly cited report assesses the effects of climate change in Northern Alaska and other Arctic regions. It is based on a large study made by 35 different authors from 18 different American universities and provides a holistic review with lots of evidence from a wide range of disciplines supporting that global warming triggers a cascade of impacts that affects “geophysical, hydrological, biological, and social systems”. This report really helped me understand some of the unique characteristics of the Arctic’s ecosystem and human society, which are interdependent and function as a dynamic system very sensitive to temperature changes. Their methodology is based on documented observed changes related to climate in Arctic Alaska, although data from other parts of the Arctic have also been utilized. The authors focus their research and selected evidence related to what they refer as a “broader arctic system”, consistent with the proposed holistic approach of their study. The drawbacks from this article are that it is old and it was not written specifically for the Canadian Arctic region and the Inuit.

Larsen, Joan Nymand & Gail Fondahl, eds. “Arctic Human Development Report: Regional Processes and Global Linkages Volume II” (Copenhagen: Nordisk Ministerråd, 2015), online: <[norden.diva-portal.org/smash/get/diva2:788965/FULLTEXT03.pdf](http://norden.diva-portal.org/smash/get/diva2:788965/FULLTEXT03.pdf)>.

The 2015 Arctic Human Development Report II (ADHR-II) was developed by the Nordic Council of Ministers and updates the first ADHR (2004) by analyzing key trends in the Arctic human development, mostly related to challenges (and opportunities) brought by climate change. The report seems to strike for an unbiased approach, providing both positive and negative aspects of global warming in the Arctic, and offers valuable insights about changes in aboriginal culture, economic systems and human health. The report is throughout in its observations about sociological, economical and political aspects in the Arctic, pointing out many aspects of human development not mentioned in any other report I have read so far. For that reason, this material is very important to my analysis of the Inuit culture and how climate change affects them.

McIvor, Bruce. “Good News for the Duty to Consult”, *First Peoples Law* (2015), online: <[www.firstpeopleslaw.com/index/articles/206.php](http://www.firstpeopleslaw.com/index/articles/206.php)>

This short article by Bruce McIvor defends the need for meaningful aboriginal consultation, beyond “hollow procedural niceties” (the same way Dwight Newman did in the section “Rising Above the Minimum Legal Requirements” in the book *Revisiting the Duty to Consult Aboriginal Peoples*), and analyzes six court decisions from 2014 and 2015 that have stretched the limits of the duty to consult from projects to policy – exactly the focus of my research. The material is recent and provides a good summary and interpretation of the cases.

Newman, Dwight. “Is the Sky the Limit? Following the Trajectory of Aboriginal Legal Rights in Resource Development” (Macdonald-Laurier Institute Paper Series, 2015).

This June 2015 report, also written by Dwight Newman and published by MacDonal-Laurier Institute, is a key material to my research because it analyzes recent court decisions (past 5 years) on the duty to consult, Aboriginal title and treaty rights. The report lists 22 landmark cases, 11 of them after the book *Revisiting the Duty to Consult* was published (2014). The section “The Duty to Consult and Resource Development” is the most important part of this paper to my research. The report is very interesting for its observations on both the “law in books” and the “law in action”. The language is simple and the content is very succinct and practical. The recommendations to policy makers, courts, industry and Aboriginal communities at the end of the report are also valuable to understand some of the challenges of Aboriginal law in action.

Newman, Dwight. “Why the Duty to Consult May be Harming Aboriginal Communities”, *The Globe and Mail* (6 May 2014), online: <[www.theglobeandmail.com/globe-debate/why-the-duty-to-consult-may-be-harming-aboriginal-communities/article18482956/](http://www.theglobeandmail.com/globe-debate/why-the-duty-to-consult-may-be-harming-aboriginal-communities/article18482956/)>.

This short article by Dwight Newman investigates some challenges with extending the duty to consult to legislative action. On a national legislation, individually consulting with the more than 600 Aboriginal groups in Canada could take decades, like it did with the educational reform. The author argues that this long process can actually harm Aboriginal communities and suggests that national representative organizations be consulted instead. This material is key to the last chapter of my research paper, where I plan to analyze the potential challenges that an Aboriginal consultation on climate change policy might face.

Sniderman, Andrew Stobo & Adam Shedletzky. “Aboriginal Peoples and Legal Challenges to Canadian Climate Change Policy” (2014) 4 *Western J Leg Studies*.

This 2014 article was written by two authors that I have not heard of before and have not been cited by others very often. Nevertheless, the material is key to my paper because its research question is similar to mine. The article brings a doctrinal review of two litigation strategies (section 35 and section 7) for challenging Canada’s climate change policy, more specifically the withdrawal from the Kyoto Protocol. In terms of methodology, it seems like the authors’ research question was too big in scope for such a small paper (16 pages). The

result was a very succinct material that covers a lot but with not much depth. I feel that the authors could have picked only one litigation strategy to focus on and have explored, expanded and explained their arguments more. Still, this source is very valuable because it provides many case references and elements the authors believe are important to analyze in a hypothetical duty to consult litigation scenario.

Stocker, T.F. et al, eds. "IPCC, 2013: Summary for Policymakers. In: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment of the Intergovernmental Panel on Climate Change" (Cambridge: Cambridge University Press, 2013).

The Intergovernmental Panel on Climate Change (IPCC) is the most important and reputable international body for the assessment of climate change. The IPCC does not carry out any original research. Instead, it reviews and assesses published literature from all around the world on climate change, reflecting a wide range of views and expertise on the topic. For that reason, it is considered the most comprehensive and reliable source of scientific, technical and socio-economic data on climate change. This 2013 report is the most recent assessment of the IPCC and brings key findings about global warming (e.g. "warming of the climate system is unequivocal") and its effects on the Arctic (e.g. "the atmosphere and ocean have warmed, the amount of snow and ice have diminished, sea level has risen"). Therefore, it is a very important material to my research project.

Watt-Cloutier, Sheila, "Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting From Global Warming Caused by Acts and Omissions of the United States", (December 7, 2005), online: <[www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionsummary.pdf](http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionsummary.pdf)>.

This petition to the Inter American Commission on Human Rights was filed in December 2005 by Sheila Watt-Cloutier, on behalf of all Inuit in the United States and Canada. The petitioner uses 2001 IPCC findings and the 2004 Arctic Climate Impact Assessment to support her allegations on the harmful impacts of global warming in the Arctic. Both sources are reliable, relevant and well-known, but, in terms of methodology, a more thorough literature review would have been preferable. The alleged human rights violations are restricted to acts and omissions of the United States. The country's historical and present contribution to climate change is much bigger than Canada's in terms of GHG emissions, which is why the petition was framed that way, but the same rationale, scientific background, and legal perspective can be used in a similar case against Canada. Because this material is a petition, it is obviously "biased" towards the petitioner's interests, which is not the appropriate approach to an academic paper like mine. I will have to address arguments in favor of and against the duty to consult the Inuit in climate change policy making. This material is an excellent source to the analysis of the "adverse effect" element of the duty to consult triggering test, once it provides a great exposition of how "global warming is harming every aspect of Inuit life and culture" (Section IV), as well as causation between "adverse effect"

and climate change and “government conduct”, especially in the section on how global warming violates Inuit human rights, “for which the United States is responsible” (Section V).

UNIVERSITY OF CALGARY  
FACULTY OF LAW

LAW 703: LEGAL RESEARCH AND METHODOLOGY

ANNOTATED BIBLIOGRAPHY

BY

LAURA SCOTT

17 December 2015

### **Brief Description of Research Problem**

This annotated bibliography has been produced in conjunction with a research proposal on *whether indigenous title to land makes indigenous Australians particularly vulnerable to environmental injustice*. To answer this question, the paper will critically examine whether the laws surrounding indigenous title allow indigenous communities to share in the commercial benefits of the environment in which they live, particularly in the context of Australia's mining industry. It will also assess whether indigenous title holders can genuinely participate in decisions to mine on their land.

### **Annotated Bibliography**

**Akhtar, Zia. "Aboriginal Determination: Native Title Claims and Barriers to Recognition" (2011) 7 Law, Environment and Development Journal 132.**

This article describes how *Mabo* and the *Native Title Act* were a break-through for the creation of a theory of indigenous title rights. However, it argues that amendments and court judgments have restricted the *Native Title Act's* operation, such that indigenous communities struggle to establish or maintain indigenous title to land. The author claims that a lack of constitutional protection for indigenous rights is to blame. This article explains a complex area of law in a way that is easy to understand and employs a structure that is easy to follow. While the constitutional analysis in the article is beyond the scope of my paper, it would be highly relevant to a comparative paper on Canada and Australia, advocating for the constitutional protection of indigenous rights in Australia. The author draws a detailed comparison between the lack of constitutional protection afforded to indigenous Australians and the protection of indigenous rights under the Canadian Constitution.

**Bankes, Nigel. “Aboriginal Title to Petroleum: Some Comparative Observations on the Law of Canada, Australia, and the United States” (2004) 7 YB NZ Juris 111.**

This article examines whether indigenous title to land in Australia, Canada, and the United States includes a title to petroleum. To answer this question, the author examines the content and scope of indigenous title to land in each country. He concludes that it is difficult for indigenous land claimants in Canada and the United States to show a title to petroleum because to do so, they must show that they used the resource in accordance with traditional laws, practices or customs. Comprehensive Crown vesting legislation in Australia precludes an indigenous title to petroleum. The article is clear and concise given the breadth of material covered.

While the discussion on indigenous title in Canada and the United States is not relevant to my research paper, the article’s examination of indigenous title in Australia provides the necessary background to my paper’s discussion on indigenous title holders’ ability to derive economic benefits from their land and participate in resource development decisions. Anyone reading this article for its analysis on Canada should be mindful that, although this article was written after the Canadian Supreme Court’s decision on indigenous title in *Delgamuukw*, it was written prior to the Canadian Supreme Court’s decision in *Tsilhqot’in*, which reshaped the content and scope of indigenous title to land in Canada. It must therefore be read critically, with reference to the decision in *Tsilhqot’in* and recent commentary.

**Bartlett, Richard. “Extinguishment, Deemed Extinguishment and Suspension: Larrakia and The Native Title Amendment Act” (1998) 17 Australian Mining and Petroleum Law Journal 228.**

This article explains how the past extinguishment of indigenous title was facilitated by the 1998 amendments to the *Native Title Act*. Bartlett discusses past extinguishment at common law, and criticizes the High Court’s failure to identify a clear and plain legislative intention to extinguish

indigenous title. He describes the Government's attempt to provide legislative intention by enacting the 1998 amendments, entitled "Confirmation of Past Extinguishment of Native Title". He then argues that while the amendments were aimed at clarifying the current state of the common law, they created more circumstances in which indigenous title could be extinguished. Although this article was written in 1998 and there have been two subsequent amendments to the *Native Title Act*, neither of the subsequent amendments dealt with the extinguishment of indigenous title. This article's analysis of the *Native Title Act* therefore remains relevant. However, because this article was written in the same year as the 1998 amendments, it does not include case law indicating how the 1998 amendments have been applied in practice. Nonetheless it provides an excellent explanation of the vulnerability of indigenous title to extinguishment under the *Native Title Act*.

**Bartlett, Richard H. *Native Title in Australia*, 3<sup>rd</sup> ed (Reed International Books Australia Pty Ltd, 2015).**

This book provides a comprehensive overview of Australian law on indigenous title, including the recognition of indigenous title in Australia, the nature and content of indigenous title, limits on indigenous title, and the right to negotiate. It also discusses resource development on indigenous title land and reflects on the developments of indigenous title to land over the past twenty years. Because the book was published in 2015 it refers to numerous recent cases which have shaped or applied aspects of the law on indigenous title. Its publication date and comprehensive analysis of indigenous title make it a valuable resource to refer to when reading other sources. However, this book is predominantly descriptive. It does not provide a critical analysis of the law on indigenous title. It is therefore a useful source for understanding the law, but not for any broader analysis.

**Bell, Justine et al. “A Comparative Study into the Rights of Landholders to Prevent Access to Land by Mining Companies” (2012) Queensland Council for Civil Liberties Research Note.**

This article compares the land access rights under mining legislation in the Australian states of Queensland, Western Australia, New South Wales, South Australia and the Canadian province of Alberta. The authors conclude that none of these jurisdictions grant land owners an absolute right to exclude mining companies from accessing their land. However, there are limited exceptions. There are also conditions to land entry concerning negotiation and compensation. This article provides a valuable overview of the fee simple title holders’ inability to completely withhold consent to resource development on their land. It identifies numerous primary sources to support its conclusions. While this article provides a clear and concise overview land access rights it does not provide any critical analysis.

**Carrington, John. “Mining in Australia: An Introduction for Investors” (2013) Ashurst Working Paper February 2013, online: <  
[https://www.ashurst.com/doc.aspx?id\\_Content=6967](https://www.ashurst.com/doc.aspx?id_Content=6967)>**

This working paper was produced for potential investors in the mining industry by one of Australia’s leading law firms – Ashurst. It provides a clear overview of Australia’s legal and regulatory framework in relation to mining, including: mining licences; joint ventures; royalties and taxes; land access; native title; environmental law; occupational health and safety law; and Australia’s foreign investment approval framework. The chapter on native title explains the extent to which mining interests can be affected by a claim of indigenous title. This chapter was the only section relevant to my paper. However, the entire working paper is an easy-to-learn-from resource for anyone seeking to develop a basic understanding of the mining approval process in Australia. While this working paper does not provide a comprehensive explanation of any of the issues it

addresses, it directs the reader to relevant legislation and provides a basic understanding of how the legislation operates.

**Haluza-Delay, Randolph. “Environmental Justice in Canada” (2007) 12:6 Local Environment 557.**

This article explains the concept “environmental justice”: how exposure to “environmental bads” is disproportionately borne by marginalized groups, including indigenous communities. The author then illustrates this concept in a Canadian context. He notes that research in Canada is dominated by situations involving indigenous communities. By referring to case studies Haluza-Delay suggests that the marginalization of indigenous groups in decision-making processes may create greater environmental injustice than the environmental impacts suffered by these groups. When I initially read this article, I was intending to write a comparative paper on Canada and Australia. However, this article’s description, albeit brief, of how the term “environmental justice” was conceived out of a social justice movement in the United States is relevant to any paper on environmental justice. The article’s discussion of the environmental injustice suffered by Canadian indigenous groups who lack decision making powers would be a valuable resource for a paper on environmental justice in Canada.

**McKinnon, Elizabeth. “Environmental Justice Project” (2012) Environmental Defenders Office Final Report, online: <  
[https://envirojustice.org.au/downloads/files/law\\_reform/edo\\_vic\\_environmental\\_justice\\_report.pdf](https://envirojustice.org.au/downloads/files/law_reform/edo_vic_environmental_justice_report.pdf)>.**

This report describes the history and origins of environmental justice. It then explores different definitions of the term and queries why the concept is not being used in Australia. It provides three main case studies to determine the applicability of environmental justice in Australia, including: the impact of the Tullamarine toxic waste dump on local residents, Indigenous

Nations' involvement in the development of the Murray-Darling Basin Plan, and the ability of rural residents to participate in land use management decisions. However, it refers to numerous other examples, including those involving indigenous communities. Its final two chapters are devoted to strategies for address environmental injustice and solutions to achieving environmental justice in Australia. This is a pivotal source on environmental justice in Australia. There a very few sources that discuss environmental justice in an Australia context. This report is comprehensive in its analysis and was published recently.

**McNeil, Kent. "Self-Government and the Inalienability of Indigenous Title" (2001-2002) 47 McGill Law Journal 473.**

This article provides a comprehensive assessment of the inalienability of indigenous title. The author argues that while preventing the alienability of indigenous title may have historical justification due to the perceived need to protect indigenous communities from settlers, in today's context, this paternalistic policy places indigenous Australian's at a distinct economic disadvantage compared with freehold owners. Allowing indigenous communities to alienate their land would facilitate economic development that is subject to indigenous communities' control. McNeil is a leading scholar on indigenous title in Australia. His article is extremely thorough and unique in its approach. It is clear in structure and expression. It also appears to be one of the only available sources that addresses the economic disadvantage of indigenous title holders as a consequence of the inalienability of indigenous title. It is therefore a valuable resource to support an argument for the economic empowerment of indigenous Australians.

**Neate, Graeme & Daniel O’Dea. “The Functions of the Native Title Tribunal” (2010) National Native Title Tribunal Seminars held 28 May 2010 and 4 June 2010, online: <<http://www.nntt.gov.au/Information%20Publications/The%20functions%20of%20the%20National%20Native%20Title%20Tribunal.pdf>>.**

This publication provides an overview of the functions of the National Native Title Tribunal. The Tribunal is responsible for registering indigenous title claims and mediation and arbitration with respect to the future use of indigenous title land. While the majority of this publication addresses the administrative duties of the tribunal, its chapter on mediation and arbitration with respect to the future use of indigenous title land directly addresses the tribunal’s role in resolving disputes between resource developers and indigenous title holders where an agreement cannot be reached pursuant to the right to negotiate in the *Native Title Act*. It describes the scope of the right to negotiate and each party’s ability to refer the matter to the Tribunal after six months of negotiation. It then sets out the functions of the Tribunal as a mediator and arbitrator and matters the Tribunal must take into account when making a determination. While this publication provides extensive background for any discussion on indigenous rights and resource development, it is a government produced document, and therefore lacks any critical analysis of the Tribunal’s role. For instance, it fails to mention that over the past twenty years, the Tribunal has only refused to grant a mining lease or licence twice.

**O’Faircheallaigh, Ciaran. “Unreasonable and Extraordinary Restraints’: Native Title, Markets and Australia’s Resources Boom” (2007) 11 *Australian Indigenous Law Review* 28.**

This article describes the right to negotiate under the *Native Title Act*. The author asserts that the *Native Title Act* does not confer commercial leverage on indigenous title holders because indigenous title holders do not have a right to veto resource development and are pressured to reach an agreement regarding royalty payments at the negotiation stage because National Native Title

Tribunal cannot award royalty payments if the matter reaches arbitration. The balance of the article discusses how amendments to the *Native Title Act*, the way in which the *Native Title Act* is administered by the Tribunal, and how recent court cases have diminished any commercial leverage associated with indigenous title rights. This article provides an extremely detailed and specific analysis on the right to negotiate and indigenous title holder's ability to derive economic benefits from their land through the *Native Title Act* right to negotiate. It does so in less than ten pages. The author is also one of Australia's leading scholars on indigenous rights. It is therefore a key resource for any paper on the right to negotiate.

**Winnett, Celia. "Just Terms or Just Money? Section 51(xxxi), Native Title and Non-Monetary Terms of Acquisition" (2010) 33(3) UNSW Law Journal 776**

This article describes the Australian Government's constitutional power to acquire property on just terms from any person for any purpose. It explains how Australian courts have been reluctant to find that "just terms" includes non-monetary recompense. The author draws from multiple constitutional sources which influenced the drafting of the acquisition of property provision to argue that "just terms" should encompass non-monetary obligations. The author then demonstrates the need for non-monetary recompense in an indigenous title context. However, she concedes that the *Native Title Act* requires that recompense be monetary unless non-monetary recompense is specifically requested. If a request is made, a court need only consider the request. This article provides several excellent arguments as to why the Australian Government's constitutional power to acquire property on just terms should include the award of non-monetary recompense in an indigenous title context. While it argues that the Australian courts should interpret the constitutional provision to include non-monetary recompense where necessary, it does suggest reform of the *Native Title Act* as an alternative solution.

UNIVERSITY OF CALGARY

FACULTY OF LAW

LAW 703: LEGAL RESEARCH AND METHODOLOGY

HYDRAULIC FRACTURING OF HYDROCARBON RESERVOIRS AND MATURE OIL  
AND GAS JURISDICTIONS: A REVIEW OF RULES, PRINCIPLES AND  
BEST PRACTICES TO IMPROVE BRAZIL'S LEGAL FRAMEWORK

**ANNOTATED BIBLIOGRAPHY**

**(IN PROGRESS)**

BY

PRISCILA KNOLL AYMONE

DECEMBER 17, 2015

## **ANNOTATED BIBLIOGRAPHY**

The following annotated bibliography is a work in progress of the primary and secondary sources that will guide my major paper project. My paper is entitled “Hydraulic Fracturing of Hydrocarbon Reservoirs and Mature Oil and Gas Jurisdictions: A Review of Rules, Principles and Best Practices to Improve Brazil’s Legal Framework”. This paper first aims to analyze the existing regulatory frameworks, regarding oil and gas law, specifically related to hydraulic fracturing (commonly known as “fracking”) in some of the mature jurisdictions (e.g., Canada and the US) and international organizations. Secondly, it seeks to develop recommendations for Brazil to improve its legislation aimed at preventing, and/or mitigating, potential environmental harm caused by the use of hydraulic fracturing.

### **SECONDARY MATERIALS: ARTICLES**

Bankes, Nigel. “Non-Conventional Oil and Gas Resources and The Legal Issues Associated with Hydraulic Fracturing in Canada” (2013) 15:4 International Environmental and Resources Law Committee Newsletter 4.

The author is Professor and Chair of Natural Resources Law at the University of Calgary and Adjunct Professor at the University of Tromsø.

The author provides an overview of some recent trends regarding the regulation of hydraulic fracturing in different provinces of Canada, comparing more traditional with new oil and gas jurisdictions. He addresses five legal issues related to hydraulic fracturing: (1) Alberta’s new directive on hydraulic fracturing issued by the Energy Resources Conservation Board which seeks to strengthen the regulation of maintaining well integrity, interwellbore communication and hydraulic fracturing operations at shallow depths; (2) the British Columbia Oil and Gas Commission’s approach to concerns regarding fracturing, such as water use, induced seismicity and communication between multistage fracturing operations and ongoing drilling operations, and the fluids used in hydraulic fracturing operations; (3) Quebec’s public resistance to fracking and environmental reviews on its impact; (4) The Maritime Provinces’ cautious proceedings regarding fracturing; and (5) the work of industry associations, such as the Canadian Association of Petroleum Producers (CAPP) and its “Guiding Principles for

Hydraulic Fracturing”; and the Drilling and Completions Committee of Enform Canada which focuses on interwellbore communication between well operators in its implementation. After his analysis, Professor Bankes concludes that more traditional jurisdictions (i.e., Alberta and British Columbia) have focused on adjusting regulations of hydraulic fracturing considering industry issues and public concerns. In contrast, new jurisdictions in the oil and gas field (i.e., Quebec, New Brunswick and Nova Scotia) have been more cautious in adopting and regulating hydraulic fracturing. This article is relevant for academics and practitioners as it provides an updated overview of the different approaches to hydraulic fracturing resulting from public concerns.

Blake, Lara. “Hydraulic Fracturing: Evaluating Fracking Regulations” (2014-2015) 4 University of Baltimore Journal of Land and Development 177.

The author examines the American regulation of fracking, at federal and state levels, to prevent environmental and health damages. Her approach focuses on environment and health concerns due to the use of toxic chemicals in the process, which contaminates surface and groundwater sources. Given these risks and the lack of uniformity in the law at the state level, the author proposes a federal regulation to mitigate harm and impose standards on all states. Accordingly, she seeks uniformity in federal regulation due to discrepancies found in state-level rules. For this reason, the article is especially important to academics and lawmakers who could address, and promote new regulations for hydraulic fracturing at US federal level in order to develop a comprehensive national law.

Klass, Vanessa. “What’s the Big Fracking Deal?” (2014-2015) 42:2 Western State Law Review 159.

This article provides a US perspective on what is being done to prevent the negative impact of hydraulic fracturing. It is addressed not only to academics, but also to the general public seeking information about the potential harm caused by hydraulic fracturing. The author emphasizes the pros and cons of fracking. Given that potential consequences can be mitigated, regulated or eliminated, she compares some state level legislation and some federal laws applicable to the oil and gas industry in US. She then examines some environmental concerns, such as water contamination; chemicals used in the process; effect to air quality; and seismicity events; to demystify them as damages resulting from fracking techniques. In fact, the author advocates in favor of hydraulic fracturing and assumes that any polemic and divergence are restricted to misleading information without scientific basis. In this regard, she reveals some bias towards the economic pros of using hydraulic fracturing. However, such bias does not diminish her contribution to the defense of sustainable development by means of regulations to prevent and mitigate any potential harm arising from fracking. Therefore, her analysis is important to foster a balance between the development of new technologies, such as hydraulic fracturing, and responsibility towards the environment and public health.

Leiter, Amanda C. “Fracking, Federalism, and Private Governance” (2015) 39 *Harvard Environmental Law Review* 107.

This author examines the US federal legal regime on fracking – or better, the lack of comprehensive legislation on the federal level – and seeks to find a solution through a mixed public and private regulation to avoid health and environmental risks due to this gap. After a brief background explanation on the technology of fracking, the author focuses her study on six private governance players (i.e., FracFocus, ASTM, CSSD, STRONGER, GAPP, and API) to address gas risks. She expects that the private sector will engage in “research, gathering and disseminating data, developing best practices, and assessing and certifying compliance with those practices” in the place of state. As a positive aspect, she points out that private environmental governance is more “flexible and boundless” since it can adapt to different situations without attachment to a particular jurisdiction. Further, analyzing the positive and negative effects of private governance, the author states that if national uniformity is required, there will be a need for widely accepted rules to guarantee the supremacy of private standards. This article is therefore very useful for lawmakers and oil and gas industry practitioners in order to promote the need for a uniform federal law for hydraulic fracturing. More importantly, it promotes the interface between the federal law and the oil and gas industry’s best practices to validate such uniform law.

Lucas, Alastair R. Theresa Watson & Eric Kimmel. “Regulating Multistage Hydraulic Fracturing: Challenges in a Mature Oil and Gas Jurisdiction” in Donald N. Zillman et al, eds, *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (Oxford: Oxford University Press, 2014) 127.

This book chapter is co-authored by Professor Alastair R. Lucas of the University of Calgary, P.Eng. Theresa Watson, a former member of the Alberta Energy Resources Conservation Board, and Eric Kimmel, economist and senior advisor of the Alberta Energy Regulator.

The scope of this chapter is to analyze the need to adapt the regulation to a new form of activity: the multistage hydraulic fracturing. The authors focus on the Alberta Energy Regulator (AER) and the development of public consultation to assure legitimacy for the regulation of hydraulic fracturing. First, they present an overview of the hydraulic fracturing technology in Alberta and its regulatory experience. Second, they evaluate the importance of public participation to energy regulators due to the public’s awareness of health, safety and environmental concerns. This article is relevant because it provides a good summary of Alberta’s position as a mature jurisdiction in the oil and gas sector; its legal framework; and its experience regarding hydraulic fracturing. Alberta’s tradition in the oil and gas sector serves as a model for the improvement of legal regimes in other jurisdictions. Furthermore, the authors contribute to the enrichment of Alberta’s regulation by proposing that legal intervention should be combined with public engagement. Using this combined mechanism, adaptation and reform of existing legal regimes can be legitimated by the public beforehand, guaranteeing the coverage of most of public concerns in the new, or reformed law.

Mooney, Leila. “South America! Fracking’s Next Destination! Aligning Conditions below and above Ground for Unconventional Oil and Gas Development within a Governance and Sustainability Framework” (Spring 2015) 44:2 *International Law News* 35.

The author is a member of the UN Global Compact’s Business for the Rule of Law Working Group and a director for Latin America and the Caribbean at Partners for Democratic Change in Washington, D.C.

This article provides a general overview of the hydraulic fracturing in South America. It demonstrates that South America has prospective shale gas and shale oil potential. However, these countries abide by different regulations on hydrocarbons and minerals ownership, as well as different rules of law and sustainability standards. For this reason, she proposes “(1) a strategy approach to hemispheric policy development, diplomacy, and cooperation; (2) understanding the importance of social licensing processes and how that could affect the private-sector bottom line; and (3) the role of the legal profession in these developments”. These proposals are relevant because they raise the debate about the need for a new regime comprised of soft and hard law (international law), involving not only human rights and environmental law, but also high standards for safeguard and sustainability to be adopted by the industry even where no local regulation exists. However, the author does not intend to identify any peculiarity of South America legal regimes. Rather, she only aims to shed light on the need for a new legal framework in the region that incorporates international law into national laws when addressing sustainable development concerns.

Olawuyi, Damilola S. “Regulating Unconventional Oil and Gas Production: Towards an International Sustainability Framework” (2014) 11:3 *Indonesian Journal of International Law* 345.

The author promotes the development of an international framework to “ensure the sustainable production of oil from unconventional sources”, which includes the exploration of shale gas through hydraulic fracturing. Given this scope, she first examines the legal and sustainable development of hydraulic fracturing, and secondly, the international approach to mitigate environmental risks associated with fracking. In contrast with the abovementioned Vanessa Klass article, this paper is less optimistic and assumes the existence of possible environmental and health risks related to hydraulic fracturing. By assuming the existence of potential damage caused by fracking techniques, the author addresses her article to international organizations (e.g., the United Nations Environment Program and the International Maritime Organization) that could foster international standards for hydraulic fracturing to prevent environmental and social risks. These international standards or guidelines should consider economic, social and environmental criteria in order to lessen the impact on human rights. Because of its scope and position, this article meets the aim of my research project, as it will propose a law reform based on best practices and the development of international standards for hydraulic fracturing.

Paddock, LeRoy C. & Jessica Anne Wentz. “Emerging Regulatory Frameworks for Hydraulic Fracturing and Shale Gas Development in the United States” in Donald N. Zillman et al, eds, *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (Oxford: Oxford University Press, 2014) 147.

In this book chapter, the authors evaluate the evolving US federal regulation of hydraulic fracturing and compare two state regulations: Pennsylvania, as a more mature and a leading state for hydraulic fracturing gas production, and New York, as a more cautious jurisdiction where a moratorium has taken place to ban hydraulic fracturing. They compare different approaches set forth in the law of these two states in order to address environmental concerns and mitigate risks associated with hydraulic fracturing, such as water use and conservation; wastewater management; chemicals use and disclosure; water contamination; site disturbances and habitat fragmentation; methane releases; air pollution; public engagement and the role of local governments. Considering the public concerns regarding the use of hydraulic fracturing, this article confirms that the same conclusion applies to Canada and the US. This means that mature jurisdictions (such as Alberta and Pennsylvania) are more favorable and advanced in governing hydraulic fracturing, while new oil and gas jurisdictions (such as Quebec and New York) are more cautious in granting approval of this technology.

Redgwell, Catherine & Lavanya Rajamani. “Energy Underground: What’s International Law Got to Do With It?” in Donald N. Zillman et al, eds, *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (Oxford: Oxford University Press, 2014) 101.

In this book chapter, the authors examine international law applicable to “energy underground”, based on existing treaties, customary law and soft law for “the regulation of subsurface energy activities”. In this regard, the authors analyze international principles and best practices to avoid environmental impacts of underground activities. Considering the efforts of international institutes to develop international policy to harmonize best practices (for example, the International Energy Agency’s 2012 Golden Rules on unconventional gas), they state that “the development of soft law guidance” is a means to overcome international regulatory gaps of energy underground. Therefore, this chapter recommends the development of an international guidance based on the harmonization of best practices of energy underground. This article demonstrates that the development of international standards or guidance can fill out the regulatory gaps of domestic energy law through the transposition of international environmental principles to domestic legislations. Therefore, in terms of subsurface extraction, including hydraulic fracturing, it is relevant to emphasize the need for an interface between international and national law in the regulation of energy law.

Rubin, James. "U.S. Regulatory Developments in Hydraulic Fracturing" (2013) 15:4 International Environmental and Resources Law Committee Newsletter 9.

The author analyzes the US hydraulic fracturing regulation. Firstly, he describes state level regulations in, Colorado, Illinois, Ohio, Pennsylvania, Texas, and Wyoming concerning disclosure of drilling constituent, use of water and wastewater, waste disposal, and air emissions. Secondly, he demonstrates the attempts to develop a comprehensive federal regulation of hydraulic fracturing through the Environmental Protection Agency (EPA) and the Department of the Interior (DOI). Having analyzed the federal level efforts to regulate hydraulic fracturing, the author expects US Congress will provide next steps towards regulation, which do not lead to "unacceptable environmental costs or overdependence on fossil fuels". He goes on to state that the administration has been cautious, assuring state regulatory authority. This article is helpful in providing an update of US regulation of hydraulic fracturing at state level and the attempts to achieve a federal regulation. In contrast with Canadian legal system, the US system ensures that the federal level regulates matters relating to oil and gas. Hence, the development of a comprehensive law is a matter of governmental energy policy to be uniformly applied nationwide. However, it will be challenging to develop a uniform law applicable to both mature and new jurisdictions in oil and gas sector requiring the same environmental, safety and health standards associated with hydraulic fracturing, disregarding local needs.

Schill, Stephan W. "The Interface between National and International Energy Law" in Kim Talus, ed, *Research Handbook on International Energy Law* (Cheltenham: Edward Elgar, 2014) 44.

This book chapter was written with the support of the European Research Council on "Transnational Private-Public Arbitration as Global Regulatory Governance: Charting and Codifying the Lex Mercatoria Publica". The author begins his chapter identifying the "transnational character of energy law" from the perspective of this research council. This includes the fact that "energy exploitation and production has trans-border or even global externalities with its impact on the environment and the global climate". Hence, in order to implement energy policies it is necessary to balance national and international interests and laws in the energy sector. This chapter is divided in four parts: (1) the need for new theories to conceptualize the relations between national and international energy law; (2) the division of labor between functions of national and international energy law; (3) the different types of interface between national and international law; and (4) the need for cooperation of different actors and institutions across legal orders in order to reach binding transnational public policies. The author demonstrates the interface of international and national laws through several examples, such as the influence and incorporation of international standards into national energy laws, and the application of international recommendations by national agencies, courts and arbitral tribunals. Thus, this book chapter is relevant to the international legal community because it recognizes the development of international energy law. It emphasizes the need for the interaction between national and international law in this field considering that energy markets are "trans-border" or global. As well, these relations can bring externalities, such as environmental and health damages not limited to national borders. For this reason, it is important to evaluate international energy law when proposing a law reform based on international standards and best practices of hydraulic fracturing. In

this regard, the review of the existing legal frameworks and international recommendations will be a product of the interface between international and national laws.

Stokes, Elen. "New EU Policy on Shale Gas" (2014) 16 Environmental Law Review 42.

The author gives the legal and political background of European regulation of shale gas after the issuing of a Communication and Recommendation on the field by the European Commission. Aiming to "foster a harmonized approach" on hydraulic fracturing among the Member States, the author recommends an EU legal framework establishing common principles of best practice not only for the Member States, but also for the operators. This article gives an update on the EU regulation on hydraulic fracturing. It centers its analysis on the legislative options that may provide binding or non-binding approaches and its impact on EU markets. As a result, this article raises another interface between national and international law for the regulation of hydraulic fracturing to EU Member States. However, due to controversies regarding environmental impact of hydraulic fracturing (e.g., France, the Netherlands, Scotia in the UK, and Catalonia in Spain has banned fracking), it will be difficult to reach a uniform legal framework through the draft of a EU directive for hydraulic fracturing. Because of this, the EU has only issued guidelines at this stage to govern fracking; rather than directives that may be incorporated as national laws in each Member State.

**University of Calgary**

**Faculty of Law**

**Law 703: Legal Research & Methodology**

**Statement of Proposed Research Project:**

**An Analysis of the ESTMA: Canada's Legislative Response  
to the Global Extractive Sector Transparency Movement**

**ANNOTATED BIBLIOGRAPHY**

**AS AT DECEMBER 15, 2015**

**L. Daniel Wilson**

## **Introduction to Annotated Bibliography**

This Annotated Bibliography is prepared in conjunction with a Statement of Proposed Research relating to Canada's Extractive Sector Transparency Measures Act (the "ESTMA"), a new federal act which came into force in the summer of 2015. The ESTMA represents Canada's legislative response to the global extractive sector transparency movement, and is one of several similar acts recently adopted or currently going through the ratification process around the world. The Major Paper proposes to use a comparative analysis methodology to assess the ESTMA against evolving international best practices in this rapidly-developing area, particularly focusing on comparison of the ESTMA to the legislative models adopted by developed nations that are viewed as competitive to Canada in the international resource extraction sector. The Major Paper will also ask whether adoption of the ESTMA is sufficient to place Canada in a position of international leadership in the area of extractive sector transparency, or whether Canada should go further in considering additional measures including submitting itself as a candidate country under the Extractive Industry Transparency Initiative ("EITI").

The annotations in this bibliography are undertaken only with respect to those secondary sources that are published in periodicals. I considered at some length the merit of also annotating the law firm online commentaries, other online sources and presentations. Ultimately, I concluded that completing annotations for these other documents had limited analytical value due to my particular dataset. The law firm online commentaries largely follow a nearly identical presentation format, address the same statutes and make the same points from a practice-based perspective. There would be very little to say after the first annotation other than "this is written with the same tone and covers the same content as the other examples contained herein".

The other online sources are primarily comprised of Government of Canada publications and lengthy non-governmental organization (“NGO”) publications from EITI and Publish What You Pay (“PWYP”). These sources are of immense value in executing the research project, but serve a fundamentally different research purpose than the periodical articles. Most of these online sources are published anonymously and collaboratively by the relevant organization or government department. Assessment of the content of these materials will occur in the body of the Major Research Paper itself and many of these documents cannot be adequately summarized or evaluated in the limited space constraints of an annotated bibliography. As such, I decided that there was insufficient value to provide annotations for these documents and restricted my annotations to the secondary materials contained in periodicals.

## LEGISLATION

### A. CANADIAN LEGISLATION

*Corruption of Public Officials Act*, SC 1998, c 34.

*Extractive Sector Transparency Measures Act*, SC 2014, c 39, s 376.

Bill 55, *An Act Respecting Transparency Measures in the Mining, Oil and Gas Industries*, 1<sup>st</sup> Sess, 41<sup>st</sup> Leg, Quebec, 2015 (assented to 21 October 2105) SQ 2015, c 23.

### B. FOREIGN LEGISLATION

*Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub. L. 111- 203, 124 Stat. 1376 (2010).

## SECONDARY MATERIALS

### A. CANADIAN JOURNAL ARTICLES

Blyschak, Paul. “Corporate Liability for Foreign Corrupt Practices under Canadian Law” (2014) 59:3 McGill LJ 655.

The author begins by reviewing the history of the Corruption of Foreign Public Officials Act (the “COFPA”) in Canada, juxtaposing Canada’s historical limited enforcement in practice against the recent aggressive enforcement measures taken since 2013 in response to international criticism. The author then focuses on the relevant *Criminal Code mens rea* and *actus reus* thresholds for prosecuting corporations and corporate actors (officers and employees) for corporate offences before and after 2013, including an analysis of the relevance of the 2013 amendments to future criminal law prosecutions.

In his introduction, the author states that he is going to highlight numerous inconsistencies in the current legislative regime and propose solutions, but he does not actually do this to a significant degree. Other than this shortcoming, it is an excellent analysis of the interrelationships between the COFPA and the *Criminal Code* and highlights a number of practical enforcement challenges. Written by a practitioner, it is more procedural and black-letter law focused and does not consider the theoretical underpinnings of the legislation.

Blyschak, Paul. “Corporate Foreign Corrupt Practices and Director Liability” (2014) 51:3 Alberta L Rev 555.

This article is a companion piece to the previous article by same author. In this article, Blyschak follows the same presentation methodology and black letter law analysis as in the McGill article above, but instead of focusing on the liability of

officers and employees, this article focuses exclusively on the liability of directors.

While published in an academic journal, this article is written from a practitioner's perspective for the benefit of real-life directors as a "how to avoid liability" analysis. This certainly has utilitarian value, but it does not delve into the theory behind the legislative initiatives from an academic perspective and consider what broader issues are being addressed by the legislative initiatives.

Janda, Richard. "An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries [Bill C-300]: Anatomy of a Failed Initiative" (2010) 6 JSDLP 97.

This article reviews a precursor initiative to the Extractive Sector Transparency Measures Act (the "ESTMA") that was tabled as a private members bill in 2010 during a Conservative minority government. The legislative initiative failed to receive approval (barely) and was ultimately abandoned, but certainly has strong relevance as a forerunner of the ESTMA.

The author provides an excellent review of the history behind the initiative and the arguments advanced by both the opponents and supporters of the measure. In particular, it delves into the aversion of corporations to see themselves as having a broader responsibility for poor outcomes in the developing nations in which they engage. It is an extremely valuable background piece for my ESTMA analysis, because it considers the interrelationships between corporate actions and the resource curse and shows how the government position evolved rapidly over the 5 year interval between the failure of Bill C-300 and the introduction of the ESTMA.

Mijares, Susana C. "The Global Fight Against Foreign Bribery: Is Canada a Leader or a Laggard?" (2015) 5:4 West Ont L Rev 1.

The article is written by a Canadian JD student at Western University, but the author is an individual with significant experience as a civilian lawyer in Venezuela before coming to Canada and also attained an LLM from the University of Ottawa before commencing her JD studies. This article provides a very good overview of the history of the COFPA, the content of the 2013 amendments and the facts and ratios of the recent Canadian cases that show the impact of the government's increasing focus on COFPA enforcement. It also focuses extensively on Transparency International ("TI) and TI's historical criticisms of Canadian enforcement in the area.

However, the article contains what I believe are at least of couple of clear errors in its summary of background law and also fundamentally fails to address the question posed in its title other than a single statement in its conclusion that "it appears Canada is ready to follow the international leaders" without any analysis

or discussion supporting this statement. I found this wholly unsatisfactory. The focus on the TI criticisms is also troubling, because almost all those criticisms preceded the ESTMA introduction and the 2013 amendments to the COPFA. As such, the TI criticisms pertain to a previous legislative regime and the author does not attempt to analyze whether the specific criticisms have been addressed by the recent legislative amendments, which I view as a lost opportunity and a failure to address the question posed in the title.

## **B. AMERICAN JOURNAL ARTICLES**

Allridge, Peter. “The U.K. Bribery Act: The Caffeinated Younger Sibling of the FCPA” (2012) 73 Ohio St LJ 1181.

The author here provides an overview of the historical reluctance of the British authorities to view bribery initiated by British companies operating in foreign countries as an appropriate subject of formal legal sanction. He points out that the eventual adoption in the United Kingdom (“UK”) of the Bribery Act was not a result of domestic forces, but a response to international pressure. However, notwithstanding the reluctance of the British government to align itself with the international anti-bribery revolution, the Bribery Act eventually adopted in 2010 has turned out to be more stringent in some important elements than the US Foreign Corrupt Practices Act (“FCPA”).

This article provides a useful summary of the scope of the Bribery Act along with an overview of recent jurisprudence in the U.K. thereunder. It is interesting in that it demonstrates that the degree of local enthusiasm for a piece of legislation is not necessarily linked with the strength and quality of the legislation ultimately adopted. The Bribery Act is a solid piece of legislation and useful tool in combatting corruption in spite of the fact that enthusiasm for its adoption was lukewarm at best.

Brannigan, Megan R. “Resource Curse in the Wake of the Arab Spring” (2014) 36 Houston J Intl L 535.

This article provides a well-written and well-organized background discussion on current academic perspectives on the causes of the resource curse. For my research, it is a valuable and succinct overview of the leading commentaries on linkage of the resource curse and consideration of undisclosed payments from extractive industry participants as a development issue.

The relevant portions for my research all come in the first half of the article. The second half of the article which focus on the ramifications of the events that comprised the Arab Spring, although interesting, don’t have much relevance to my paper.

Broecker, Christen. “Better the Devil You Know: Home State Approaches to Transnational Corporate Accountability” (2008-2009) 41 NYUJ Int L and Pol 158.

This article provides another good historical analysis of the link between undisclosed extractive sector payments and the resource curse in developing nations. It is particularly interesting as a relatively early work on the topic and for the depth of the insights that it provides for the period in which it was written (ie., 2008). The author proposes that developed nations should be leaders in dealing with corruption in the extractive industries in developing nations by regulating the actions of companies incorporated in their jurisdictions. Over subsequent years, this has proven to a successful methodology as evidenced by the ESTMA and other similar international initiatives.

Burton, Eli G. “Reverse the Curse: Creating a Framework to Mitigate the Resource Curse and Promote Human Rights in Mineral Extraction in Industries in Africa” (2014) 28 *Emory Intl L Rev* 425.

This article also provides a useful and concise summary of the nature of the resource curse, this time focused on diamond mining activities in southern Africa. It reviews the history, successes and failures of an African transparency initiative called the “Kimberley Process” from 2003. The article then proposes a model framework for dealing with disclosure in the mining industry combining elements of the Kimberly process with new mechanisms developed by the author.

The article is interesting in that it provides a different perspective in the extractive sector (diamonds instead of oil) compared to most of the literature that I have reviewed. Moreover, it is particularly useful as an example of an initiative that was birthed in the developing nations of Southern Africa and is therefore an “indigenous initiative” as opposed to the PWYP and EITI initiatives which are both Western in their genesis. Comparison of the approaches of the Kimberly Process to the ETITI Standard may provide some useful insights into the differences between Western and developing nation ideas to combat the same problems.

Collier, Paul. “Laws and Codes for the Resource Curse” (2008) 11 *Yale Human Rts & Dev LJ* 9.

The author, an economics professor at Oxford, presents as his central argument that the priorities and methodologies of the US and other donor western countries in supporting international development are “lopsided”. He points out that billions of dollars in aid are contributed to developing nations annually, but the western world has largely neglected the potential of international standards and laws to promote improvement in developing-nation economic governance. The author reviews academic commentary on the sources of the resource curse and concludes that voluntary standards promulgated through the Organization for Economic Cooperation and Development (“OECD”) hold out the most hope for improving corporate and economic governance in developing nations, and that striving for improved governance should be a critical element on any integrated development policy.

I find this article to be interesting from the perspective that the author supports voluntary standards rather than mandatory standards. This article predates the Indira Carr and Opi Outhwaite article discussed below, which came to a very different conclusion based on their survey of companies operating internationally. In the interim since these articles were published, the pendulum has certainly swung in favor of advocating for mandatory standards and enforceable domestic laws to combat corruption, as evidenced by EITI Standard and the Canadian ESTMA adoption. However, this article remains relevant to explain the evolution of academic opinion in the past 10 years from belief in the ability of voluntary standards to achieve change to the current model of advocating mandatory legislative regimes due to lack of faith in the effectiveness of voluntary measures based on recent observations.

Desai, Deval and Michael Jarvis. "Governance and Accountability in Extractive Industries: Theory and Practice at the World Bank" (2012) 30 J Energy and Nat Resources L 101.

The authors are a law professors from Oxford and a policy specialist from the World Bank, so certainly come from prestigious positions and are clearly well versed in the topic. The article focuses on the recent trend at the World Bank to focus on increasing transparency in extractive industries, particularly through support of the EITI.

The authors outline the risks and limitations that may arise from an overemphasis on transparency to the detriment of other critical factors that are relevant in increasing revenue capture. Ultimately, the authors conclude that all elements of corporate governance are important in improving development results and that a multi-faceted approach to transparency will create more value than merely focusing on the mandatory disclosure model of the EITI. This article is particularly useful in that it provides a counterpoint to the EITI position on disclosure as the core element of securing improved development outcomes.

Fortineau, Eric. "The Fight Against the Extractive Industries Transparency Initiative" (2014) 11:1 Loy U Chicago Intl L Rev 65.

The article focuses on a United States ("US") District Court (Washington D.C.) case that has held that certain provisions of the Dodd-Frank Act relating to extractive sector transparency regulation are invalid by virtue of failing to provide exemptions for host country foreign disclosure prohibitions and also for failure of the Securities and Exchange Commission (the "SEC") to properly implement the provisions of the Dodd-Frank Act as intended by Congress. The US District Court went so far as to characterize the SEC rules as "arbitrary and capricious".

The author goes on to discuss the importance of the policy objectives behind the extractive sector transparency disclosure elements of the Dodd-Frank Act, and states that the US must implement the Dodd-Frank Act in order to retain its position of moral leadership in the fight against global corruption in the extractive sector. Ultimately, the author is critical of the US District Court decision and the arguments of the complainant (the American Petroleum Institute) against the SEC measures implementing the Dodd-

Frank principles which are based on putting US companies at a competitive disadvantage. Between the competing interests, the author argues for the necessity for resource sector transparency as being paramount to any competitive disadvantage incurred and argues that the US should use its influence in support of the international transparency efforts such that the standard of transparency becomes more universal. By attaining universal disclosure rules, the competitive disadvantage for US companies which served as the basis for the US District Court decision in this case would be largely eliminated.

Foster, Lane. "Corruption, Convention and Canadian Law: Responses to OECD Criticism" (2014) 14 *Asper Rev of Intl Bus & Trade L* 251.

This article focuses on a 2011 report issued to Canada by a Working Group of the OECD under the OECD anti-bribery convention. This Phase Three report was significantly critical of Canada's efforts to enhance its internal regulations to limit Canadian companies being complicit in international corruption case at that time.

The article then turns to address Canada's 2013 amendments to the COFPA and the announcement by the government of its intent to table the ESTMA in Parliament, and assesses how those proposed instruments relate to the original criticisms in the 2011 OECD report. The author concludes that the amendments to Canada's foreign corruption legislation represents the most productive steps taken by Canada in recent times and places Canada much further ahead in meeting the OECD expectations.

Gaefle, Roya and Angus Mercer. "Not Starting in Sixth Gear: An Assessment of the U.N. Global Compact's Use of Soft Law as a Global Governance Structure for Corporate Social Responsibility" (2010) 17 *UC Davis J Intl L & Policy* 41.

This article is very similar in tone and thesis to the article above by Paul Collier in that it advocates strongly for the value of soft law policies and instruments as a first-step towards improving global governance structures for corporate social responsibility. The authors argue that attempting to skip the soft law phase and move towards legally-binding legislation will end in frustration as initiatives are thwarted for various purposes. In their view, the UN and other NGO's promulgating voluntary standards fulfill an important role in creating international consensus and improving standards of governance without resorting to domestic hard law instruments.

Of note, Roya Gaefle was also a lecturer at Oxford (where Paul Collier was an economics professor) in the School of International Policy and it leads me to question whether support of soft law options and collaborative approaches to improving corporate governance represented a school of thought back in 2009-2010 when both of these articles were written. I have not found any articles espousing similar positions in the past few years, and it points to the possibility that soft law approaches have been discredited due to the realization that most companies are profit-driven and will only respond to recommendations designed to improve their behavior when acting in the international sphere in response to mandatorily legislated requirements. Again, it seems that the

OECD and EITI in particular have graduated during this interval from soft law initiatives to advocating for mandatory domestic legislation to achieve the desired reforms.

Keith, Norm. “Is Canada’s Anti-Corruption Law in Step with International Trends?” (2014) 15:3 *Business Law International* 223.

The author begins the article by reviewing the 2013 amendments to the COFPA and the relevant case law decided under the COFPA over the past several years. This review is very similar to that completed by Susan Mijares in the *Western Law Journal* article referenced above.

However Norm Keith continues in this article to provide a brief comparative analysis of the US FCPA provisions and the UK Bribery Act provision, along with a brief review of the most recent jurisprudence under each of those statutes. The author here concludes by pointing out specific differences between the legislation and the judicial interpretation on key anti-corruption provisions in each of the three jurisdictions.

On the whole, this is a very concise and useful comparative analysis of the anti-bribery legislation and jurisprudence in Canada, the US and the UK.

Manger, Andrew L. “Drilling for Disclosure: Resource Extraction Issuer Disclosure and *American Petroleum Institute v. SEC*” (2014-2015) 40 *J Corp L* 521.

This article deals with the same subject matter as the Eric Fontineau article above; ie., the case brought by the American Petroleum Institute in US District Court (Washington D.C.) against the SEC with respect to SEC rule 13-q endeavoring to implement Section 1504 of the Dodd-Frank Act.

The author reviews the rationale for the District Court decision striking down the SEC rule as improperly capturing the intent of Congress under the Dodd-Frank Act. The author reiterates that the SEC will need to revise its implementation rules as a result of the District Court ruling, but does not provide specific guidance on how to do so. Compared to the Fontineau article above, this article spends more time summarizing the rationale of the District Court in detail and little time suggesting possible amendments that the SEC could adopt to pass judicial muster on a future challenge. Ultimately, this article is limited to summarizing the rationale for the court decision and discussing its ramifications for industry and does not attempt to critically analyze the court’s assumptions and findings.

Podgorny, Monica & James B. Musgrove. “Foreign Corrupt Practices Laws: Implications for the Canadian Natural Resources Sector” (2014) 14 *Asper Rev Intl Bus & Trade L* 161.

The authors of this article are practitioners at a large Toronto corporate firm, and their practice orientation is demonstrated in the tone of this article. The article is a concise overview of various international anti-corruption initiatives (including the EITI and the OECD Ant-Bribery Convention), the Canadian legislative initiatives (including the

COFPA including the 2013 amendments and the ESTMA), the US FCPA and the UK Anti-Bribery Act. The article goes on to analyze existing Canada case law from the last 10 years and then reviews pending corruption investigations in Canada. This article does not go into significant detail in any single area, but provides the best overview of the various forms of anti-corruption regulations that may be relevant to Canadian firms working abroad of any source that I have found to date. It reads quite similarly to how a textbook would organize and address the topic if this were a significant chapter in a Canadian corporate governance text.

Rahman, Imran. "Drilling for Disclosure After *API v. SEC*: Incentivizing Voluntary Payment Transparency in the Resource Extraction Industry Through Exemptions to Section 1504 of the Dodd-Frank Act" (2015) 21 Sw J Intl L 479.

This is the third article in this bibliography written about the US District Court (Washington, D.C.) decision that struck down the SEC rules implementing Section 1504 of the Dodd-Frank Act in response to a claim filed by the American Petroleum Institute. This article focuses almost exclusively on one element of the decision, namely the finding that SEC Rule 13-q was arbitrary and capricious because of its failure to allow for an exemption for US companies under the mandatory payment disclosure section in the face of home country prohibitions against payment disclosure. The position of the American Petroleum Institute was that this provision would put US companies at a significant competitive disadvantage compared to foreign competitors when operating in those specific jurisdictions which had legislation preventing payment disclosure.

The author points out the practical challenges associated with the resulting judgment (i.e., uncertainty as to the future legal impact of Section 1504 with an effective enforcement mechanism), but stops short of criticizing the court's decision. The article concludes by making recommendations that the author believes are consistent with the court's rationale, including allowing for exemptions for home country prohibitions that have met a certain threshold on some objective standard such as the UN Human Development Index.

I personally feel that the court decision itself is problematic, and rather than trying to frame exemptions for home country prohibitions that do not frustrate the purpose of the Dodd-Frank Act, the US should be focusing on exercising a leadership position abroad to secure universal adoption of mandatory disclosure rules without exemptions so that they playing field is level for all companies. I reach this conclusion because any home jurisdiction prohibition on disclosure is morally problematic at a starting point. What interest does any developing country have in prohibiting the disclosure of source payments other than obfuscation from the public of the amount of payments it has received? I submit that we should not be pandering to this type of regulation in the name of preserving competitive equality. Rather, we should be preventing the participation of our resource companies in those jurisdictions that prohibit disclosure until such countries consent to disclosure of source payments to them.

Therefore, I disagree fundamentally with the recommendations in this article which I believe are indicative of the discredited position that maintaining competitive equality for North American companies operating abroad should trump all other considerations.

Reilkoff, Thea. "Legislating Corporate Social Responsibility: Expanding Social Disclosure Through the Resource Extraction Disclosure Rule" (2013-2014) 98 Minn L Rev 2435.

This article, written by a J.D. candidate at the University of Minnesota, is the fourth article in this bibliography dealing with the US District Court (Washington D.C.) decision in *American Petroleum Institute vs. SEC* that struck down portions of SEC Rule 13-q implementing Section 1504 of the Dodd-Frank Act.

This article differs from the other three in that it devotes a significant amount of space to discussing the historical backdrop to the global transparency initiative and the early US leadership role in pushing for extractive sector transparency. It discussed the developing consensus internationally on the need for mandatory payment disclosure as a means to combatting the resource curse. Ultimately, the author is highly critical of the US District Court Decision in *API v. SEC* and develops a rationale for a clear rebuttal to the court's analysis. The author concludes that the court was in error on several points, supports the sustainability of SEC Rule 13-q as currently drafted and believes that any future court challenges to Rule 13-q should fail. All in all, this article provides a passionate defense of the need for protecting Rule 13-q and provides an interesting counterpoint to the Andrew Manger article that accepts the District Court ruling without critically challenging it. I find it interesting that the article that is most critical of the US District Court ruling is the one written by a J.D. candidate (ie., the most junior of the four authors). Amongst the four articles in this bibliography that address the *API v. SEC* case, this article is the most ambitious and the most aligned with progressive academic commentary on the paramountcy of transparency in this area.

Truelove, Adreanna M. "Oil, Diamonds, and Sunlight: Fostering Human Rights Through Transparency in Revenues from Natural Resources" (2003) 35:1 *Geo J Intl L* 207.

This article comes from the reading list in the International Development Law course that I took this term. I have included it in my annotated bibliography as I found it provided a very insightful description of the nature of the resource curse in the diamond mining industry, analysis of the costs of corruption and diversion of funds on development nations, and a strong rationale as to how disclosure of payments at the source can be effective as an anti-corruption tool in combatting resource-based corruption in developing countries. The author writes with a particularly accessible style and is convincing in her analysis, which I am sure is one of the reasons that Professor Ilg has selected it as required reading in his course.

White, Will. "Oil Corruption and the Department of Justice: FCPA Enforcement and the Energy Industry" (2014) 10:1 *Texas J Oil Gas & Energy L* 182.

The author focuses on the substantive terms of the FCPA legislation against corrupting foreign officials and provides an overview of key US jurisprudence over the past decade where US companies and individuals were prosecuted under the FCPA. The author is critical of elements of the FCPA for being too over-reaching and is also critical of the Department of Justice for its aggressive interpretation of the definition of “foreign officials” under the FCPA.

This article is a departure from the other US-focused articles in this bibliography in that it is focused exclusively on the anti-corruption crusade internationally through the mechanism of FCPA, whereas the other articles are focused primarily on the Dodd-Frank Act implications and mandatory disclosure. I have included this article because it provides a good background analysis into the broader corruption issues in the oil and gas industry internationally, and also includes several statistics that quantify the magnitude of the problem in developing nations.

Woody, Karen. “Securities Law as Foreign Policy” (2014) 15 Nev LJ 297

This article is as an interesting counterpoint to most of the other US articles in this bibliography. The author is a securities and white-collar crime defense attorney. As such, she takes a very different perspective towards the goals of extractive sector transparency in Sections 1502 and 1504 of the Dodd-Frank Act. Section 1504 is the equivalent provision to the ESTMA, whereas Section 1502 is the “blood diamonds” provision that prevents companies from engaging in mineral exploration where conflict is occurring. The author views Section 1502 as representing an unwelcome and unwise attempt to use domestic securities laws to implement foreign policy aims, and also an attempt to co-opt the SEC to provide an enforcement mechanism outside of both its expertise and capacity. However, she categorizes execution of the policy aims of Section 1504 as being within both the expertise and capacity of the SEC and supports the aims of section as general policy.

I found the author’s position on Section 1504 surprising since I assumed that she would oppose all attempts to use domestic securities laws to implement foreign policy goals given her professional background as a defense attorney, but she demonstrated an open-mindedness in her approach in this article. This article demonstrates that, outside of the US District Court in the District of Columbia, there is considerable support and appreciation in the legal community of the importance of the goals of Section 1504 in improving extractive sector transparency.

### **C. FOREIGN JOURNAL ARTICLES OUTSIDE NORTH AMERICA**

Billion, Phillippe. “Extractive Sectors and Illicit Financial Flows” (2011) 11 U4: Christian Michelson Institute 1.

This article is from the in-house periodical published by the Christian Michelson Institute from Bergen, Norway. This international policy organization is funded by a variety of governments (including Canada, Norway, Sweden, Denmark, Germany and Finland) and

is focused on policy initiatives in the justice and development areas. The author is a Professor in Geography at UBC, but also serves in an adjunct role in the Liu Institute for Global Issues.

This work is well-researched and presented in a different format from most of the other articles in the traditional academic journals. It focuses on the sources and effects of illicit cash flows generated from natural resource extraction. The author's thesis is that the international focus on disclosing source payments has value in increasing transparency, but stops short of being fully effective in combatting the source issues that lead to corruption. He suggests that transparency should extend beyond mere reporting of revenues to include licensing, contracts, public expenditures and other elements of production.

I find the author's arguments to be persuasive, and the challenge will be in determining whether I can find enough scope in my Major Paper to incorporate some of these thoughts under the "further actions" analysis in my paper.

Carr, Indira and Opi Outhwaite. "Corruption and Business Integrity: Law, Policy and Company Practices" (2009) 6:3 *Manchester J Intl Economic L* 16.

This article poses the question: Have the anti-corruption strategies that have been in place since the early 1990s had any effect? The authors focus on the OECD Ant-Bribery Convention, the UN Convention Against Corruption, the International Chamber of Commerce and the efforts of several NGO's including Transparency International.

The authors also engaged in a large survey of company officers in the United Kingdom as a basis for determining to what the degree the recommendations of the anti-corruption efforts had taken hold in industry, the reports of which are summarized in this article. The results of the survey demonstrated that the companies engaged in international business were reactive rather than proactive in dealing with corruption issues and were more motivated by the "stick" of sanctions rather than any inherent desire for participating in the global fight against corruption.

I have found this article to be very instructive in explaining why civil-society NGO's ultimately moved towards advocacy for mandatory disclosure models, as this article demonstrates that efforts to engage companies' support in combatting corruption for altruistic motives were failing miserably at the time of the publication of this article. Unfortunately, it seems that many have concluded that mandatory regulation is required because industry is unlikely to respond to voluntary measures.

Carbonier, Gilles. "The Global and Local Governance of Extractive Resources" (2011) 17 *Global Governance* 135.

The author begins by stating that the historical agenda for governance of extractive industries has been driven by industrialized countries to the detriment of developing countries. The failure of the industrialized countries to consider the issues of developing

countries is one of the contributing factors to the existence of the resource curse. He discusses the history of the International Energy Agency, International Energy Forum and the World Trade Organization in developing the current extractive sector corporate governance structure and the deficiencies of the current structure. The article advocates for an international multi-stakeholder initiative comprised of governments, resource sector and NGO's to engage in a major revamp of the international governance structure for extractive industries.

I have included this article due to its discussion of the historical development of the agencies referenced above, which is not included in any of the other sources in this bibliography. It is relevant to understand how the existing resource governance structure developed historically to appreciate the current efforts to move beyond that structure. I would submit that the current EITI initiative and the OECD initiatives are aligned with the type of multi-stakeholder initiatives advocated in this article.

Nolan, Justine. "Refining the Rules of the Game: The Corporate Social Responsibility to Respect Human Rights" (2014) 30:78 *Utrecht J Intl L* 7

The author, a law professor from the University of New South Wales in Australia, brings a different and interesting approach to the anti-corruption discussion. She frames her arguments in terms of the inherent obligations of companies to respect the human rights of individuals where they operate. In the case of corruption, she argues that the negative socio-economic impacts associated with developing nation large-scale diversion of public funds to private hands extends the obligation on corporations to ensure that they are not complicit in such activities as a matter of respecting fundamental human rights.

Much of her arguments are aspirational in nature and not necessarily founded in existing legal frameworks. She advocates for a collaborative approach to enforcement of corporate accountability to respect human rights comprised of government actors, NGO's and corporate organizations to improve and enhance the legal framework. This article is interesting in that it approaches the issue from a fundamentally different perspective than any of the other articles in this bibliography, and is valuable to consider at least as a counterpoint to the traditional arguments raised in the other articles in terms of the legal and moral basis for regulating corporate actions.

Wouters, Jan, Cedric Rengae & Ann Sophie Cloots. "The International Legal Framework Against Corruption: Achievements and Challenges" (2013) 14 *Melbourne J Intl L* 204.

This article is an ambitious collaborative effort that purports to summarize the regulatory frameworks being adopted to combat corruption throughout the world and to place these legislative instruments in an overall context to assess their effectiveness. In scope, the article may be too ambitious for a journal article, and I find that the analysis of each region's anti-corruption initiatives is undertaken very much at a surface level. There is simply too much prospective content to deal with any of the individual national or regional initiatives in any greater depth. However, I still find the summary to be extremely helpful as a research tool for my project in terms of providing a background

framework that can be used as a starting point for more in-depth research on particular topics.

The article concludes by outlining some of the most important issues that arise in multiple jurisdictions and attempts to provide some insight into where international best practices are evolving on specific topics. This is somewhat similar in scope to what I propose to cover in my Major Paper, although this article is much broader in focus by considering anti-corruption initiatives at a macro-level, whereas I am only focusing on extractive sector transparency initiatives. Also, I am limiting the countries that will be the subjects of comparative analysis, whereas this article covers the entire world.

I believe that this article is valuable as a framework and provides several interesting insights not contained in other articles that I have found. My main criticisms are: (1) it is too ambitious in scope of coverage for the periodical format, such that it can only deal with each region at a surface level (ie., the scope would have been more appropriate for a full book); and (2) it summarizes the current laws and initiatives on a country-by-country or region-by-region basis, rather than on an issue by issue basis, and therefore places the emphasis on the reader to distill commonality in approaches.

#### **D. LAW FIRM ONLINE COMMENTARIES**

Boscariol, John W., Robert Glasgow and Kayal Albin. “Canada Brings into Force Payment Disclosure Regime: The Extractive Sector Transparency Measures Act” (14 July 2015), McCarthy Tétrault LLP- Publications, Commentary, online <[www.mccarthy.ca/article\\_detail.aspx?id=7131](http://www.mccarthy.ca/article_detail.aspx?id=7131)>.

Morrison, Mark, Michael Dixon & Jamie Olsen. “Extracting Transparency: New Bill Creates Mandatory Reporting Standards for Canada’s Extractive Industries” (11 November 2014) Blake, Cassels & Graydon LLP- Blakes Bulletin, Commentary, online <[www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=2023](http://www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=2023)>.

Powell, Sarah, et al. “Transparency Requirements Proposed for Payments by Canada's Extractive Industry” (30 October 2014), Davies, Ward Phillips & Vinberg LLP, Resources-Publications, Commentary, online <[www.dwpv.com/en/Resource/Publications/2014/TransparencyRequirementsProposedforPaymentsbyCanadasExtractiveIndustry](http://www.dwpv.com/en/Resource/Publications/2014/TransparencyRequirementsProposedforPaymentsbyCanadasExtractiveIndustry)>.

Siwanowicz, Hellen L. and David Andrews. “Federal Government Issues Guidance Under the Extractive Sector Transparency Measures Act” (22 September 2015) McMillan LLP- News & Knowledge- Guidance, Commentary, online <[www.mondaq.com/canada/x/428736/Oil+Gas+Electricity/Federal+Government+Issues+Guidance+under+the+Extractive+Sector+Transparency+Measures+Act](http://www.mondaq.com/canada/x/428736/Oil+Gas+Electricity/Federal+Government+Issues+Guidance+under+the+Extractive+Sector+Transparency+Measures+Act)>.

Syer, Tim, et al. “Transparency Obligations for the Canadian Extractive Sector: Will Canada be Ready to Lead on April 1?” (25 February 2015) Osler, Hoskin & Harcourt LLP- Resources, Commentary, online <[ww.osler.com/en/resources/regulations/2015/transparencyobligationsforthecanadianextractivesector](http://www.osler.com/en/resources/regulations/2015/transparencyobligationsforthecanadianextractivesector)>.

## **E. OTHER ONLINE SOURCES**

David Eaves. “Canada’s Opaque Transparency- An Open Data Failure” (4 March 2014) *If Writing Is a Muscle, This is My Gym* (blog), online <[eaves.ca/2014/03/04/canadas-opaque-transparency-an-open-data-failure](http://eaves.ca/2014/03/04/canadas-opaque-transparency-an-open-data-failure)>.

EITI Canada. “Securing Public Engagement in Natural Resources Management” (undated-accessed October 25, 2015), EITI Canada website, online <[eiti.org/files/page/canada\\_eiti\\_brochure.pdf](http://eiti.org/files/page/canada_eiti_brochure.pdf)>

EITI International Secretariat. *The EITI Standard, Revised Version 1.1.2015* (2015) [unpublished, monograph] online <[eiti.org/files/English\\_EITI\\_STANDARD.pdf](http://eiti.org/files/English_EITI_STANDARD.pdf)>.

Natural Resources Canada. “Developing Mandatory Reporting Standards for the Extractive Sector” (March 2014), Government of Canada website, online: <<http://open.canada.ca/en/content/developing-mandatory-reporting-standards-extractive-sector>>.

Natural Resources Canada. “Extractive Sector Transparency Measures Act- Guidance” (29 July 2015) Government of Canada website, online <[http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/estma/ESTMA\\_Guidance\\_e.pdf](http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/estma/ESTMA_Guidance_e.pdf)>.

Natural Resources Canada. “Reporting Template” (29 July 2015) Government of Canada website, online <[http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/estma/Reporting\\_Template\\_EN.pdf](http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/estma/Reporting_Template_EN.pdf)>.

Natural Resources Canada. “Technical Reporting Specifications” (1 August 2015) Government of Canada website, online <[www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/estma/Technical\\_Reporting\\_Specifications\\_EN.pdf](http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/estma/Technical_Reporting_Specifications_EN.pdf)>.

Office of Canada’s Minister of Natural Resources. “Harper Government Delivers on Commitment to Enhance Transparency of Extractive Industry” (1 June 2015) News Release, online <[news.gc.ca/web/articleen.do?mthd=tp&ctr.page=1&nid=982369&ctr.tp1D=1](http://news.gc.ca/web/articleen.do?mthd=tp&ctr.page=1&nid=982369&ctr.tp1D=1)>.

Publish What You Pay Canada and the Natural Resources Governance Institute. “The Extractive Sector Transparency Measures Act” (2015), online <[www.resourcegovernance.org/sites/default/files/PWYP-NRGI\\_CanadaBriefing20141216.pdf](http://www.resourcegovernance.org/sites/default/files/PWYP-NRGI_CanadaBriefing20141216.pdf)>.

Van Riet, Marinke and George Roter. “Canada Moves Closer to Transparency in Mining & Energy”, Editorial, *The Toronto Star* (7 March 2014), online: <[www.thestar.com/opinion/commentary/2014/03/07/canada\\_moves\\_closer\\_to\\_transparency\\_in\\_mining\\_and\\_energy.html](http://www.thestar.com/opinion/commentary/2014/03/07/canada_moves_closer_to_transparency_in_mining_and_energy.html)>.

## **F. PRESENTATIONS**

Cole, Avril. "Canada's New Payments Disclosure Regime: The Extractive Sector Transparency Act" Paper delivered at the Canada-South Africa Chamber of Commerce 16<sup>th</sup> Risk Mitigation Seminar, London, U.K. (30 October 2015) [unpublished].

THE INTERPRETATION OF “DUE REGARD” IN THE UNITED NATIONS  
CONVENTION ON THE LAW OF THE SEA: A CASE STUDY

ANNOTATED BIBLIOGRAPHY

Julia Gaunce

The project is a study of the interpretation of “due regard” for the purpose of the *United Nations Convention on the Law of the Sea* (LOSC) for purposes both intrinsic (to establish guidelines, if not a rule, by which interpretations of “due regard” can be predicted) and instrumental (to provide insight into the interpretation of international law principles that define the relation between sovereign states).

This preliminary annotated bibliography includes sections on relevant general textbooks, authoritative LOSC commentary, and secondary literature on treaty interpretation issues.

GENERAL TEXTS

Aust, Anthony. *Modern Treaty Law and Practice*, 2<sup>nd</sup> ed (Cambridge: Cambridge University Press, 2007).

This leading textbook provides a broad overview of treaty law. The work’s particularity is in its emphasis is on practical contexts apart from disputes (for example, international relations and diplomacy) in which, the author argues, principles of treaty law are most fully illustrated. The book’s contribution to this project lies in its authoritative discussion of the *Vienna Convention on the Law of Treaties* (VCLT) and its application in practice.

Rothwell, Donald R. & Tim Stephens. *The International Law of the Sea*. (Oxford and Portland Oregon: Hart Publishing, 2010).

This textbook provides an overview of core concepts of the law of the sea. Its two particular emphases are the evolution of the law of the sea and LOSC, both of which are especially relevant to this project’s consideration of the relation between the “due regard” obligation in LOSC and other principles in international law.

Crawford, James. *Brownlie’s Principles of International Law*, 8<sup>th</sup> ed (Oxford: Oxford University Press, 2012).

This long-leading textbook on public international law is, in its eight edition, taken over and revised by the eminent scholar, practitioner and former ICJ judge James Crawford. The work is widely cited by scholars, practitioners and in jurisprudence. It is particularly helpful for its concise and authoritative treatment of general principles (and the system) of international law.

#### COMMENTARY

Belsky, Martin H et al. “Due regard” in George K Walker, ed. *Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention* (Leiden: Martinus Nijhoff Publishers, 2011).

This commentary is by the International Law Association, American Branch, Law of the Sea Committee. The book organizes, by term, references to undefined terms within LOSC along with related commentary. The work contributes to this project in two respects: it compiles references to “due regard” toward an interpretation of the meaning of the term and, at once, it confirms that such meaning remains elusive.

Nordquist, Myron H, Shabtai Rosenne & Louis B. Sohn. *United Nations Convention on the Law of the Sea 1982: A Commentary*, volumes I to VII (Dordrecht: Martinus Nijhoff Publishers, 1985-2011).

Sometimes referred to as the *Virginia Commentary* (being associated with the Center for Oceans Law and Policy at the University of Virginia), this is the authoritative published compilation of LOSC primary source references, organized by LOSC article. The book contains commentary with reference to UN document numbers, not copies of the documents themselves. It is widely cited by the the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ) and arbitral tribunals under LOSC in respect of LOSC preparatory works, and is key to this project’s consideration of same in respect of “due regard”.

#### TREATY INTERPRETATION

Boyle, Alan E. “Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction” (1997) 46 Intl & Comp LQ 37.

This article concludes that (at the time of writing) it is too early to determine whether the variety of dispute mechanisms available under LOSC will result in fragmentation of the law of the sea. In the course of coming to that conclusion, the articles sets out a usefully authoritative discussion of LOSC jurisdictional issues and cautionary observations that are resonant with and contribute to this case study on the interpretation of “due regard”, including: LOSC contains many inherently uncertain or ambiguous articles and does not include any mechanism for ensuring uniformity of interpretation or outcome across fora, disputes regarding the exclusive economic zone will be most complex because this is a legal regime of concurrent rights, and under LOSC ITLOS has jurisdiction to decide matters of general international law not part of the law of the sea.

Klabbers, Jan. “International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?” (2003) 50 NILR 267.

This article proposes that recourse to preparatory works generally declines in the life of a treaty as interpretative consensus on the meaning of terms is established, and poses the separate question whether interpretation generally (at the time of writing) is less “concerned with” preparatory works. Its conclusion is that the use of history, as exemplified by recourse to preparatory work in interpretation, and interpretative method generally, is essentially convenient—that is, political. The article contributes to this project’s proposition that method in the interpretation of “due regard” has purposes besides interpretation *per se*.

\_\_\_\_\_. “Virtuous Interpretation” in Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris, eds, *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Leiden: Martinus Nijhoff/Brill, 2010) 17.

The article argues against a mechanistic reliance on formal rules of treaty interpretation and advocates instead an interpretative practice that accords with the “virtues” of recognition of the multiplicity of possible interpretations in any given circumstance, attention to past interpretations, integrity in reaching conclusions, and transparency. The article’s contribution to this project lies in its relative currency with respect to doctrinal debates on treaty interpretation, its useful overview of various positions in such debates, and its depth of reference to the literature, all of which contributes to a study of the interpretation of “due regard”.

Linderfalk, Ulf. “Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation” (2007) *Nethl Intl L Rev* 133.

This article argues, *contra* Stephen Schwebel and others, that treaty interpretation is correct only to the extent that it accords literally with Articles 31 to 33 of the VCLT, and that preparatory works may validly be used only when meaning cannot be established first by primary methods. The article is a useful representation of this position in debates about the use of preparatory works, though arguably the position itself has largely been overtaken.

Mortenen, Julian Davis. “The *Travaux* of *Travaux*: Is the Vienna Convention Hostile to Drafting History?” (2013) 107 *Am J Intl L* 780.

This article deftly sets out an exhaustive analysis of the preparatory works related to Articles 31 to 33 of the *Vienna Convention on the Law of Treaties* to demonstrate that these provisions were intended to exclude only those interpretative methods that would entirely disassociate meaning from the text of a treaty. Its contribution to this project is its imaginative reconciliation of opposing positions on the the use of preparatory works, and its conclusion that recourse to preparatory work can be justified under the VCLT for every interpretation.

Ris, Martin. “Treaty Interpretation and ICJ Recourse to *Travaux Préparatoires*: Towards

a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties” (1991) 14 BC Intl & Comparative L Rev 111.

This article surveys the use of preparatory work in the interpretation of treaties by the ICJ, with the aim of identifying the Court’s interpretative rhetoric and practice in this regard and the extent to which these diverge. The author argues that inconsistencies between the Court’s rhetoric and practice are symptomatic of the political sensitivity of its jurisdiction over sovereign states. The author proposes amendments to the VCLT to reconcile such inconsistencies. Although proposed amendment of the VCLT is unrealistic, the article contributes to this project both in respect of its conclusions about the disjunction between rhetoric and practice by the ICJ and to some extent by providing a useful model for the analysis of the interpretation of LOSC.

Schwebel, Stephen M. “May Preparatory Work Be Used to Correct Rather Than Confirm the ‘Clear’ Meaning of a Treaty Provision?” in J. Makarczyk, ed, *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, (The Hague: Kluwer Law International, 1996) 541.

Written by a former judge and president of the International Court of Justice, this is an authoritative and influential article in the literature on the use of preparatory works in treaty interpretation. The article takes the position that a literal reading of Articles 31 and 32 of the VCLT (whereby such recourse is a strictly supplementary procedure, and only to confirm an interpretation otherwise determined) is unrealistic, inadequate and incorrect. On the contrary, Schwebel writes, custom, state practice and judicial precedent all confirm that preparatory work may be and is used throughout interpretation, to inform, confirm and correct interpretations. The article is central to this project’s proposition about and analysis of the interpretation of “due regard”.

## **Annotated Bibliography**

**Paul Grenon**

My research question is as follows. Can underground coal gasification, in conjunction with carbon capture and storage techniques, be used to produce coal-fired electrical power in Alberta in a way that is compliant with the requirements of the CLP and the agreement made by Canada at the 2015 Paris Climate Conference.

### **Legislation**

Bill 24, *Carbon Capture and Storage Statutes Amendment Act*, 3<sup>rd</sup> Sess, 27<sup>th</sup> Leg, Alberta 2010.

*Carbon Capture and Storage Funding Act*, SAB 2009, c C-2.5.

*Coal Conservation Act*, RSA 2000, c C-17 s 28.

*Coal Conservation Regulations*, Alta Reg 270/1981.

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

*Oil and Gas Conservation Rules*, Alta Reg 151/1971.

*Pipeline Act*, RSA 2000, c P-15.

*Pipeline Regulation*, Alta Reg 91/2005.

### **Secondary Material: Articles**

Bankes, Nigel. "Mutatis Mutandis: The ERCB Speaks (in Latin) on the Subject of Carbon Capture and Storage" (2010) 109 CIRL 4.

The purpose of this article is to discuss the announcement of the ERCB about how it would regulate CCS projects going forward. The article provides an overview of the ERCB's proposal and then provides comments about the proposal. The summary of the article is that the ERCB's announcement does not go far enough and that the ERCB and Alberta government are falling behind in the implementation and encouragement of CCS. The audience of the article is those in the legal community and likely those familiar with natural resource regulation in Canada and probably Alberta. This is an authoritative article as Nigel Bankes is a renowned author on natural resource law topics. That being said, the article is five years old and should not be relied on as a summary of the current regulations of CCS without research confirming no changes have been made.

Driesen, David M. "Phasing Out Fossil Fuels" (2014) 38 Nova L Rev 523.

The purpose of this article is to propose that the use of fossil fuels as an energy source be stopped in order to prevent climate change. The article supports this proposition by presenting the case for the necessity of the phase out. Then, the article looks at how quickly the phase out must occur to prevent irreparable climate change. Finally, suggested policy mechanisms to implement the phase out are discussed. The audience for this article is people involved in the legal community. The scientific background portion of the paper explains the scientific argument for fossil fuel phase out in a concise but not overly simplistic manner. The policy portion of the article is more complex and requires some understanding of legal mechanisms. The article is well cited and well researched. However, it should not be relied on as having all the answers to a fossil fuel phase out as the author admits his answers are only some of many suggestions.

Kalkbrenner, Astrid. "Underground Coal Gasification: A Regulatory Framework for Alberta" (2014) 51 *Alta L Rev* 525.

The purpose of this article is to describe Alberta's UCG regulatory framework and propose Alberta's framework as a model for other jurisdictions. The article supports its claim by focusing on the flexibility Alberta's UCG regulations offer. It also provides a historical overview of the UCG process. Finally, the paper explains Alberta's property regime to give context to how the UCG regulations developed.

The author's intended audience appears to be those with at least some familiarity with natural resource law jargon. This is a fairly authoritative source as it was published in 2014 and the author's research with regards to regulation of UCG in Alberta was very in-depth and comprehensive.

Massicotte, Michael G, Alan L Ross & Chidinma B Thompson. "The Changing Legislation and Regulation of Carbon Capture and Storage: Impacts on Purpose, Policy, and Projects" (2011) 49 *Alta L Rev* 305.

This article discusses the government of Alberta's willingness to implement CCS technology to reduce CO<sup>2</sup> emissions. The article considers the *Carbon Capture and Storage Statutes Amendment Act* and the possible impact the legislation will have on Alberta. The article delves deeply into many possible issues that may arise with CCS in Alberta. Now that four years have passed since the writing of the article I will need to research to see if any of the potential issues the article highlighted have come to pass.

Of particular interest in this article is the comparison it draws between Alberta and Australia's CCS regimes. This will likely be useful in two ways. First, it provides a useful template on how to compare the legislation from Alberta and Australia. Second, it can help me determine how closely related Australia's CCS legislation is with Alberta, which will be a good indicator for the UCG regulations as the two are closely connected.

McCachen, Michael W et al. "Petroleum Law Edition: Recent Regulatory and Legislative Developments of Interest to Oil and Gas Lawyers" (2010) 47 Alta L Rev 529.

The purpose of this article is to update lawyers on recent regulatory and legislative developments that may affect those working in oil and gas law. Of interest to the research aimed at UCG is the section on coal gasification. That section discusses the approval under the OGCA of the Swan Hills project. The section of the article provides an overview of the approval process. The article is authoritative as Michael McCachen is a well respected oil and gas lawyer in Calgary. That being said, the article does not provide much detail beyond a brief overview.

Meadows, Teresa & Tony Crossman. "A Tale of Two Provinces: Imposing Greenhouse Gas Emissions Constraints Through Law and Policy in Alberta and British Columbia" (2010) 47 Alta L Rev 421.

The purpose of this article is to compare the legislative responses of Alberta and British Columbia as both provinces attempt to deal with greenhouse gas emissions at a provincial level. Of particular interest to my research is the portion of the article that considers carbon trading programs and CCS projects. The audience of this article is someone that is familiar with the climate change debate and the way it has influenced the development of natural resources. The source is authoritative as it is cited by other articles I have come across and the paper goes into quite a lot of detail. It is a useful overview but more research will be required to update the article to reflect policy changes made in the last five years.

Randolph, Justus J. "A Guide to Writing Dissertation Literature Review", (2009) 14:13 Practical Assessment, Research & Evaluation 1.

Rohleder, Jennifer. "The Buzz About Clean Coal" (2006) 7 Sust Dev L & Poly 21.

The purpose of this article is to provide a brief explanation of what clean coal technology is and how it has developed over the last few years. The focus of the article is on providing a basic understanding of the key components of CCT and what the development of CCT hopes to accomplish. This work is aimed at an audience that is unfamiliar with CCT. The article is not very authoritative as it is only a short piece based primarily on research from two pieces, one of which was a BBC news story.

Stracher, Glenn B. "Coal Fires Burning Around the World: A Global Catastrophe" (2004) 59 Int'l J Coal Geo 1.

Sury, Martin, et al. *Review of Environmental Issues of Underground Coal Gasification* (Report On COAL R272, November 2004), online: Stanford <<http://large.stanford.edu/courses/2014/ph240/cui2/docs/file19154.pdf>>.

This is a scientific article the purpose of which is to examine the environmental issues applicable to UCG. The article does a good job addressing and providing an overview of the issues that must be addressed when considering an UCG project. The author is writing for a knowledgeable audience that has the ability to understand technical language. The point of view of the author is one of an unbiased observer that is reviewing the scientific evidence before them to come to a conclusion. The article is from 2004, however, that does not necessarily decrease the authoritativeness of the article as the science behind UCG is fairly established. That being said, this article should not be relied upon as a stand alone article without more recent scientific and environmental data.

### **Other Materials**

Alberta Energy. “Carbon Capture and Storage”, online: Alberta Energy <<http://www.energy.alberta.ca/Initiatives/1438.asp>>.

\_\_\_\_\_. “Electricity Facts”, online: Alberta Energy <<http://www.energy.alberta.ca/Electricity/681.asp>>.

Alberta Energy Regulator. *Alberta’s Energy Reserves 2013 and Supply/Demand Outlook 2014-2023*, online: Alberta Energy Regulator <<https://www.aer.ca/documents/sts/ST98/ST98-2014.pdf>>.

\_\_\_\_\_. *Directive 020: Well Abandonment*, online: Alberta Energy Regulator <<https://www.aer.ca/documents/directives/Directive020.pdf>>.

\_\_\_\_\_. *Directive 061: How to Apply for Government Approval of Coal Projects in Alberta*, online: Alberta Energy Regulator <<https://www.aer.ca/documents/directives/Directive061.pdf>>.

“Alberta’s new greenhouse gas rules may prove costly, says energy industry”, *CBC News* (26 June 2015) online: <<http://www.cbc.ca/news/canada/calgary/alberta-s-new-greenhouse-gas-rules-may-prove-costly-says-energy-industry-1.3128532>>.

“Alberta’s new greenhouse gas rules may prove costly, says energy industry”, *CBC News* (26 June 2015) online: <<http://www.cbc.ca/news/canada/calgary/alberta-s-new-greenhouse-gas-rules-may-prove-costly-says-energy-industry-1.3128532>>.

“Canada Pulls Out of Kyoto Protocol” *CBC News* (12 December 2011), online: <<http://www.cbc.ca/news/politics/canada-pulls-out-of-kyoto-protocol-1.999072>>.

“Crude Oil”, *Nasdaq* (30 October 2015) online: <<http://www.nasdaq.com/markets/crude-oil.aspx?timeframe=18m>>.

Derworiz, Colette. "Coal industry warns of mine closures, blasts NDP government's climate plan" *The Calgary Herald* (26 November 2015), online: The Calgary Herald <<http://calgaryherald.com/news/local-news/coal-industry-warns-of-mine-closures-blasts-ndp-governments-climate-plan>>.

Goldenberg, Suzanne et al. "Paris climate deal: nearly 200 nations sign in end of fossil fuel era" *The Guardian* (12 December 2015) online: The Guardian <<http://www.theguardian.com/environment/2015/dec/12/paris-climate-deal-200-nations-sign-finish-fossil-fuel-era>>.

The purpose of this article is to summarize the events of the 2015 Paris Climate Conference. This is a newspaper article so its authoritative value is limited. That being said, the Paris Climate Conference just concluded and newspaper articles are a fairly good source to rely on for news updates. The aim of the authors in this article is to provide an unbiased accounting of the accomplishments of the Paris Climate Conference. The article does not provide a scientific look into the likelihood of the Paris agreement making a significant impact on climate change. It can however be relied on as an overview of how the negotiations took place and what were some of the key elements to the agreement.

Gosden, Emily. "Fracking Doesn't Contaminate Water Supplies, Faulty Shale Gas Wells Do" *The Telegraph* (15 September 2014), online: The Telegraph <<http://www.telegraph.co.uk/news/earth/energy/fracking/11097487/Fracking-doesnt-contaminate-water-supplies-faulty-shale-gas-wells-do.html>>.

Government of Alberta. *Alberta's 2008 Climate Change Strategy: Responsibility/Leadership/Action* (January 2008), online: Government of Alberta <<http://esrd.alberta.ca/focus/alberta-and-climate-change/climate-change-strategy/documents/AlbertaClimateChangeStrategy-2008.pdf>> [Climate Change Strategy].

---

\_\_\_\_\_. *Carbon pricing*, online: Government of Alberta <<http://alberta.ca/climate/carbon-pricing.cfm>>.

---

\_\_\_\_\_. *Climate Leadership Plan will protect Albertans' health, environment and economy* (22 November 2015), online: Government of Alberta <<http://alberta.ca/release.cfm?xID=38885E74F7B63-A62D-D1D2-E7BCF6A98D616C09>>.

---

\_\_\_\_\_. *Coal and electricity*, online: Government of Alberta <<http://alberta.ca/climate/coal-electricity.cfm>>.

---

\_\_\_\_\_. *Launching Alberta's Energy Future: Provincial Energy Strategy* (2008), online: Alberta Energy <[http://www.energy.alberta.ca/Org/pdfs/AB\\_ProvincialEnergyStrategy.pdf](http://www.energy.alberta.ca/Org/pdfs/AB_ProvincialEnergyStrategy.pdf)>.

“Integrated Gasification Combined Cycle (IGCC)”, online: Source Watch <[http://www.sourcewatch.org/index.php/Integrated\\_Gasification\\_Combined\\_Cycle\\_%28IGCC%29#Proposed\\_IGCC\\_Plants](http://www.sourcewatch.org/index.php/Integrated_Gasification_Combined_Cycle_%28IGCC%29#Proposed_IGCC_Plants)>.

International Energy Agency. *World Energy Outlook 2014* (France, 2014), online: International Energy Agency <<http://www.iea.org>>.

The purpose of this report is to provide a comprehensive overview of the world's energy outlook. The report is based on scientific data but is written in a clear and succinct way so those throughout the world's energy industry can understand the report without requiring specific expertise. The IEA is an authoritative agency and well respected throughout the world. Further, the yearly World Energy Outlook is highly respected. That being said, this is the 2014 version. The 2015 version was just released and will have updated facts, figures, and projections that should be consulted.

Jones, Jeffrey. “Alberta's coal-phaseout plan receives lukewarm praise from energy corps” *The Globe and Mail* (23 November 2015), online <[http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/albertas-coal-phaseout-plan-receives-lukewarm-praise-from-energy-corps/article27442414/?cmpid=rss1&click=sf\\_globe](http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/albertas-coal-phaseout-plan-receives-lukewarm-praise-from-energy-corps/article27442414/?cmpid=rss1&click=sf_globe)>.

This article examines the recent Climate Leadership Plan announced by Alberta's NDP government. The article does so by focusing on those that disagree with the limits placed on the coal industry. This is a newspaper article so it is not as authoritative as a journal article. That being said, as the Climate Leadership Plan is such a new development, newspaper articles are one of the best sources available for current information. Reliance on this article should be tempered as the article is written with a focus on the negatives of the Climate Leadership Plan.

“Natural Gas”, *Nasdaq* (30 October 2015) online: <<http://www.nasdaq.com/markets/natural-gas.aspx?timeframe=18m>>.

Pana, C. *Review of Underground Coal Gasification with Reference to Alberta's Potential* (Alberta: Energy Resources Conservation Board/ Alberta Geological Survey 2009), online: Alberta Government <[http://www.ags.gov.ab.ca/publications/OFR/PDF/OFR\\_2009\\_10.PDF](http://www.ags.gov.ab.ca/publications/OFR/PDF/OFR_2009_10.PDF)>.

This report is an in-depth review and consideration of Alberta's potential for UCG. It is a scientific report that focuses on the UCG process and the necessary variables required for a successful UCG project. The report then considers potential viable areas in

Alberta which could be developed, coming to the conclusion that there are multiple viable locations for UCG in Alberta.

This report focuses on scientific factors as opposed to legal impediments to UCG. The audience of the report is those with some technical expertise or at least understanding of fossil fuel exploration. The report is authoritative in that it is the most recent and in-depth government document discussing the applicability of UCG in Alberta.

Stark, Erika. “‘What is she basing this on?’ Opposition totally confused as new climate minister says Alberta can suddenly meet emissions targets” *The Calgary Herald* (20 March 2015), online: The Calgary Herald <<http://calgaryherald.com/storyline/what-is-she-basing-this-on-opposition-totally-confused-as-new-climate-minister-says-alberta-can-suddenly-meet-emissions-targets>>.

“Technology”, online: Coal Association of Canada <<http://www.coal.ca/technology/>>.

United Nations Treaty Collection, *Kyoto Protocol*, online: United Nations <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-a&chapter=27&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&lang=en)>.

Varcoe, Chris. “What you need to know about the carbon tax” *The Calgary Herald* (23 November 2015), online: The Calgary Herald <<http://calgaryherald.com/news/local-news/understanding-the-carbon-tax>>.

UNIVERSITY OF CALGARY

FACULTY OF LAW

LAW 703: LEGAL RESEARCH AND METHODOLOGY

ANNOTATED BIBLIOGRAPHY FOR A PROJECT ENTITLED

“PUBLIC INTEREST REGULATION OF NON-RENEWABLE NATURAL RESOURCE FUNDS: A COMPARATIVE CASE STUDY OF THE ALBERTA HERITAGE TRUST FUND, THE ALASKA PERMANENT FUND AND NORWAY’S GOVERNMENT PENSION FUND”

BY

TEMITOPE TUNBI ONIFADE

DECEMBER 2015

## **TITLE**

Public Interest Regulation of Non-renewable Natural Resource Funds: A Comparative Case Study of the Alberta Heritage Trust Fund, the Alaska Permanent Fund and the Government Pension Fund of Norway

## **NAME**

Temitope Tunbi Onifade

## **DESCRIPTION OF PROPOSED RESEARCH PROJECT**

My project will examine how the regulation of non-renewable natural resource funds (NNRFs) could advance public interests. NNRFs are commodity funds, a subset of sovereign wealth funds, derived from non-renewable natural resource revenues.

My research question is: How should NNRFs be regulated to advance public interests embedded in their stated policy objectives? In this context, public interests refer to intergenerational justice, intragenerational justice and economic resilience. These three interests revolve around people generally and collectively, hence the reason they are described as public. I will answer the research question by comparing the regulatory systems of the Alberta Heritage Trust Fund, the Alaska Permanent Fund and Norway's Government Pension Fund as case studies, with the aim of producing generalisable lessons.

I plan to employ the doctrinal, comparative case study, literature review, hermeneutics, and qualitative analysis methods in answering my research question. These methods are suitable for reasons and sections outlined in my restatement of proposed research project.

## ANNOTATION

### SECONDARY MATERIAL: BOOKS

Zucker, Ross. *Democratic Distributive Justice* (Cambridge: Cambridge University Press, 2000).

The author discusses the regulation of sovereign wealth funds, partly from a public policy perspective but mostly from a corporate governance point of view, claiming that the United States (US) Foreign Investment and National Security Act (FINSA), a unilateral national regulation on foreign investment emphasizing sovereign wealth funds and designed mainly to ensure their transparency, is unnecessary and may be harmful for the US capital markets and overall economy. His reasoning is that, under the guise of ensuring transparency, the US enacted the FINSA as a governance structure to unilaterally deal with the challenges that have emerged with the increased investment inflow of sovereign wealth funds in the US, with the possibility of creating political and bureaucratic delays, despite the fact that the transparency of sovereign wealth funds does not depend on the governance structure.

Because it mostly proceeds from a corporate governance point of view, the argument of the author pre-empts other considerations behind sovereign wealth funds, for example non-business interests that could warrant the government's unilateral regulation. Also, there are claims that the author does not back by evidence or logic, for example on the point that the transparency of sovereign wealth funds is not tied to the governance structure.

The public policy contributions of the author are relevant to my thesis, including the information on the history and transparency of sovereign wealth funds. I will also critique the book in setting a context for my research.

### SECONDARY MATERIAL: JOURNAL ARTICLES

Backer, Larry Catá. "The Norwegian Sovereign Wealth Fund: Between Private and Public" (2009) 40 *Geo J Intl L* 1271.

Backer argues that the constitution and operation of the Norwegian sovereign wealth fund, the Government Pension Fund Global, shows that the rationale behind the prevailing approaches to the regulation of sovereign wealth funds fails as a principled basis for understanding how these funds work. The Government Pension Fund Global is formally public but functionally private; that is, it is regulated as a public property but operated as a private business. The author concludes that, given this public-private model, publicly regulating a sovereign wealth fund to drive a policy objective does not make it less of a private business, hence the prevailing regulatory rationale that sovereign wealth funds should either be public or private entities rather than combining public-private features fails as a principled basis for understanding how these funds work.

This article provides useful analysis of how a sovereign wealth fund could be understood, especially in terms of its public-private dichotomy. Despite the increased criticism of sovereign wealth funds as advancing public policy interests rather than private profit-maximisation interests, the author has shown that both public and private interests of sovereign wealth funds are not necessarily symmetric when put in proper perspectives.

The most relevant part of this article's contribution to my thesis is on the separation of the investment and political functions of the Norwegian model. This contribution challenges the reasoning of a majority of authors on the public-private dichotomy of sovereign wealth funds, and will support my arguments on the value of separating administrative and business control in the management of these funds.

Baena, Ce'sar, Benoît Sévi, & Allan Warrack. "Funds from Non-renewable Energy Resources: Policy Lessons from Alaska and Alberta" (2012) 51 *Energy Pol'y* 569-577.

The article employs Alberta and Alaska as comparative case studies to evaluate the performance of funds in managing natural resources wealth, focusing on their potentials for solving resource curse problems. It explores the potential of a fund as an intergenerational equity and economic resilience tool, submitting that the Alaskan fund, with its emphasis on legal residents, effectively drives intergenerational equity and economic resilience goals, while the Alberta fund, which experiences government predomination, substantially fails to drive these goals.

The authors fail to justify why they choose intergenerational equity and economic resilience as the objectives that a fund should target. This is an error since there are other goals that funds could equally aim at.

Nonetheless, this article discusses two of the three public interests, intergenerational equity and economic resilience, that my thesis will focus on. The article will form a starting point for my scholarly discussion of these interests, as well as a source to critique.

Bantekas, Ilias. "Natural Resource Revenue Sharing Schemes (Trust Funds) in International Law" (2005) LII *Nethl Intl L Rev* 31.

Bantekas discusses how the management of natural resources revenues could combat poverty and promote sustainable development. The author examines how the principle of permanent sovereignty emerged to liberate ex-colonies from their colonial past and assigned them the rights over natural resources, identifying the polarity of people's ownership and government control of subsoil resources as a central issue in the liberation movement.

It is not clear how the author has justified the focus of his article: how natural resources could combat poverty and promote sustainable development. The article seems to focus more on establishing the right of citizens to natural resource revenues, not how the access to or existence of these revenues could combat poverty and promote sustainable development.

However, the contribution of the article on the rights of citizens to natural resource revenues is useful for setting a background for my thesis. I plan to adopt its arguments on why citizens ought to have rights to natural resource revenues, which in turn could support public stake on natural resource funds.

Miranda, Lillian Aponte. "The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human rights, and Peoples-based Development" (2012) 45 Vand J Transnat'l L 785.

Miranda evaluates the emergence of the principle of permanent sovereignty against the context of decolonization in international law, and claims that the principle emerged to protect peoples— which she defines as indigenous groups and citizens— generally, and could be reconciled with the right to self-determination. She provides arguments on the bases of sovereignty, human rights, and good governance in justifying her claim, submitting that her view challenges the absolute ownership claims of states and might advance the right of peoples to economic rent.

Unlike most other publications on permanent sovereignty, this article directly connects the principle of permanent sovereignty with the right to economic rent. However, since the principle operates in international law where states are the major actors, the article fails to discuss how it could advance access to economic rent within national territories.

I will use this article along with other relevant materials in the introductory section of my thesis to establish that people could claim rights to economic rent derived from the exploitation of non-renewable natural resources, thus showing that they have a public stake. I will also critique the article under the literature review section to show its deficiency on how permanent sovereignty over natural resources could advance domestic access to economic rents, one of which is through the administration of benefits under natural resource funds.

Mumey, Glen & Joseph Osterman. "Alberta Heritage Fund: Measuring Value and Achievement" (1990) XVI: 1 Can Public Policy 29.

The paper examines the quality of information provided by the annual reports on the Alberta Heritage Savings Trust Fund, presenting alternative evaluations of the size and performance of the fund based on the financial instruments of the fund and the three goals of saving for the future, strengthening and diversifying the economy, and improving the quality of life of Albertans. In their examination, the authors compare the Alberta Heritage Trust Fund with the Alaska Permanent Fund, concluding that the value and investment performance of the former are affected by its accounting techniques and conflicting goals.

While the authors claim to provide an alternative evaluation system, they do not show how their alternative model differs from the existing system employed in the annual reports, and what their alternative adds to this existing system. Hence, it is not clear whether this alternative is better or otherwise.

Nevertheless, this article, although focusing on accounting, provides hints on the variables that could affect the evaluation outcomes of a non-renewable natural resource fund. The finding of the article serves as a caution on the need for a careful evaluation of not only the fund of Alberta but also those of Norway and Alaska, and the comparison of these funds.

Onifade, Temitope Tunbi. "Peoples-based Permanent Sovereignty over Natural Resources: Toward Functional Distributive Justice?" (2015) 16:4 Human Rights Rev 343.

Relying on the doctrine of peoples-based permanent sovereignty over natural resources, I investigate the rights citizens have over natural resources in view of the disconnection between the international law ideal that people own natural resources and the governance realities showcasing citizen marginalisation. I show how the peoples-based permanent sovereignty doctrine entrenches the idea of distributive justice, and how Norway and Alaska have made this distributive justice idea functional through resource rent distribution practices.

The article does not sufficiently show the difference between how the peoples-based rights over surface and subsurface resources play out. This makes the article deficient in its legal contextualisation of peoples-based rights. Nonetheless, the article will be helpful in showing the stake people have over natural resources and the revenues therefrom, and how legal instruments should advance people-based rights over natural resources.

Popova, Arina V. "Sovereign Wealth Funds: To Be or Not to Be Is Not the Question; Which One to Choose, Is" (2009) 40 Geo J Intl L 1191.

Unlike most other authors that concentrate on what sovereign wealth funds do in their destination economies, the author is interested in how they play out in their home economies. Using Russia as a case study, the article evaluates different types of funds and the purposes they serve, focusing on the question of what type of fund jurisdictions should create to derive the most benefit, and submitting that they should depend on the objectives of the jurisdiction.

The article submits that Russia made a mistake in adopting Norway's stabilization fund model that prioritizes long-term saving, that the design of a sovereign wealth fund should be tailor-made. Thus, the author concludes that Russia should have designed a fund that diversifies its economy and reduces its dependence on crude oil.

However, while the author rightly submits that sovereign wealth funds should be tailor-made, she omits the unique policy considerations often associated with sovereign wealth funds that receive the bulk of their inputs from non-renewable natural resources. The author's conclusion focuses more on economic resilience and intragenerational justice interests, excluding intergenerational justice considerations. This conclusion cannot stand if the author considers the fact that decisions on non-renewable natural resources almost always need to provide for intergenerational interests of future generations as these resources are a common heritage.

Nonetheless, the author's analysis of the purpose and types of sovereign wealth fund will be useful in the introductory and discussion sections of my thesis. Moreover, some of the data relating to Norway's sovereign wealth fund will be useful in various sections of my thesis.

Sarkar, Rumu. "Sovereign Wealth Funds as a Development Tool for ASEAN Nations: From Social Wealth to Social Responsibility" (2010) 41 *Geo J Intl L* 621.

Focusing on the Association of Southeast Asian Nations (ASEAN) members, Sakar examines the development aspects of sovereign wealth funds, posing questions aimed at identifying the reasons that could underlie the creation of a sovereign wealth fund. In advocating a development approach to sovereign wealth funds, the author identifies protection from future economic shocks as a major reason for creating sovereign wealth funds, but states that there are other reasons such as managing volatility in oil prices, diversification of fund holdings generated by non-renewable commodity exports, earning greater returns on foreign exchange reserves, increasing savings for future generations, funding social and economic development, and exercising increased political influence by making strategic foreign investments.

The author is able to properly contextualise the development approach of the article, identifying local implications for ASEAN members and investment choices that support sustainable economic development; like Popova (referenced above), the author's approach also looks inwardly, focusing on the domestic issues surrounding sovereign wealth funds. However, it is doubtful whether the assertion that the protection from future economic shocks, an economic resilience objective, is the major reason for creating sovereign wealth funds considering the majority of other authors that consider intergenerational justice as the most important goal.

In any case, the development approach of the article supports the public interest focus of my thesis. As such, the article will be useful in framing the issues arising from its public interest discourse as they relate to my thesis.

Savacool, Benjamin K. "Countering a Corrupt Oil Boom: Energy justice, Natural Resource Funds, and São Tomé e Príncipe's Oil Revenue Management Law" (2016) 55 *Environmental Science & Policy* 196.

The author evaluates the Oil Revenue and Management Law governing Sao Tome e Principe's natural resource fund as a case study to illustrate how social and economic benefits could be derived from a dwindling natural resource. Based on the analysis of the features of this law, he concludes that the law illustrates how natural resources can contribute to government savings and macroeconomic security, how capacity building and leadership are important in natural resource governance, and how natural resource funds need to work together with other mechanisms to be effective.

The author seems to conflate Sao Tome e Principe's natural resource fund and the Oil Revenue and Management Law regulating it, which are two separate entities whose variables are not necessarily dependent; for example, other factors could make the fund thrive even without the law. Perhaps this confusion is why the benefits and challenges identified by the author are too general and are not specifically those facing the law his article focuses on.

In any case, this paper's evaluation of its case study is useful in my thesis for illustrating how law could be dependent on the contextual peculiarities of a jurisdiction. The article also

illustrates how much generalisations could arise from a case study, a lesson useful for guiding the generalisations I will make in my thesis.

## SECONDARY MATERIAL: NEWSPAPER AND MAGAZINE ARTICLES

Giovanetti, Justin, Michael Pereira, & Julia Wolfe. “What Happened to Alberta’s Cash Stash: The Life and Death of the Province’s Rainy-Day Fund” (2015) The Globe and Mail <<http://www.theglobeandmail.com/news/alberta/what-happened-to-albertas-cash-stash/article24191018/>>.

This article provides information about the policy underpinnings of the Alberta Heritage Fund, comparing it with the Alaska Permanent Fund and the Government Pension Fund of Norway. It identifies issues of governance, taxation, savings and expenditure as points of departure across these funds.

The reflection of the authors on the policy proposal that the Alberta Heritage Fund should be saved for future generations and how this might result in fewer public services and more financial burden for tax payers is instructive. It will inform my critique on the arguments that Alberta’s law should stimulate the diversion of more non-renewable resource revenues into the Alberta Heritage Fund. This will lead me to more nuanced submissions.

The Economist Explains. “What Dutch Disease Is, And Why It’s Bad” (2014) The Economist <<http://www.economist.com/blogs/economist-explains/2014/11/economist-explains-2>>.

The article discusses the history and economic implications of the Dutch disease, a concept that emerged in 1977 to describe the effect of gas revenue boom that led to the neglect of the non-crude oil sector of the Dutch economy, resulting in undesirable effects such as unemployment and inflation. The overall lesson of the article is that resource-dependent jurisdictions need to diversify their economies to prevent the problems associated with the Dutch disease.

Unlike most other authors that have discussed the Dutch disease, this article approaches the concept from a narrow neo-classical economic perspective. As some other authors have observed, for example in appraising the concept of resource complex, there are other variables that could be contributing to the problems envisaged by the Dutch disease, a point this article omits.

Despite its deficiency, this article provides information that could help me to contextualize Alberta as a jurisdiction facing the problems of the Dutch disease, albeit from a nuanced perspective. My thesis will also note that the threat of the Dutch disease, as espoused by this article and other commentaries, is one of the justifications for protecting public interests associated with non-renewable natural resource funds.

## SECONDARY MATERIAL: OTHERS

Dahlby, Bev & Niloo Hojjati. “The Challenge of Saving Natural Resources Revenues: An Overview of the Alberta Heritage Trust Fund” (2014)  
<<http://www.iticnet.org/images/19th%20Special%20Report/3.%20Bev%20Dahlby.pdf>>.

The article provides an overview of the Alberta Heritage Savings Trust Fund, established to save for future Albertans, strengthen and diversify Alberta’s economy, and improve the quality of life of Albertans. It discusses the history, objectives, structure, governance, investments and problems of the fund, submitting that it has not played much role in the economy of the province due to its slow growth rate.

The information this article provides on the investment divisions of the Alberta Heritage Savings Trust Fund is unclear as it does not show the relationship between the older divisions, established when the fund was created, and the newer divisions, established subsequently, for example whether they coexist or otherwise. This shows areas needing clarification in the structural analysis of the Alberta Heritage Savings Trust Fund.

The article provides information that will be useful in all the sections of my thesis. This will assist my description of the policy objectives, structure, governance and problems of the Alberta Heritage Savings Trust Fund.

Norges Bank Investment Management. “About the Fund” (2011) <<http://www.nbim.no/en/the-fund/about-the-fund/>>.

This commentary provides the history of the Government Pension Fund Global and explains how the fund operates. It states that the fund was established in 1990 to protect intergenerational interests associated with petroleum and to serve as a fiscal policy tool; it also states that although the fund was established to augment the government’s unreliable pension scheme, it no longer focuses on pensions.

The information this commentary provides is somewhat haphazard, perhaps for political propaganda purposes. Its stipulation that the fund was established for intergenerational justice is doubtful, as the majority of authoritative documents such as statutes and white papers exclude intergenerational justice from the initial goals of the fund.

In any case, the commentary provides some historical inputs that could form part of the information in the background section of my thesis, for example the point that the fund does not focus on pensions anymore. However, I will crosscheck every piece of information in this commentary against authoritative sources.