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The Nothing that is: The leading environmental law case of the past decade

By Shaun Fluker

The most important judicial decision in environmental law from Alberta courts (or the Supreme Court of Canada for that matter) during the last decade is precisely the absence of any such decision. This is not to say that significant issues in environmental law have not been ruled upon by the courts during this time, but rather that environmental law has stagnated and has lost its vigour and imagination. The 1990s were marked with strong statements by the Supreme Court of Canada on environmental protection: "one of the major challenges of our time" (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at para. 1); "a fundamental value in Canadian society" (*Ontario v. Canadian Pacific*, [1995] 2 S.C.R. 1031 at para. 55); "a public purpose of superordinate importance" (*R. v. Hydro Quebec*, [1997] 3 S.C.R. 213 at para. 85). Looking back now, these statements seem like nothing more than rhetoric.

A Canlii text search of 'environmental protection' on Alberta Court of Appeal judgements produced 72 hits since 1998. Nearly all of these decisions were hit because either the Minister of Environmental Protection was a party to the action, an environmental protection order was under consideration, or the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 was being interpreted. None of these decisions refer to environmental protection as a fundamental value or public purpose in Alberta. Similarly, a quick survey of News Briefs issued by the Environmental Law Centre since 2000 confirmed no discussion of an Alberta judicial decision with significance for environmental law over the past decade.

Some readers might think I've overlooked decisions such as the Supreme Court's decision in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 upholding the validity of a municipal bylaw prohibiting the application of pesticides or the Federal Court's decision in *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 to require a federal-provincial environmental assessment panel to provide a rationale for its conclusion that increased greenhouse gas emissions from Imperial Oil's Kearl oil sands project would not result in adverse environmental effects due to intensity-based mitigation measures. My reading of these decisions, and the basis for my view of their insignificance, is that they represent tinkering at the margins of environmentalism. These decisions are significant in their findings but they hardly qualify as important landmarks. No one seriously believes that municipalities should not be able to restrict the application of pesticides and likewise no one seriously believes that intensity-based emissions measures will have any meaningful effect on climate change. These decisions, and others like them, do not push the boundaries of environmental law.

Indeed the one decision I considered noting as most important actually subverts environmental protection. Since the late 1960s preservationists have lobbied the federal government to assert preservation of nature as the purpose of Canada's national parks. This pressure, along with

several high-profile studies in the 1990s, led to new federal parks legislation in early 2001 – the *Canada National Parks Act*, S.C. 2000, c. 32 - that mandates the maintenance or restoration of ecological integrity as the first priority in parks management. The new legislation seemingly charts a preservationist direction for national parks with the preservation of nature for its own sake taking precedence over the 'parks for people' ideology that has governed the parks since their inception in the late 19th century. The Federal Court was asked to interpret this new preservation mandate shortly after its enactment, and its interpretation in *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2001 FCT 1123, aff'd 2003 FCA 197 has effectively nullified any impact of the legislation towards enhancing a preservation mandate in the parks (See my paper "Ecological Integrity in Canada's National Parks: The False Promise of Law").

I suspect that one reason for the absence of judicial activism here is that environmental issues are by and large viewed by the judiciary as a political question with an insufficient legal component to be justiciable. The most recent illustration of this view is the Federal Court's decision in *Friends of the Earth v. Canada (Minister of the Environment)*, 2008 FC 1183, aff'd 2009 FCA 297, dismissing as non-justiciable an application for judicial review of the federal government's failure to adhere to various sections of the *Kyoto Protocol Implementation Act*, S.C. 2007, c. 30. The Federal Court held that the application, if granted, would improperly place the Court into the executive sphere of government by making policy choices on climate change. For similar reasons, courts are extremely reluctant to compel government decision-makers (via *mandamus* orders or otherwise) to act on environmental matters. That is why there are only a handful of judicial decisions concerning the *Species at Risk Act*, S.C. 2002, c. 29, despite the widespread view that Canada is failing to enforce the provisions of the legislation (Canada is subject to an investigation under the North American Agreement on Environmental Cooperation examining allegations that Canada is failing to enforce the *Species at Risk Act*). Environmental law in Canada is dominated by legislation that effectively restricts the judicial role to statutory interpretation and judicial review of government decisions.

The stagnant position of environment law will remain entrenched until creativity and imagination return to the judicial role in this area. I think this will have to include viewing certain environmental issues as concerning the rule of law: Increasingly finding that government officials have a legal duty to act in the interests of environmental protection.

(Note: The title for this post was inspired by Robert Kaplan's *The Nothing That is: A Natural History of Zero* (Oxford, 1999)).

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