April 22, 2015

Environmental Laws as Decision-Making Processes (or, Why I am Grateful for Environmental Groups this Earth Day)

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Event Commented On: Earth Day

This past weekend, as part of the Canadian Institute for Resource Law's "Saturday Morning at the Law School" series, I gave a free public lecture on the basic nature and features of Canadian environmental law. April 22 being Earth Day, I thought I would try to capture some of that discussion in a blog post. My starting point was that while Canadians may assume that their environmental laws consist of standards and limits designed to protect the natural environment, the reality is that many of our most important environmental laws simply set out a process for decision-making, where environmental considerations have varying degrees of importance. As further set out in this post, this reality has important implications for the state of the environment and the mechanics of government accountability, which in turn suggest a fundamental and indispensable, if also imperfect, role for environmental groups in this context.

Some Substantive Environmental Laws

Before considering environmental laws as process, I should make clear that there are some substantive environmental laws in Canada. Most of these take the form of activity or industry specific regulations developed by various ministries and departments by virtue of some authority in the laws passed by our legislatures. For example, pursuant to subsections 36(5), 36(5.1), and 36(5.2) of the federal Fisheries Act, RSC 1985 c F-1, the Governor in Council (i.e. Cabinet) has been given the authority to develop regulations to authorize the deposit of substances deleterious to fish, which is otherwise prohibited by subsection 36(3). There are now ten such regulations applying to various industries and activities: metal mining, pulp and paper mills, and wastewater systems (to name but a few). Most – though not all – of these contain quantitative limits on the amount of pollution that can be released (see e.g. Schedule 4 of the Metal Mining Effluent Regulations SOR 2002-222). To be sure, these limits are not totally protective; rather – and much like the process-based environmental laws discussed below – they reflect a compromise of environmental, economic and social considerations.

Environmental Laws as Discretionary Decision-Making Processes

Many environmental laws, however, do not contain any substantive limits – including some of Canada's most important ones. For example, subsection 35(1) of the Fisheries Act states that "no

person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery."

On its face, this law appears very protective, bearing in mind that the *Fisheries Act* defines serious harm as "the death of fish, or the permanent alteration or destruction of fish habitat" and that commercial, recreational and Aboriginal fisheries are found in most Canadian waters (at least according to the Department responsible for enforcing the *Act*). But this is only half the story. Pursuant to subsection 35(2), and paragraph 35(2)(b) in particular, the Minister (through his or her delegates in the Department) is given a broad discretion to authorize such harm pursuant to whatever terms and conditions he or she deems fit. Although the Minister is required to take certain environmental considerations into account (as further discussed below), there is no clear limit to the amount of harm that he or she may authorize.

A similar scheme is found under the much-reduced-in-scope *Navigation Protection Act,* RSC 1985 c N-22. Section 3 prohibits the construction, placement, alteration, etc… of any work in or across any listed navigable water, but the Minister may approve such works pursuant to section 6. The same is true on the provincial level. Under Alberta's *Water Act,* RSA 2000 c W-3, for example, it is prohibited to take or divert water without a license (subsection 49(1)), but the relevant regulator (Alberta Environment and Sustainable Resource Development or, in the case of oil and gas activities, the Alberta Energy Regulator) is given a broad discretion to grant such licenses (subsection 51(4)).

As I've blogged about before, the procedural nature of modern environmental law has actually long been recognized. In his authoritative article on the topic nearly ten years ago, American law professor Dan Tarlock invoked scientific uncertainty (especially in the field of ecology) as one of the main drivers of an environmental law that he described as "a dynamic, but inevitably *ad hoc*, decision-making process" (A. Dan Tarlock, "Is There a There There in Environmental Law?" (2004) 19 J Land Use & Envtl L 213 at 219). At the same time, Professor Tarlock was quick to add that such processes had to be structured with what he termed "guideposts": "environmental impact assessment, polluter pays, precaution, and sustainable development" (*ibid*). The need for such guideposts speaks to the other main driver of the environmental law-as-process paradigm: the reluctance of governments to bind themselves too tightly in this context. In matters of environmental and natural resources development, governments often prefer discretionary decision-making powers, even though (or perhaps because) it is widely understood that the exercise of such powers is "subject to the political, economic, and social winds of the time and place in which any particular decision occurs" and that "such winds usually favour business as usual," not environmental protection (see Bruce Pardy, "Ecosystem Management in Question: A Reply to Ruhl" (2005) 23 Pace Environ Law Rev 209 at 217).

The purpose of "guideposts," then, is to act as a kind of drag on government decision-making, reducing an otherwise infinite number of potential outcomes to those that fit within a certain, at least somewhat protective, range. Under the *Canada National Parks Act,* SC 2000 c 32, for example, subsection 8(2) requires the Minister to give the "maintenance or restoration of ecological priority" first priority in all aspects of parks management. Similarly, where the Minister of Fisheries and Oceans proposes to authorize serious harm to fish pursuant to subsection 35(2) of the *Fisheries Act*, section 6 sets out a series of factors that he or she must consider, including fisheries management objectives and whether there are measures available to avoid, mitigate or offset serious harm to fish, all with a view towards providing for "the sustainability and ongoing productivity of commercial, recreational and Aboriginal fisheries"

(section 6.1). While such guideposts will not yield a single right answer, and in some cases have not lived up to expectations, they do narrow the range of potential outcomes.

Perhaps the strictest set of guideposts can be found in the federal *Species at Risk Act,* SC 2002 c 29 (*SARA*). Like the examples above, section 32 prohibits the killing, harming, harassment or capture of a listed species (*e.g.* endangered or threatened), while subsection 73(1) gives the Minister the power to issue a permit for such harm where it is "incidental" to carrying out some other activity (often referred to as "incidental take" permits). Before issuing such a permit, however, the Minister must be of the opinion that (subsection 73(3)):

> (*a*) all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;
> (*b*) all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and
> (*c*) the activity will not jeopardize the survival or recovery of the species.

This list, and (c) especially, comes very close to a substantive standard (or environmental bottom line) while still leaving room for some permits to be issued in certain instances. Pursuant to subsection 73(3.1), the Minister must include in a public registry an explanation of why any permit has been issued, taking into account the matters referred to above.

Implications

Perhaps the most important practical effect of the environmental law-as-decision-making process paradigm is that each day, permit-by-permit, authorization-by-authorization, Canada's environment is being degraded. The extent of this degradation depends on the actual decisions made. Some decisions will fall within the range established by the relevant guideposts; many do not (this is the stuff of the vast majority of environmental litigation). Differentiating between these two requires effort. Some statutes provide for public notice to be given when a decision is made (*e.g.* the *Water Act*, *SARA*, the *Canadian Environmental Assessment Act, 2012,* SC 2012 c 19 s 52), but others do not (*e.g.* the *Fisheries Act*). And while it is tempting to suggest that the latter should simply be amended to require such notice (they should be), this ignores the fact that Canadians are arguably already drowning in information.

If you were inclined to keep tabs on major resource development, or a specific project in particular, you'd have to know your way around the Canadian Environmental Assessment Registry. If you happen to be concerned about species at risk, you better get familiar with the *SARA* Registry. Concerned about pollution more generally? You'll need to visit Environment Canada's National Pollution Release Inventory. Perhaps oil sands are your thing; you now have unprecedented access to air, land and water data through the Joint Oil Sands Monitoring Program's Information Portal. You should also browse through relevant permits and authorizations on Alberta Environment and Sustainable Resource Development's website. Want to know about the state of Alberta's environment more broadly? Let me introduce you to the Alberta Environmental Monitoring, Evaluation and Reporting Agency (AEMERA). Simply put, the number of decisions being made and the amount of information that needs to be digested is staggering.

Enter environmental groups. I am using the term broadly here to refer not just to the big environmental non-governmental organizations but also the small and local ones. I have never worked for one so can't say for sure, but it seems that at least some staff and/or volunteers make

it their job to keep track of those decisions relevant to their mandate. When something seems amiss, they try to raise public awareness and yes, sometimes they go to court. Both are difficult tasks. With respect to the former, they are faced with general apathy (an observation, not a criticism). With respect to the latter, they will be successful if – and only if – they can convince a court that the decision in question falls outside of the above noted range of permissible outcomes, which is a rather long-winded way of saying it was *unlawful*. If not, the matter returns to the public, or political, arena.

This is not to suggest that I agree with everything these organizations do, or every tactic they adopt. But as Professor Bankes and Mascher and I recently observed, there would probably still be no critical habitat identified for the Greater Sage Grouse, no proposed recovery strategies for White Sturgeon, and no legal protection for Killer Whales (all *unlawfully* withheld) without these groups and the litigation that they bring forward.

It may be the case that, when a tree falls in the forest and no one is around, it doesn't make a sound. But if that tree was unlawfully felled, then it still contributes to the process of environmental degradation. In this context, and to borrow the (in)famous wording of the Northern Gateway Joint Review Panel, Canadians seem better off with environmental groups than without them.