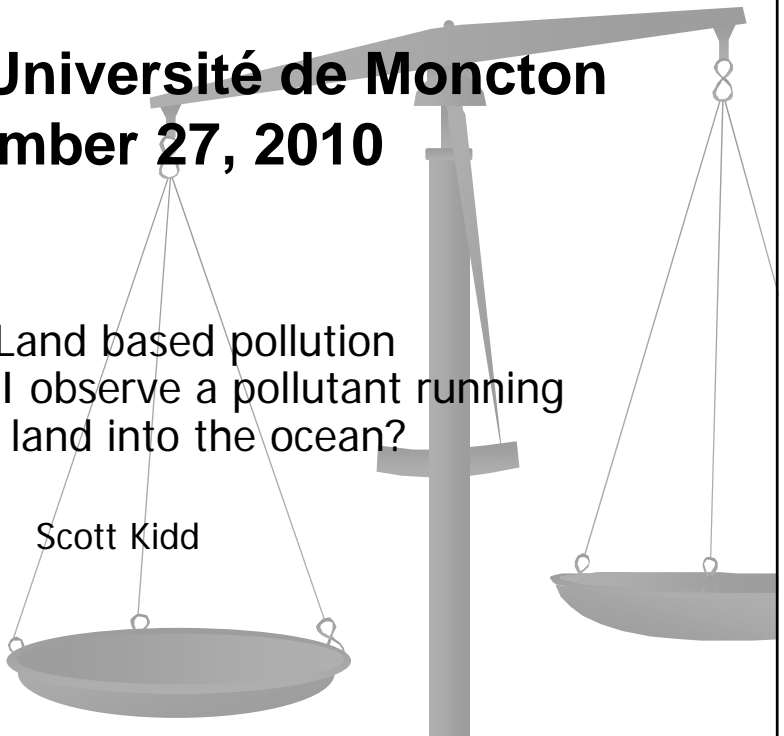


Environmental Law for Land and Sea: New Brunswick

**Workshop – Université de Moncton
November 27, 2010**

TOPIC: Land based pollution
What can I do if I observe a pollutant running
from the land into the ocean?

Scott Kidd



Land based pollution is a problem

- Most of the pollutants entering New Brunswick coastal waters come from land based activities.
- For example, about 91% of nitrogen into the Gulf of Maine (includes the Bay of Fundy) is from waste water treatment plants, and 9% from industries (half of that from pulp and paper operations).
 - Gulf of Maine Council on the Marine Environment at <http://www.gulfofmaine.org/state-of-the-gulf/eutrophication.html>

Pollution has many forms

- Large, visible pollution such as debris from aquaculture operations, illegal dumping
- Day to day garbage like water bottles
- Toxics such as heavy metals from industrial effluent
- Nutrients from a number of sources such as waste water treatment plants, agriculture

Something to think about ...

“From an environmental perspective, laws establish rules governing our rights to use natural resources and our responsibilities in protecting nature.”
(Boyd at 11)

“... the reality is that on most environmental issues Canada is performing poorly”. (Boyd at 228)

**Six reasons why (from Boyd)

- Missing laws
- Excessive discretion
- Failure to reflect contemporary science
- Inadequate implementation and enforcement
- Lack of meaningful public participation
- Narrow approach

D.R. Boyd. 2003. Unnatural Law: Rethinking Canadian Environmental Law and Policy. UBC Press: Vancouver. pp. 469.

Jurisdiction to control water pollution

- *Constitution Act, 1867*, s.91 – listing of federal powers to make laws re:
 - s.91(12) Sea Coast and Inland Fisheries
 - Peace, Order and Good Government
 - Other subjects not expressly given to the provinces, eg. toxics
- *Constitution Act, 1867*, s.92 – listing of provincial powers to make laws re:
 - s.92(13) Property and Civil Rights
 - s.92(5) Management and Sale of Public Lands

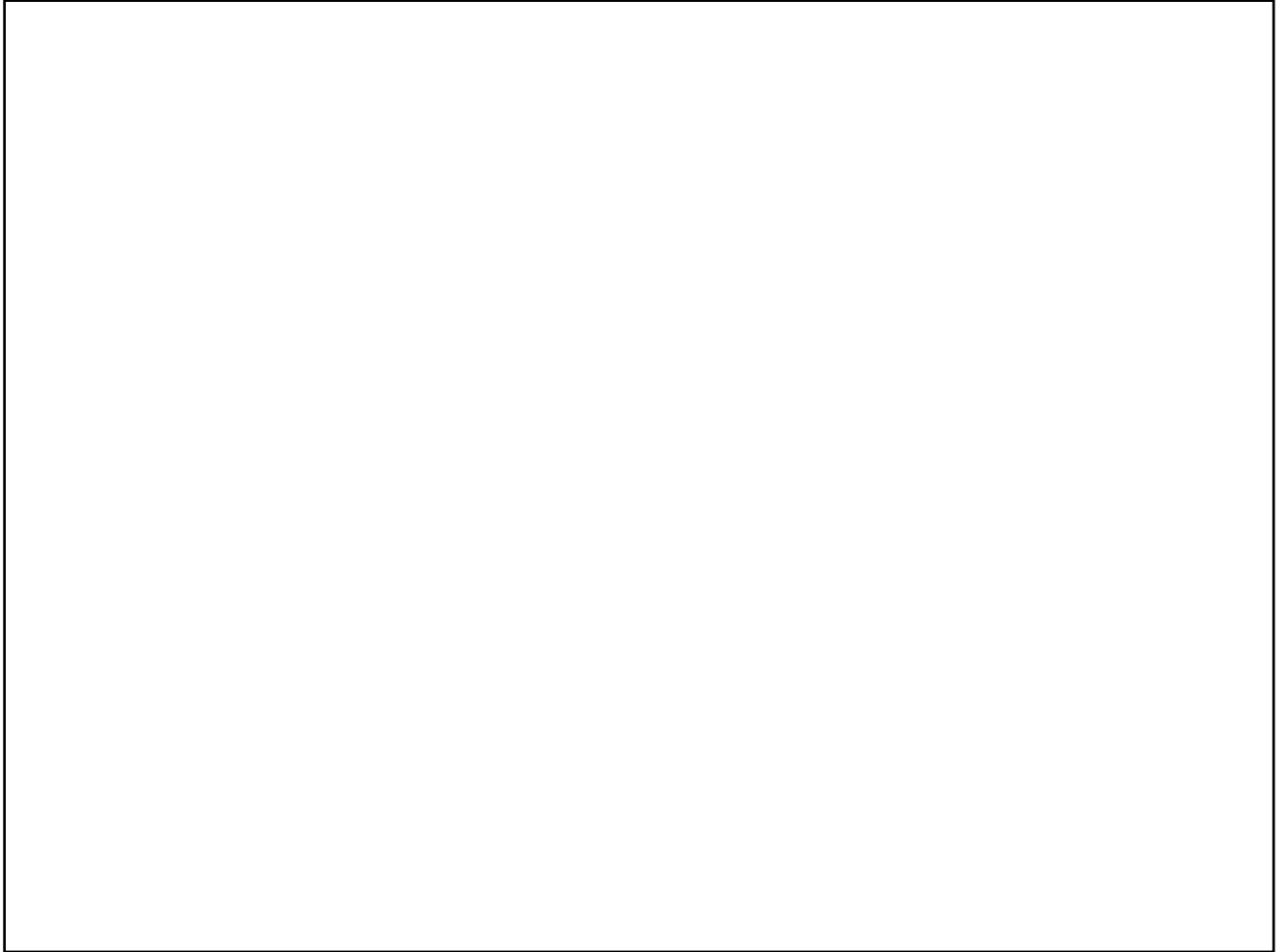
Laws we will look at

- Federal
 - *Canadian Environmental Protection Act (CEPA)*
 - *Fisheries Act*

- Provincial
 - *NB Clean Environment Act*
 - *Water Quality Regulation*
 - *NB Clean Water Act*

Please note ...

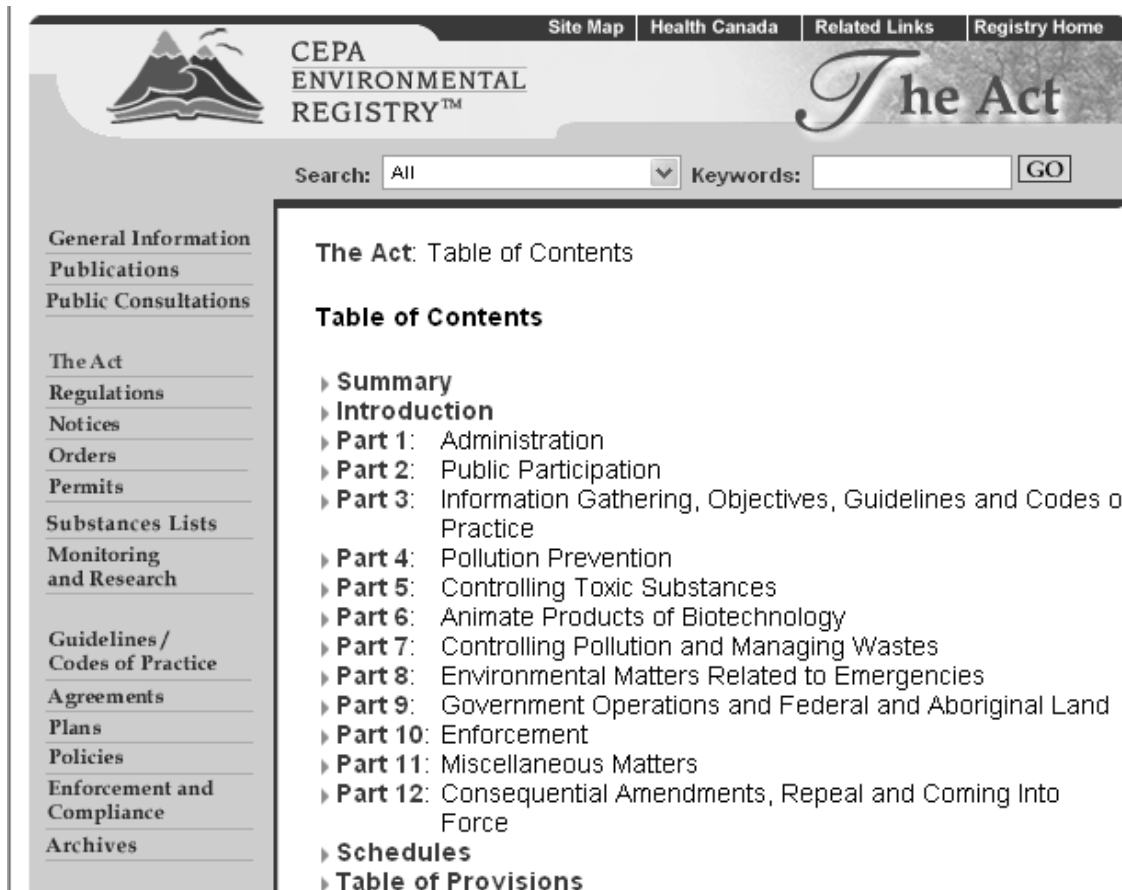
- In Canada, most polluting activities are prohibited – unless you have a permit.
 - A license to pollute??



CEPA, 1999

- Came into effect on March 31, 2000
 - Replaced old CEPA
- Administered by Min. of Environment
 - Toxics program managed by Environment Canada and Health Canada
- Purpose:
 - Prevention and management of risks from toxics
 - Manage impacts of human products

CEPA Table of Contents – from <http://www.ec.gc.ca/CEPARegistry/>



The screenshot displays the CEPA Environmental Registry website. At the top, there is a navigation bar with links for Site Map, Health Canada, Related Links, and Registry Home. The main header features the CEPA Environmental Registry logo and the title 'The Act'. Below the header is a search bar with a dropdown menu set to 'All' and a 'GO' button. A left-hand sidebar contains a list of menu items: General Information, Publications, Public Consultations, The Act, Regulations, Notices, Orders, Permits, Substances Lists, Monitoring and Research, Guidelines / Codes of Practice, Agreements, Plans, Policies, Enforcement and Compliance, and Archives. The main content area is titled 'The Act: Table of Contents' and lists the following sections:

- ▶ **Summary**
- ▶ **Introduction**
- ▶ **Part 1:** Administration
- ▶ **Part 2:** Public Participation
- ▶ **Part 3:** Information Gathering, Objectives, Guidelines and Codes of Practice
- ▶ **Part 4:** Pollution Prevention
- ▶ **Part 5:** Controlling Toxic Substances
- ▶ **Part 6:** Animate Products of Biotechnology
- ▶ **Part 7:** Controlling Pollution and Managing Wastes
- ▶ **Part 8:** Environmental Matters Related to Emergencies
- ▶ **Part 9:** Government Operations and Federal and Aboriginal Land
- ▶ **Part 10:** Enforcement
- ▶ **Part 11:** Miscellaneous Matters
- ▶ **Part 12:** Consequential Amendments, Repeal and Coming Into Force
- ▶ **Schedules**
- ▶ **Table of Provisions**

CEPA, 1999

Canadian Environmental Protection Act, 1999, S.C. 1999, c.33

- Declaration
- Preamble
- s.1 – Short title
- s.2 – Administrative duties of the Government of Canada
- s.3 – Interpretation (definitions)
- Part 1: Administration – ss. 6-10
- **Part 2: Public Participation – ss. 11-42**
- Part 3: Information Gathering, Objectives, Guidelines and Codes of Conduct – ss. 43-55
- Part 4: Pollution Prevention – ss. 56-63
- Part 5: Controlling Toxic Substances – ss.64-103

CEPA, 1999

- Part 6: Animate Products of Biotechnology – ss. 104-115
- **Part 7: Controlling Pollution and Managing Wastes – ss. 116-192**
- Part 8: Env. Matters Related to Emergencies – ss. 193-205
- Part 9: Govt. Operations and Fed. and Aboriginal Land – ss.206-215
- **Part 10: Enforcement – ss. 216 - 312**
- Part 11: Miscellaneous Matters – ss. 313 - 343
- Part 12: Consequential Amendments – ss. 344 - 356
- Schedules – 6 schedules
- Table of Provisions

CEPA, 1999 – s. 3 Definitions

"environment" means the components of the Earth and includes

(a) air, land and water;

(b) all layers of the atmosphere;

(c) all organic and inorganic matter and living organisms; and

(d) the interacting natural systems that include components referred to in paragraphs (a) to (c).

CEPA, 1999 – s. 3 Definitions

"pollution prevention" means the use of processes, practices, materials, products, substances or energy that avoid or minimize the creation of pollutants and waste and reduce the overall risk to the environment or human health.

"release" includes discharge, spray, inject, inoculate, abandon, deposit, spill, leak, seep, pour, emit, empty, throw, dump, place and exhaust.

CEPA, 1999 – s. 3 Definitions

"substance" means any distinguishable kind of organic or inorganic matter, whether animate or inanimate, and includes

(a) any matter that is capable of being dispersed in the environment or of being transformed in the environment into matter that is capable of being so dispersed or that is capable of causing such transformations in the environment,

(b) any element or free radical,

(c) any combination of elements of a particular molecular identity that occurs in nature or as a result of a chemical reaction, and

(d) complex combinations of different molecules that originate in nature or are the result of chemical reactions but that could not practicably be formed by simply combining individual constituents,

CEPA – Public Participation

Investigation of Offences

- **17. (1)** An individual who is resident in Canada and at least 18 years of age may apply to the Minister for an investigation of any offence under this Act that the individual alleges has occurred ...
- **18.** The Minister shall acknowledge receipt of the application within 20 days of the receipt and shall investigate all matters that the Minister considers necessary to determine the facts relating to the alleged offence.
- **19.** After acknowledging receipt of the application, the Minister shall report to the applicant every 90 days on the progress of the investigation and the action, if any, that the Minister has taken or proposes to take ...
- **21. (1)** The Minister may discontinue the investigation if the Minister is of the opinion that
 - (a) the alleged offence does not require further investigation; or
 - (b) the investigation does not substantiate the alleged offence.
- Report
 - 21. (2)** If the investigation is discontinued, the Minister shall ...
 - (b) send a copy of the report to the applicant and to any person whose conduct was investigated.

CEPA – Public Participation Environmental Protection Action

- **22.** (1) An individual who has applied for an investigation may bring an environmental protection action if
 - (a) the Minister failed to conduct an investigation and report within a reasonable time; or
 - (b) the Minister's response to the investigation was unreasonable.

- **26.** (1) The plaintiff in an environmental protection action shall give notice of the action to the Minister no later than 10 days after the document originating the action is first served on a defendant, and the Minister shall give notice of the action in the Environmental Registry as soon as possible after receipt of the plaintiff's notice.
 - I have not found any CEPAR notices or court actions re: EPAs.

CEPA – Public Participation Environmental Protection Action

Disposal at sea

- **125.** (1) No person or ship shall dispose of a substance in an area of the sea referred to in any of paragraphs 122(2)(a) to (e) unless
 - (a) the substance is waste or other matter;
 - and
 - (b) the disposal is done in accordance with a Canadian permit.

CEPA – Public Participation Environmental Protection Action

Disposal at sea

SCHEDULE 5

WASTE OR OTHER MATTER

1. Dredged material.
2. Fish waste and other organic matter resulting from industrial fish processing operations.
3. Ships, aircraft, platforms or other structures ... would not pose a serious obstacle to fishing or navigation after being disposed of.
4. Inert, inorganic geological matter.
5. Uncontaminated organic matter of natural origin.
6. Bulky substances that are primarily composed of iron, steel, concrete ...

CEPA – Public Participation Environmental Protection Action

- Disposal at sea
- Disposal does not include
a disposal of a substance that is incidental to or derived from the normal operations of a ship ...
 - *Nanoose Conversion Campaign v. Canada (Minister of Environment)*, 2000 CanLII 15574 (F.C.A.)
 - Didn't like leftover debris from missile testing - debris consists of plastic-covered copper wire, dead weights, sonobuoy hardware and lithium batteries.
 - Held – this debris was incidental to the normal operations of a warship.



Fisheries Act

- I believe it is the most potent environmental protection law in Canada.
- Much of it has seen little change since 1868.
- Our focus will be on s.36(3).

Fish Habitat Protection and Pollution Prevention ss. 34-42

34. (1) For the purposes of sections 35 to 43,

"deleterious substance" means

- (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or
 - Note: Does not require waters in question to be rendered deleterious.

Deleterious substance cont'd

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, and without limiting the generality of the foregoing includes ...

H.P. & P.P cont'd

"deposit" means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;

"fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes;

"water frequented by fish" means Canadian fisheries waters.

s. 34 Fisheries Act cont'd

(2) The Governor in Council may make regulations prescribing

- (a) substances and classes of substances,
- (b) quantities or concentrations of substances and classes of substances in water, and
- (c) treatments, processes and changes of water for the purpose of paragraphs (c) to (e) of the definition "deleterious substance" in subsection (1).

eg.: Metal Mining Effluent Regulations

s.35 Fisheries Act cont'd

35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

s. 36 Fisheries Act cont'd

36. (1) No one shall

- (a) throw overboard ballast, coal ashes, stones or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is carried on;
 - (b) leave or deposit or cause to be thrown, left or deposited, on the shore, beach or bank of any water or on the beach between high and low water mark, remains or offal of fish or of marine animals; or
 - (c) leave decayed or decaying fish in any net or other fishing apparatus.
- (2) Remains or offal described in subsection (1) may be buried ashore, above high water mark.

s. 36(3) Fisheries Act cont'd

s. 36(3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

s. 36(3) Fisheries Act cont'd

- s. 36(4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of
 - (a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act; or
 - (b) a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (5).
 - See: the Metal Mining Effluent Regulations, and Pulp and Paper Effluent Regulations

Deleterious substance cont'd

R. v. Kingston (Corp. of the City), 2004 CanLII 39042 (ON.CA)

- The City of Kingston operated a municipal dump site which was closed in the 70's.
- Ms Fletcher began a private prosecution against the City after she collected samples of leachate, which was “acutely lethal to fish”, flowing from the landfill into the Cataraqui River.

- Issue: a) Was the leachate deleterious? - Yes
 - What is the proper interpretation of s.36(3) of the Fisheries Act?

Deleterious substance cont'd

R. v. Kingston (Corp. of the City), 2004 CanLII 39042 (ON.CA)

- CA's interpretation:
 - para: 65: "There is no requirement in s. 36(3) of paragraph (a) of the definition of the term "deleterious substance" in s. 34(1), of proof that the receiving waters are deleterious to fish.
 - para. 78: "In this case, it meant that the prosecution had to prove, that the leachate, when added to any water, was likely to render the water deleterious to fish or fish habitat . . . It did not have to prove which component of the leachate was responsible for the degradation ... Nor was it obliged to show that fish living in the vicinity of the seep were harmed..."
- CA restored trial judge's conviction
 - City pay \$30,000
 - Provide monitoring plan
 - Provide a plan to MoE for capping the site
 - This sentence was appealed – not sure of outcome

s. 40 Fisheries Act cont'd

40. (1) Every person who contravenes subsection 35(1) is guilty of

- (a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or
- (b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.

s. 40 Fisheries Act cont'd

- (2) Every person who contravenes subsection 36(1) or (3) is guilty of
- (a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or
 - (b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.

Offence and Punishment sections – 78 – 78.6 (+)

OFFENCE AND PUNISHMENT

Punishment not otherwise provided for

78. Except as otherwise provided in this Act, every person who contravenes this Act or the regulations is guilty of

- (a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding one hundred thousand dollars and, for any subsequent offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year, or to both; or
- (b) an indictable offence and liable, for a first offence, to a fine not exceeding five hundred thousand dollars and, for any subsequent offence, to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding two years, or to both.

R.S., 1985, c. F-14, s. 78; 1991, c. 1, s. 24.

s. 78 continued

Continuing offences

78.1 Where any contravention of this Act or the regulations is committed or continued on more than one day, it constitutes a separate offence for each day on which the contravention is committed or continued.

Offences by corporate officers, etc.

78.2 Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted.

s. 78 continued

Offences by employers

78.3 In any prosecution for an offence under this Act, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without the knowledge or consent of the accused.

Offences by licence holders

78.4 In any prosecution for an offence under this Act, it is sufficient proof of the offence to establish that it was committed by a person in respect of any matter relating to any operations under a lease or licence issued to the accused pursuant to this Act or the regulations, whether or not the person is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without the knowledge or consent of the accused.

s. 78 continued

Burden of proving licence

78.5 In any prosecution for an offence under this Act, where a question arises as to whether a person was issued a licence, the burden is on the person to establish that the licence was issued.

Due diligence defence

78.6 No person shall be convicted of an offence under this Act if the person establishes that the person

- (a) exercised all due diligence to prevent the commission of the offence; or
- (b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.



Some NB Water Protection Laws

- *Clean Water Act* and regulations
- *Clean Environment Act*
 - *Water Quality Regulation*

NB Clean Water Act c. C-6.1

"contaminant" means any solid, liquid, gas, micro-organism, odour, heat, sound, vibration, radiation or combination of any of them, present in the environment,

- (a) that is foreign to or in excess of the natural constituents of the environment,
- (b) that affects the natural, physical, chemical or biological quality or constitution of the environment,
- (c) that endangers the health, safety or comfort of a person or the health of animal life, that causes damage to property or to plant life or that interferes with visibility, the normal conduct of transport or business or the normal enjoyment of life or use or enjoyment of property, or
- (d) that is designated by the Minister of Health and Wellness or the Minister as a contaminant under section 10,

NB Clean Water Act

- "licence" means a licence issued under this Act or the regulations that has not expired or been suspended or cancelled;
- "Minister" means the Minister of the Environment and Local Government and includes a person designated by the Minister to act on the Minister's behalf;
- "water" includes
 - (a) flowing or standing water whether on or below the surface of the earth, and
 - (b) the ice of any body of water;

NB Clean Water Act

2 Her Majesty in right of Canada and Her Majesty in right of New Brunswick are bound by the provisions of this Act

NB Clean Water Act

4(1) Subject to subsection 12(3), the Minister may issue a Ministerial Order requiring the person to whom it is directed to do, in accordance with the directions set out in the order, one or more of the following:

- (a) to control or reduce the rate of release of any contaminant or waste into or upon water; . . .
- (b) to eliminate the release of any contaminant or waste into or upon water
- (c) to alter the manner of release of any contaminant or waste into or upon water;
- (d) to alter the procedures to be followed in the control, reduction or elimination of the release of any contaminant or waste into or upon water;
- (e) to install, replace or alter any equipment or thing designed to control, reduce or eliminate the release of any contaminant or waste into or upon water;
- (f) to install, replace or alter a wastewater treatment facility or waterworks in order to control, reduce, eliminate or remedy the release of a contaminant or waste into or upon water; and
- (g) if a contaminant or waste has been released into or upon water, to carry out clean-up, site rehabilitation or other remedial action.

NB Clean Water Act

7(1) Subject to subsections (2) and 12(3), if the Minister, on reasonable and probable grounds, is of the opinion that a contaminant or waste is being directly or indirectly released into or upon water, the Minister, together with such persons, materials and equipment as the Minister considers necessary, may enter upon any land or premises, using the force the Minister considers necessary, and may take such further action the Minister considers necessary in order to control, reduce or eliminate the release of the contaminant or waste and remedy the situation.

NB Clean Water Act

8(1) If

(a) a contaminant or waste has been directly or indirectly released into or upon water,

(b) the Minister has incurred any cost, expense, loss, damages or charge that remains unrecovered in part or in whole with respect to the occurrence of an event described in paragraph (a), while acting under section 5 or 7, and

(c) the Minister has made a written demand under subsection 6(1) where applicable,

the unrecovered cost, expense, loss, damages or charge may be recovered by the Minister by action in a court of competent jurisdiction as a debt owed to Her Majesty in right of the Province.

NB Clean Water Act

12(1) No person shall directly or indirectly release a contaminant or waste or a class of contaminant or waste into or upon water if to do so would or could

(a) affect the natural, physical, chemical or biological quality or constitution of water,

(b) endanger the health, safety or comfort of a person or the health of animal life,

(c) cause damage to property or plant life, or

(d) interfere with visibility, the normal conduct of transport or business or the normal enjoyment of life or property,

unless the person is acting under and in compliance with authority or permission given under an Act of the Legislature.

NB Clean Water Act

14(1) The Minister, with the approval of the Lieutenant-Governor in Council, may by a Designation Order designate as a protected area all or any portion of a watershed, aquifer or ground water recharge area that is used as a source of water for a public water supply system.

■ See:

- Watershed Protected Area Designation Order
- Wellfield Protected Area Designation Order

NB Clean Water Act

OFFENCES AND PENALTIES

25(1) Subject to subsection (3), a person who violates any provision of this Act or the regulations or fails to comply with an order issued under this Act or the regulations, with a term or condition of an approval, registration, licence or permit granted or issued under this Act or the regulations or with a prohibition, control, requirement, limitation, allocation, term, condition or standard relating to a designation made under this Act or the regulations commits an offence and is liable, on summary conviction,

(a) in the case of an individual, to a fine of not less than five hundred dollars and not more than fifty thousand dollars, and in default of payment is liable to imprisonment in accordance with subsection 31(3) of the *Summary Convictions Act*, and

(b) in the case of a person other than an individual, to a fine of not less than one thousand dollars and not more than one million dollars.

NB Clean Water Act

25(2) If a violation of a provision of or a failure to comply under this Act or the regulations continues for more than one day, the fine payable shall be the product of

(a) the fine imposed under subsection (1), and

(b) the number of days on which the violation or failure continues.

27 Every person other than an individual who commits an offence under this Act or the regulations commits an absolute liability offence. (no defence of due diligence)

Regulations under the N.B. Clean Water Act

- 90-79 Water Well
- 90-80 Watercourse Alteration
- 93-201 Fees for Industrial Approvals
- 93-203 Potable Water
- 2000-47 Wellfield Protected Area Designation Order
- 2001-83 Watershed Protected Area Designation Order
- 2002-13 Water Classification



NB Clean Env. Act – Water Quality Reg., N.B.Reg. 82-126

- **2(2)** For the purposes of this Regulation, sewage is a contaminant.
- **3(1)** No person shall, without an approval, emit, discharge, deposit, leave or throw any contaminant into or upon the environment in any location such that it may, directly or indirectly, cause water pollution to any waters of the Province.
 - Water pollution is the alteration of the various properties of the waters of the Province or the addition or removal of substances to those waters. These actions must then render or likely render the waters of the Province harmful to the public health, safety or welfare or harmful or less useful for domestic, municipal, industrial, agricultural, recreational or other lawful uses or harmful or less useful to wildlife.
 - See R. v. New Brunswick Power Corp. case
- **3(2)** No person shall, without an approval, cause or permit a source to emit, discharge, deposit, leave or throw any contaminant into or upon the environment in any location such that it may, directly or indirectly, cause water pollution to any waters of the Province.

NB Clean Env. Act – Water Quality Reg., N.B.Reg. 82-126

- **3(3)** No person shall, without an approval, construct, modify or operate or permit the construction, modification or operation of a source.
 - "source" means "source of contaminant" as defined in the Act.



Example of s.12 of N.B. Clean Water Act

R. v. Potocan Mining Co. (1996), 183 N.B.R. (2d) 54 (NBPC).

- Potocan operated a potash mine.
- On Oct. 24, 1995, an employee of Potocan took a water sample from the Hammond River downstream from the mine site.
- The sample was analyzed for conductivity and it was discovered the salinity of the sample was extremely high vs. the regular salinity of the river.
- An search was conducted and it was determined that brine pipeline had ruptured, causing brine to flow into a marshland that then drained into the Hammond River.
- Provincial and federal officials were notified of the leak.
- The brine created conditions toxic to fish and dead salmon were found in the river.

- Potocan was charged with releasing a contaminant into water, thereby endangering the health of animal life, contrary to ss. 12(1)(a) and 12(1)(b) of the Clean Water Act and thereby committing an offence contrary to s. 25(1)(b) of the Act.
- Potocan first pled not guilty. At trial it then pled guilty.
- Sentence: \$3,000 fine, installation of an alarm system to detect salinity problems, development of an Emergency Contingency Plan, and payment of \$12,000 into a fund for HRAA use
 - In total, approximately \$50,000.

Regulations under the N.B. Clean Water Act

- 90-79 Water Well Regulation deals with:
 - The standards for the construction of wells.
 - The needed permits for well drillers.
 - Aquifer protection.
 - s.22 No well shall be located so near to a source of contaminant that contamination of the well by groundwater flow or seepage may take place.
 - Sets out how far away from a source of a contaminant a well must be located, eg. 30 m from a cesspool.
- 93-203 Potable Water Regulation provides that:
 - Water for human consumption must meet certain water quality requirements.
 - Well drillers are to provide new well owners with a voucher to have their water tested. The well owner must submit a sample to DOE.
 - Requires public water suppliers (eg. municipalities) to have their water tested and the results provided to the Minister of Health

Watercourse Alterations

- With specific regard to the issue of shoreline alterations, s.15 of the Clean Water Act requires a person to obtain a permit from the Minister before altering a watercourse or wetland. Wetlands include coastal wetlands (salt marshes).
- The main purpose of this section is to protect watercourses (beds and banks) from activities that will negatively impact the watercourses.
- Examples of alterations from the NB Department of Environment:
 - Construction of structures on or in the watercourse or wetland, such as retaining walls, breakwaters, bridges, culverts or wharves.
 - Driving or operating any machinery in a wetland or on the bed of a watercourse, or operating heavy machinery within 30 metres of a wetland or the banks of a watercourse.
 - Disturbing ground within 30 metres of a wetland or the banks of a watercourse.
 - Removing vegetation from a wetland or the bank or bed of a watercourse, or the harvesting of trees within 30 metres of a wetland or the banks of a watercourse.
 - Depositing or removing any material such as fill, sand, mud, gravel rocks, debris, etc. from a watercourse or wetland, or land located within 30 metres of a watercourse or wetland.
 - Draining, pumping, or otherwise taking water from a watercourse or wetland.
 - Creating or altering a pond connected to a watercourse or wetland, or that is within 30 metres of a watercourse or a wetland.

Watercourse alterations

R. v. Isbill (2005), 295 N.B.R. (2d) 80.

- A New Brunswick Clean Water Act Inspector charged the two Isbell brothers with committing a shoreline alteration without a permit contrary to section 15(1) of the *Clean Water Act*.
- During an inspection of a suspected violation he “found that at the site a logging operation, mostly a clear cut, had taken place, on both sides of the watercourse right down to the side of First Run Brook for approximately 400 metres, ...”.
- The original trial judge accepted the Inspector’s evidence and convicted the Isbells, holding among other things that they had cut trees within 30 metres of the watercourse.
- The trial court appeal judge overturned this decision. He strictly interpreted provisions of the *Clean Water Act* and held the cutting of trees on a private woodlot did not “... resemble “a hydro-electric power project, a control dam, a river diversion, a drainage diversion” or a “structure that alters a watercourse”...”, and as such was not a violation of section 15(1) of the Act.

Watercourse alterations

- The N.B. Court of Appeal overturned the trial court appeal judge's decision and restored the original trial judge's decision, finding that the proper interpretation of the *Clean Water Act* results in section 15(1) applying to all projects and structures that would alter a watercourse or wetland unless a particular project or structure is exempted from the requirement to obtain a WAWA permit.
- In reaching its decision, the Court of Appeal noted:
"The intention of the legislature in enacting the *Clean Water Act* was to provide through environmental legislation a control process for furthering the Province's goal of enhancing or preserving the quality of all water within the confines of the Province."
- The Isbells were fined \$500.00 each.
- Note: 90-80 Watercourse Alteration Regulation provides for a system of providing permits to allow watercourse alterations. For more details see: N.B. Watercourse and Wetland Alterations Technical Guidelines at: <http://www.gnb.ca/0009/0371/0005/English/index.asp>

Protecting water at the source

- 2000-47 Wellfield Protected Area Designation Order
- 2001-83 Watershed Protected Area Designation Order
- The purpose of a designation order is to protect surface water that is the source of a public water supply.

Protecting water at the source

For example:

- At present there are 30 protected watershed areas, such as the Chamcook Lake Watershed near the Town of St. Andrews. The Designation Order establishes three zones in a protected watershed area and only permits certain activities within in each zone:
 - Protected Area A which is the waters of the protected watershed,
 - Protected Area B which is the area within 75 metres of the banks of the watercourses in the protected watershed, and
 - Protected Area C is the remainder of the area of the protected watershed.
- For example, in Protected Area B, home and cottage owners can only carry out landscaping “if the landscaping is at least 5 metres from the banks of all watercourses and if no trees are cut within 15 metres from the banks of all watercourses.” The provisions of the Designation Order are additional to any other statutory requirements, such as the requirement to obtain a WAWA Permit.

Protecting water at the source

O'Dell v. N.B. (2004), 272 N.B.R. (2d) 161

- The Minister of Environment ordered the O'Dells to "*cease and desist from carrying out any further activity, within 75 meters of the banks of Third Lake that is not permitted by the Watershed Protected Area Designation Order.*"
- They were also ordered by the Ministerial Order to "*remove all recreational trailers, currently located within the 75 meters of the banks of Third Lake and relocate them such that they are located outside the 75 meter setback*" by June 20, 2003 and to "*stabilize the area that has been disturbed within 75 meters of the banks of Third Lake as a result of the installation of the said recreational trailers*" by June 20, 2003.
- see para.4
- The O'Dell's were not exempted from the Designation Order, so the court held that they were to comply with the Minister's order.

Power at the local level to protect water quality

- See:

- Saint John (City) v. Merzetti, [2003] NBQB 320 (NBQB)

- Mr. M lived in a cottage on the shore of First Loch Lomond Lake from 1975 to 1979. Home was then destroyed by fire.
- In 1983, City of Saint John passed a by-law saying no building is to be located within 150 metres of the shore of a lake which is a source of public water supply for the City of Saint John.
- Mr. M wanted to rebuild but City would not grant him approval (with 150 metre zone).
- City offered to buy property but Mr. M would not sell at price offered.

Power at the local level

- Despite lack of approval, Mr. M started rebuilding home in 1987 and moved in 1995
- Issue: Can the City have more stringent requirements than the province which only required 75 metre setback.
 - see: General Regulation – Health Act, s.258(d).
- Held: The City did not exceed its authority by requiring a greater setback than the province. “The precautions taken by the elected representatives have been deemed necessary to protect the purity and integrity of their water supply”.
- Note: The NB Court of Appeal on February 3, 2005 ruled that the City can have Mr. M’s house torn down for not complying with the 150 metre setback. The City is still offering to buy Mr. M’s property.

Environmental Law for Land and Sea: New Brunswick

**Workshop – Université de Moncton
November 27, 2010**

TOPIC: Enforcing Environmental Laws

Scott Kidd



Enforcing Environmental Laws

- Giving them force.
- We tend to view “enforcement” as using the law to penalize wrong-doers.
- We are looking at more than that – ways to see that they are properly used.

General ways of enforcing environmental laws

1. Government enforcement, ie. prosecute
2. Taking the law into your own hands
3. Using tort law (suing someone)
4. Petitioning an ombudsman

Government enforcement

- You think an environmental law has been broken, so you ask the government to take action.
- Example of a successful request:
 - R. v. Gemtec Limited, 2007 NBQB 199 (CanLII)
 - In November 2000, the Peticodiac Riverkeepers lodged a complaint with Environment Canada regarding leachate coming from closed City of Moncton landfill site.

N.B. environmental offence case

R. v. Gemtec and Lutes, [2006] N.B.J. No. 409
(N.B.Prov.Ct.)

- Regarding leachate collection, Gemtec recommended City select the cheapest option
 - Allowed for leachate to continue flowing into Jonathon Creek and Petitcodiac River
 - Said the dilution of the leachate by the river will allow Canadian Water Quality Guidelines to be met.
 - A reviewer of the plan told them this would not comply with the Fisheries Act.

Government enforcement

R. v. Gemtec and Lutes, [2006] N.B.J. No. 409 (N.B.Prov.Ct.)

- Issue: Did the defendants deposit or permit the deposit of the leachate?
- Yes: Gemtec, in carrying out their responsibilities for the plan, had a large degree of control and influence.

Government enforcement

R. v. Gemtec and Lutes, [2006] N.B.J. No. 409 (N.B.Prov.Ct.)

- Sentencing:
 - City of Moncton pled guilty earlier - \$35,000
 - Gemtec - \$25,000
 - \$5,000 fine
 - \$10,000 to Federal Environmental Damages Fund
 - \$10,000 to a local env. group
 - Mr. Lutes (principal/project manager) - \$3,000
 - \$1,000 fine
 - \$1,000 to Federal Environmental Damages Fund
 - \$1,000 to a local env. group
- Gemtec and Mr. Lutes appealed their convictions. The Crown appealed the amount of the fines.
 - The Court of Queen's Bench upheld the convictions and did not vary the amount of the fines.

Government enforcement

- Biggest problem with government enforcement is getting the government to act.
 - Courts will not make the government “enforce” the law.
 - It is regularly noted there is a lack of enforcement of environmental laws in Canada.

Citizen enforcement

1. Appeal – the law in question allows a citizen to appeal a government decision.
 - For example, a permit was issued that you disagree with. The law could permit you to appeal that decision to a board or tribunal.
 - I don't know of any appeal processes in NB environmental laws that allow for anyone other than the applicant to appeal the decision.
 - Exception: *Community Planning Act*, s.86

Citizen enforcement

2. Judicial review
 - Usually in a judicial review, you are asking the court to determine whether a government authority has properly applied the law.
 - In Canada, most “popular” form of citizen enforcement of environmental laws.

Citizen enforcement – judicial review

- *Fundy North Fishermen's Association v. N.B. (Minister of Agriculture, fisheries and Aquaculture)*, 2000 CanLII 3066 (NB Q.B.)
- Fundy North applied for the judicial review of an approval by the NB Minister of Agriculture, Fisheries and Aquaculture of an aquaculture occupation permit and license for a temporary aquaculture site.

Citizen enforcement – judicial review

- *Fundy North* case – decision:
 - “The duty of this court is not to determine if the decision to approve the Corporations’ Application is correct, but rather to determine if the Minister has or has not acted within his authority or discretion. If he has not, the court must quash the decision. Based on the evidence before this court, I am satisfied that the Minister has not in this case exercised his discretion for any improper purpose, or in bad faith, or based it on wrong principles or irrelevant considerations or in a discriminatory, unfair, erratic or unreasonable manner. I am of the view that the Minister acted within the bounds of the jurisdiction conferred upon him by the Act and that his decision to approve the Application was not wrong in law or patently unreasonable.”

Citizen enforcement – judicial review

- Main shortcoming of judicial reviews is the courts give a lot of deference to decision-makers.

Citizen enforcement

3. Private Prosecutions

- A private prosecution is a legal action brought in provincial court by an individual other than a government official.
- It is a criminal proceeding and you are acting as the prosecutor.
- Can be very effective – see the *Fletcher* case discussed earlier.

Citizen enforcement – private prosecution

- Several shortcomings:
 - Need to collect proper evidence
 - See: Environment Canada – The Inspector’s Field Sampling Manual
 - <http://dsp-psd.pwgsc.gc.ca/Collection-R/En40-498-2005-1E.pdf>
 - The Attorney General retains the privilege to take over the conduct of your case. Can do so and then stay the charges.

Using Tort Law

- Number of torts you can use:
 - Negligence
 - Trespass
 - Nuisance
 - Private and Public
 - Strict Liability

Using Tort Law

- Example case: Nuisance
- *Halifax (Regional Municipality) v. Willis*, 2010 NSCA 76 (CanLII)
 - Mr. Willis sued the RM of Halifax for 19 years worth of nuisance for odours coming from the operation of its sewage treatment plant.
 - Held at trial: That the interference with Mr. Willis' use and enjoyment of his land was unreasonable.
 - He was awarded \$55,000 plus interest.

Using Tort Law

- Main problem with tort law as an enforcement tool – you need to have a private interest (ie. health, land)
- Also, usually reactive – the damage has already occurred.

Petition the N.B. Ombudsman

- *New Brunswick Ombudsman Act*
- 12(1) Subject to subsection (2), the Ombudsman may, either on a written petition made to him or on his own motion, investigate a decision or recommendation made, an act done or omitted or a procedure used with respect to a matter of administration by an authority or any officer thereof whereby any person is aggrieved or, in the opinion of the Ombudsman, may be aggrieved.
- 13(1) A person may apply by written petition to the Ombudsman to investigate a grievance.

N.B. Ombudsman

- s.15 The Ombudsman can refuse to not investigate a petition for a number of reasons, including:
 - Another remedy or right of appeal exists
 - The petition is s trivial, frivolous, vexatious, etc.
 - The petitioner has had knowledge of the issue for more than one year before petitioning
- The Ombudsman has to tell you why he is not proceeding.

N.B. Ombudsman

- s.21 outlines what the Ombudsman can do if he finds the grievance has merit, ie. the government made a decision contrary to the law.
- A government authority does not have to follow the Ombudsman's recommendation(s). The Ombudsman can then report this failure to the LG in Council and the Legislative Assembly.
- The Ombudsman is to report back to the petitioner on the results of his investigation (s.22).

NB Ombudsman – Types of complaints by department



ANNUAL REPORT 2008/2009



ENVIRONMENT AND LOCAL GOVERNMENT

	2007-2008	2008-2009
<i>Administration</i>	-	5
<i>Local Service Districts</i>	7	4
<i>Permits/Licenses</i>	3	3
<i>Petition</i>	1	-
<i>Pollution</i>	1	1
<i>Pollution – Air quality</i>	1	-
<i>Property Issues</i>	1	2
<i>Water Sewage</i>	-	1
<i>Other (includes Non Jurisdiction & Inquiry)</i>	<u>10</u>	<u>6</u>
Total	24	22

http://www.gnb.ca/0073/2008-2009_Report-e.pdf at p. 48

Federal Petitions – Commissioner of the Environment and Sustainable Development

- The Commissioner (CESD) is appointed by the Auditor General of Canada and is an “Assistant Auditor General”.
- “The Commissioner conducts performance audits, and is responsible for assessing whether federal government departments are meeting their sustainable development objectives, and overseeing the environmental petitions process.”

Federal Petitions – Commissioner of the Environment and Sustainable Development

- Information on the CESD petition process can be found at:
 - [http://www.oag-bvg.gc.ca/internet/English/pet fs e 919.html](http://www.oag-bvg.gc.ca/internet/English/pet_fs_e_919.html)

- The CESD keeps a catalogue of all petitions received:
 - <http://www.oag-bvg.gc.ca/internet/English/pet fs e 929.html>

Federal Petitions – Commissioner of the Environment and Sustainable Development

- Example of a petition pending (not responded to yet by government):
 - No.300 - The environmental impact of salmon aquaculture in Passamaquoddy Bay, New Brunswick

Federal Petitions – Commissioner of the Environment and Sustainable Development

- Example of a completed petition:
 - No.290 - Federal government progress related to the conservation and recovery of wild Atlantic salmon in eastern Canada
 - Submitted by the Atlantic Salmon Federation.
 - Asked 19 questions, eg.
 - “18. *Has DFO developed a standardized approach to reviewing cumulative environment effects relating to aquaculture projects that is being applied in eastern Canada?*”
 - DFO answered all 19 questions

Federal Petitions – Commissioner of the Environment and Sustainable Development

- The CESD also audits various departments and/or issues and prepares reports detailing the results of the audit (performance audits).
- Spring 2009 CESD report looked at the issues of:
 1. Protecting Fish Habitat
 - “**Conclusion**
1.135 Fisheries and Oceans Canada and Environment Canada cannot demonstrate that they are adequately administering and enforcing the *Fisheries Act*, and applying the Habitat Policy and the Compliance and Enforcement Policy in order to protect fish habitat from the adverse impacts of human activity.”
 2. Kyoto Protocol Implementation Act

Conclusion

- Returning to Prof. Boyd's six failings of Canadian environmental law:
 - Missing laws
 - Excessive discretion
 - Failure to reflect contemporary science
 - Inadequate implementation and enforcement
 - Lack of meaningful public participation
 - Narrow approach

D.R. Boyd. 2003. *Unnatural Law: Rethinking Canadian Environmental Law and Policy*. UBC Press: Vancouver. pp. 469.