Reflections on Public Interest Environmental Lawyering in British Columbia
Deborah Curran
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REFLECTIONS ON PUBLIC INTEREST
ENVIRONMENTAL LAWYERING IN
BRITISH COLUMBIA

By Deborah Curran

Law journals and textbooks are full of cases about environmental law, while little is written about the lawyers and law firms that actually bring the cases. An incredibly rich and diverse worldwide movement of public interest environmental lawyers has grown in the past two decades.

On September 19, 2008, 63 lawyers from across British Columbia gathered for the first Continuing Legal Education Society course on public interest environmental law. Covering topics such as access to justice, environmental assessment, smart growth and climate change, the course provided a snapshot of this growing field. Public interest environmental law has burgeoned in North America in the past ten years, and B.C. is entering a new era of a more networked and collegial practitioner community.

The success of this CLE, and the mere fact that it was held, illustrates the rich, 30-plus-year tradition of the B.C. bar engaging in issues that aim to improve the quality of the natural and built environment in the province and to safeguard human health. British Columbia is recognized in North America as an ecological jewel. This is reflected in the strength of public interest environmental lawyering through the private bar and not-for-profit environmental organizations.

The province boasts three founding environmental law organizations in Canada. The first is West Coast Environmental Law Association ("WCEL"), started by students from the University of British Columbia law school in 1974. In addition to staff lawyer work on climate change/energy, forestry and livable communities, WCEL administers the Environmental Dispute Resolution Fund. For the past 20 years, the fund has supported individuals and community organizations to engage lawyers, preferably from the region in which an issue arises, at a reduced fee to address environmental law challenges.

The second organization is Ecojustice (formerly known as the Sierra Legal Defence Fund), created in Vancouver in 1990 to initiate strategic litigation in the tradition of the former Sierra Legal Defense Fund (now...
called Earth Justice) in the United States. Ecojustice has four offices (Vancouver, Toronto, Ottawa and Calgary) and is opening another office in Halifax. It employs 14 lawyers, one of whom is the director of the second Canadian environmental law clinic for law students at the University of Ottawa.

The third organization is Canada’s oldest environmental law clinic, the Environmental Law Centre (“ELC”) in the Faculty of Law at the University of Victoria. The ELC has been active since the early 1990s pairing students with community organizations and lawyers to provide legal information and representation across the province. In 1996, it incorporated as a non-profit society and entered into a partnership with the Faculty of Law to offer a clinical program in public interest environmental law. The ELC has operated the clinic on a year-round basis since 1997. Its current staffing complement includes four lawyers (executive director, legal director and two program directors) and two articling students.

Lawyers at the private bar also provide significant public interest environmental law services to clients each year, and have done so since before the founding of any of the public interest environmental law organizations. Between 2001 and 2006, 82 lawyers worked on cases that were funded through WCEL’s Environmental Dispute Resolution Fund alone, with more than 30 lawyers providing services through the fund each year.

The most recent addition to this growing public interest environmental law capacity is the ELC Associates program designed to support lawyers across the province through continuing legal education–type activities and assistance from articled and law students over a two-year period. The initial vision for the ELC Associates is for three cohorts of lawyers in six years, with the aspiration of creating a valuable environment for mentoring and networking lawyers across the province.

The foundation for all of these pillars continues to be the Law Foundation of B.C., whose staff and governors have steadily supported building the capacity of the bar to improve and uphold environmental laws.

The purpose of this article is to reflect on public interest environmental law in B.C. by discussing both the declining and the emerging practice areas and strategies. The information presented here is a summary of the thoughts of the first cohort of lawyers in the ELC Associates Program, lawyers from each of the public interest environmental law organizations in B.C. and instructors of environmental law classes.

WHAT IS PUBLIC INTEREST ENVIRONMENTAL LAW?

Public interest environmental law refers to legal advice and cases that aim to uphold environmental quality and human health. The client is usually
acting in a representative capacity in support of ecosystem services or an ecosystem component, such as water or trees. The challenged activity may also involve adverse human health impacts. The case may stem from protection of private rights, such as upholding a water licence, stopping a nuisance or enforcing a covenant, but also contain broader public interest implications. Finally, public interest environmental law is concerned with providing greater access to justice, transparency in decision making and access to information.

Public interest environmental law can be contrasted with the practice of environmental law. Environmental law includes, in large part, providing advice to clients on environmental liabilities, such as contaminated sites in business transactions, as well as advice about regulatory requirements for operating resource-based businesses in B.C. Environmental law considerations are increasingly integrated into most legal practices that deal with land in some capacity, such as real estate, corporate and commercial, Aboriginal, and municipal law.

Public interest environmental law includes topics of resource-based regulation, such as forestry, fisheries and energy, as well as cases focusing on ecosystem values, such as biodiversity, air quality, water, parks/protected areas and species at risk. It also includes ecosystem protection methods through processes or the assertion of rights, such as environmental assessment and Aboriginal rights and title.

PAST PRACTICE AND FUTURE OPPORTUNITIES
To assess trends in public interest environmental law in B.C., the author asked the following questions of the lawyers interviewed:

1. What environmental law issues or practices are less common than they were ten years ago?
2. What environmental law issues or practices are becoming more prevalent?
3. What is needed to further public interest environmental law in B.C.?

The discussion below is a summary of the issues that captured the most concurrence from the practitioners interviewed.

Less Prevalent Issues and Practices
The use of some mainstays of public interest environmental law, such as private prosecutions and judicial review, are waning somewhat. Although private prosecutions have been an effective way to enforce existing legislation, in the past five years the Attorney General has stayed all those commenced on the basis that they failed to meet the public interest test for
proceeding with the prosecution. On the judicial review front, the “patently unreasonable” test (now “unreasonable” test, as per Dunsmuir v. New Brunswick) in administrative law is a high standard for public interest litigants to meet when most administrative decisions are discretionary, and the potential for an adverse costs award inhibits the ability of not-for-profit organizations and citizens to bring test case litigation.

Engagement in law reform activities, other than responding to calls for consultation or making submissions on proposed legislation, has been less prevalent in the past five years. However, this may be changing. One notable exception to the decrease in law reform is in the local government sphere, where many local governments are working with community organizations and citizens to enact bylaws that reflect environmental quality issues. Finally, engagement in forestry issues has declined significantly with changes in the legislative regime in the past six years.

More Prevalent Issues and Practices
The diversity and complexity of public interest environmental law has burgeoned in the past decade. A cornerstone strategy is partnering with other interests. The most effective example of this is in alliances between environmental organizations and indigenous communities for the purpose of enforcing Aboriginal rights and title in order to protect the environment. These alliances have involved forestry, Crown land use planning, pesticide plans, fish farming and watershed management issues.

Given the significance of Crown land in B.C., the extent of traditional territories and the intensity of resource development, there is considerable potential for infringement of Aboriginal rights and title on most of the land base in the province. In addition, in the more rural areas of the province, where a variety of parties have interests in a watershed or river system, opportunities are emerging for shared decision making or co-management regimes. These are taking the form of a trust or a board that includes representation from indigenous communities, various levels of government, resource users and other stakeholders whose purpose is to coordinate integrated land use decision making. The intent is that through public consultation and discussion, the agencies and communities are able to work within existing jurisdictions to create integrated management approaches. No party gives up the right to resort to statute or common law remedies, and the spectre of litigation is seen as a key incentive to keeping all parties co-operating.

This partnership approach is also prevalent as public interest environmental law practitioners lend their expertise to statutory decision makers to address system environmental-quality issues as decisions are being made on individual resource-based applications.
From a topic-area perspective, energy and climate change are receiving significant attention. This is highlighted by the legislated climate action strategy of the provincial government, and the potential for concern about greenhouse gas emission to dramatically change business practices, regulation and land development. Public interest environmental lawyers are playing a key role in shaping new laws in this area that take an integrated and comprehensive approach to addressing climate change. Local government approaches to environmental protection are also providing significant opportunities for integrating ecological function into land development. Approximately 80 per cent of the population of the province lives on 2 per cent of the land base in the Okanagan and Lower Mainland, necessitating more comprehensive local approaches to environmental quality. Local governments are playing a larger role in environmental protection, particularly in urban areas and through growth management.

Another burgeoning topic area is water law as water quality and shortages are becoming more prevalent in communities across B.C.

Finally, lawyers of all types are integrating environmental law considerations into many traditional practice areas. Environmental law has gone mainstream because of concerns about environmental liabilities. It is standard practice in corporate law to seek opinions on contaminated sites, pollution liabilities and, more recently, greenhouse gas emissions for clients buying and selling businesses or land. In addition, securities regulations increasingly require the disclosure of environmental liabilities.

FUTURE NEEDS
For some, the term “environment” in B.C. has for many years evoked only trees and bears. This is changing, as current issues are increasingly addressing the protection of people, their health and property from environmental impacts. The following priorities identified by public interest environmental law practitioners point to a more comprehensive approach to environmental quality that addresses all ecosystem components across the province. Future needs include:

- Integrating human health and the environment by exploring human rights aspects of a clean environment, using s. 7 of the Canadian Charter of Rights and Freedoms.
- Engaging in law reform for sustainable development as core environmental law organization work, building on the 1990 Canadian Bar Association B.C. Branch publication *Law Reform for Sustainable Development in British Columbia*. 
• Promoting access to justice through intervener funding, support for providing pro bono and reduced-fee services to clients, protection from strategic lawsuits against public participation, and addressing the application of costs in a public interest context.

• Evaluating the jurisdiction of environmental legal institutions, such as the Environmental Appeal Board, to ensure it achieves environmental quality objectives. In many land- and water-based disputes, there is also a need to engage multiple stakeholders to achieve complex and creative solutions based on integrated, adaptive management through, for example, an environmental mediation body.

• Transferring knowledge from lawyers to the public, particularly knowledge about how to engage in decision-making processes.

• Continuing to build the capacity of the public interest environmental law bar by supporting the human capital required for responding to communities needs in B.C.

The public interest environmental law bar in B.C. is a committed, engaged and diverse group of lawyers who approach environmental law through a diversity of practice areas. There are emerging opportunities to take a more collaborative approach to environmental protection, such as shared decision making and strategies based on climate change considerations. Over the long history of public interest environmental law practice, many significant environmental and health benefits have been achieved throughout the province. However, access-to-justice deficiencies continue to limit the extent to which lawyers engaged in public interest environmental law can be fully effective in securing a healthy ecosystem.

ENDNOTES


6. The lawyers working on cases funded by the Environmental Dispute Resolution Fund are listed in each annual report, online at <http://www.wcel.org/aboutus/anrep/>.
7. The lawyers canvassed for this review include Bill Andrews, Alyssa Bradley, Wally Braul, Jo-Anna Cowan, Deborah Curran, Stacey Edzerza Fox, Andrew Gage, Mark Haddock, Jennifer Millbank, Richard Overstall, Devon Page, Krista Robertson, Stuart Rush, Q.C., Calvin Sandborn and Chris Tollefson. Collectively these lawyers have over 150 years of lawyering experience, with half of that time devoted solely to public interest environmental law. These lawyers have been called to bar from three to 35 years.
8. One caveat to the comments in this section is warranted. There may not have been a decrease in, for example, the number of judicial reviews filed on an annual basis, but the proportion of time spent on them has waned compared with that on the rise of other strategies. This is due to the overall increase in capacity of the B.C. bar to address public interest environmental law issues over the past ten years.
10. The provincial government enacted a suite of legislation in 2007 and 2008 to address climate change through the reduction of greenhouse gas emissions. These Acts include:
   • Greenhouse Gas Reduction Targets Act, S.B.C. 2007, c. 42, which sets province-wide targets for reducing greenhouse gas emissions;
   • Carbon Tax Act, S.B.C. 2008, c. 40, establishing a carbon tax;
   • Greenhouse Gas Reduction (Cap and Trade) Act, S.B.C. 2008, c. 32, enabling B.C. to participate in a cap and trade system through the Western Climate Initiative;
   • Housing Statutes Amendment Act, S.B.C. 2008, c. 8, and Local Government (Green Communities) Statutes Amendment Act, S.B.C. 2008, c. 23, enabling local governments to take further action on establishing land use and building regulations to reduce greenhouse gas emissions.
   For more information, see the papers by Greg Gowe (West Coast Environmental Law) and Chris Rolfe (Ministry of Attorney General), published by the Continuing Legal Education Society course “Environmental Law in the Public Interest”, September 19, 2008.