CHAPTER TWO

ETHICAL DIMENSIONS OF ENVIRONMENTAL LAW

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I. ETHICS AND ITS RELATIONSHIP TO LAW

Generally speaking, the relationship between ethics and the law is complex and much debated.[1] Thus, in order to properly understand the relationship between environmental ethics and environmental law, we must begin with a discussion of the nature of this relationship more generally. A legal system in a democratic society is a tool to establish explicit rules of acceptable conduct, including prescribed sanctions in cases of rule violations and installing designated officials who are enabled to write, interpret, and enforce the rules. While ethical norms

1 For the reader's understanding, the terms "ethics" and "morality" are used basically interchangeably in this chapter (with ethics generally used in reference to moral values and principles at work in an applied context). These terms are technical terms defined variously by different authors in different contexts. The work these terms do here is ultimately clarified within these pages.

are action *guiding*, the law is a means of managing and controlling human interactions and relationships.

The law in Canada and other democracies is designed to protect citizens from harm and maintain well-ordered relations between the government and citizens, between organizations and citizens, and among citizens themselves. A legal system, on the whole, is made up of rules of conduct (sometimes called primary rules), which are recognizable; applicable; and understood by reference to their relationship with other, secondary rules (which establish how the rules of conduct can be ascertained, introduced, changed, or eliminated).[2] In Canada, the secondary rules include the Constitution, encompassing the *Canadian Charter of Rights and Freedoms*;[3] the "unwritten" constitutional principles; and laws of legal interpretation, including judicial interpretation and precedent.[4] A critical concept defining a legal system in a democracy is the rule of law. Mentioned in the preamble to our Charter, the rule of law is the idea that no person is above the law/every person is subject to the law—including lawmakers, law enforcers, and judges.

Whereas a valid law is one that is backed by an effective legal system, foundational ethical principles are deemed reliable when they are proven to be reliable beyond a given situation or context. Although there are likely no ethical principles that are held by all moral agents, neither are these principles simply personal or culturally relative. For the present purposes, we will suggest that the "universality" of basic ethical principles is secured through the meta-ethical ideals of integrity (that people ought to do what they say they will do), reciprocity (that equitable exchanges between people are vital), and the fact that it is wrong to harm innocent people (the principle of harm).

Opinions about the relationship between the law and morality vary widely, with theorists famously debating about whether morality is a necessary condition of a valid legal system (which means an unjust legal system is therefore not law) or whether the two concepts overlap in a manner that is inessential.[5] The separation thesis is the idea that legal and ethical norms each exist in their own sphere, and that the validity of a law depends only on how it is made.[6] An example of a Canadian law lacking moral content is the traffic law that establishes whether people are to drive on the right-hand side of the road (as in Canada or the United States) or the left-hand side (as in the United Kingdom, Australia, or Japan).

Despite this example, clearly many Canadian laws are rooted in moral principles.[7] The Charter is a part of the constitutional framework in accordance with which all Canadian public laws are written, and it guarantees that laws governing the relationship between citizens and the state do not infringe citizens' right to think and hold beliefs according to their own conscience, to be treated equally, to be secure, and to be free. Where a law conflicts with these legal rights, which are also moral principles, it is unconstitutional.[8] If the law cannot be

2 HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) [Hart, *The Concept of Law*].

3 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

4 *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; Owen Minns, "Hart's Rule of Recognition, in Canada?" (7 May 2007), online: *Minns.ca* <https://minns.ca/owen/image/portfolio/rule-of-recognition-in-canada-20070507r2.pdf>.

5 HLA Hart, "Positivism and the Separation of Law and Morals" (1957) 71 Harv L Rev 593; Lon L Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart" (1958) 71:4 Harv L Rev 630.

6 Hart, *The Concept of Law*, *supra* note 2.

7 Wilfrid J Waluchow, *A Common Law Theory of Judicial Review* (Cambridge: Cambridge University Press, 2007).

8 Wilfrid J Waluchow, "Constitutional Morality and Bills of Rights" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008).

properly amended, it will be found invalid (see, for example, the *Reference re Same-Sex Marriage*).[9] Further instances of Canadian laws rooted in moral concepts or principles are not hard to find. See, for example, our criminal law, its purpose being to safeguard public peace, order, security, and health,[10] with punishment that is ethical;[11] Canadian contract laws, which rely on the idea that a promisor has, by his or her promise, created a reasonable expectation that it will be kept;[12] and, finally, Canadian tort law, which has been conceived as a form of corrective justice concerned with restoring equality between a doer and a sufferer of harm.[13]

So, although Canada does have on the books laws that are morally neutral, and there exist examples of Canadian laws that at one time were applicable before they were found to breach Charter rights, there is an intuitive resonance to the idea that "the reasons we have for establishing, maintaining and reforming law include moral reasons."[14] Broadly speaking, we can say or hope that legislators and legal actors in Canada's legal system are striving, in their drafting and application of the law, to represent Canadians' ideas about what is good, right, virtuous, fair, and just—though our understanding of these concepts is extremely tenuous and ever-evolving, and consensus is difficult or impossible. At times, the public conversation about a legal issue will provoke a moral debate among citizens, deliberating as a society over appropriate ethical and legal responses to the issue. The result of this conversation may be an affirmation of the law, continued resistance to the law's validity in the form of social movements, or an evolution in the law to properly reflect an expression of Canadians' values at the time. A fitting example of this type of public conversation and the law's responsiveness to society's shifting values is the Supreme Court of Canada's decisions considering the morality and legality of medically assisted death: see *Rodriguez v British Columbia (Attorney General)*[15] and then, much later, *Carter v Canada (Attorney General)*.[16] In 2015 the Supreme Court recognized a shift in the social and factual landscape in the 22 years between the two cases and overturned its previous decision to uphold the law criminalizing medically assisted death.

II. MORAL ROOTS AND LEGAL RULES

The value of possessing a basic understanding of the moral principles upon which our environmental laws are founded can be usefully compared with the value of possessing a basic understanding of the importance of keeping promises to one's ability to interpret and apply contract law. Though commercial contract law can be incredibly complex, and result in years-long legal battles with multimillion-dollar judgments and hundred-page long judicial decisions, underpinning the law and arguments in these cases are certain basic principles and values we begin to absorb around kindergarten: say what you mean, tell the truth, ask questions if you do not understand, stick with what you choose, make good on your promises, and ask permission if you are not sure. While, of course, things become much more complicated,

9 2004 SCC 79, [2004] 3 SCR 698.

10 *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1, 1948 CanLII 2.

11 *Criminal Code*, RSC 1985, c C-46, s 718.

12 Sir David Hughes Parry, "The Sanctity of Contracts in English Law," *The Hamlyn Lectures,* Tenth Series (London: Steven & Sons, 1959).

13 Ernest Weinrib, "The Special Morality of Tort Law" (1989) 34 McGill LJ 3.

14 John Finnis, "The Truth in Legal Positivism" in Robert P George, ed, *The Autonomy of Law* (Oxford: Clarendon Press) at 204.

15 [1993] 3 SCR 519, 1993 CanLII 75.

16 2015 SCC 5, [2015] 1 SCR 331.

and nuances and exceptions to the kindergarten rules (which are simply stated moral principles) abound, our grasp of these basic notions of fairness, equity, and consent allows us to comprehend the fundamentals of contract law. Our interpretations and applications of the law reflect this basic understanding. Also informing our understanding of contract law, at arguably the most basic level, is the underlying value we place on our ability to get along with others, which gives the kindergarten rules their shape and meaning. Human relationships tend to require some degree of predictability, trust, and fulfillment of obligations to one another if the relationships are to function well (whether we see this functioning well as a matter of maximizing well-being, a categorical imperative, or something else). While the associations made here are surely grossly oversimplified, they highlight a connection (perhaps necessary but certainly not sufficient) between the value we humans place on reliability in our relationships, the moral principles that direct us to fulfill our commitments to one another, and the laws of contract.

As we explore the relationship between environmental ethics and environmental law, we will find that things are much less obvious or intuitive, and much more complicated. As a starting place, there is no doubt that for most of us the values and morals informing our human relationships are more easily understood and articulated than our values and morals concerning our relationship to nature.

At the beginning of his famous paper, "Should Trees Have Standing? Towards Legal Rights for Natural Objects," Christopher D Stone cites Charles Darwin's observation that

> the history of a man's moral development has been a continual extension in the objects of his "social instincts and sympathies." Originally each man had regard only for himself and those of a very narrow circle about him; later, he came to regard more and more "not only the welfare, but the happiness of all his fellow-men"; then "his sympathies became more tender and widely diffused, extending to men of all races."[17]

Stone's point, and Darwin's before him, is that we humans end up caring for those we can relate to. The suggestion is that our morals tend to arise out of our ability to sympathize with or at least comprehend the object of our attention. Following this idea, our environmental ethics are an extension of our ability to understand and relate to nature (for example, if or how we value nature, and our understanding of what is required for nature to thrive).

How do these possible ways of thinking about environmental ethics relate to our environmental laws? See, for example, the preamble to the *Canadian Environmental Protection Act, 1999*,[18] which reads like a moral treatise in its reference to environmental ethics concepts,

17 (1972) 45 S Cal L Rev 450 at 450.

18 SC 1999, c 33 [CEPA]. The preamble reads:

> Whereas the Government of Canada seeks to achieve sustainable development that is based on an ecologically efficient use of natural, social and economic resources and acknowledges the need to integrate environmental, economic and social factors in the making of all decisions by government and private entities;
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> Whereas the Government of Canada is committed to implementing pollution prevention as a national goal and as the priority approach to environmental protection;
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> Whereas the Government of Canada acknowledges the need to virtually eliminate the most persistent and bioaccumulative toxic substances and the need to control and manage pollutants and wastes if their release into the environment cannot be prevented;
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> Whereas the Government of Canada recognizes the importance of an ecosystem approach;
>
> Whereas the Government of Canada will continue to demonstrate national leadership in establishing environmental standards, ecosystem objectives and environmental quality guidelines and codes of practice;
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> Whereas the Government of Canada is committed to implementing the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation;

including sustainable development, pollution prevention, ecosystem approach, the precautionary principle, environmental quality, and biological diversity. As the language of the preamble, these terms are meant to aid in interpreting the Act.[19] While in the contracts example we can logically connect the legal requirement to honour a contract with the moral requirement to keep our word, we lack a comparable comprehension of what "sustainable development" means or requires, or what is really at stake if we fail. The concept is abstract and not within the control of any identifiable member of the moral community. Outside of CEPA, we have heard references to these terms in various contexts in relation to caring for the environment: in lessons at school, in advertisements, in corporate mission statements, in political speeches, and by those who believe passionately about protecting and preserving nature. Though these concepts find their meaning within the context of environmental ethics, most Canadians cannot speak in a thoughtful or informed way about the values they protect and, as such, they are vacuous as moral concepts. Further, there is no meaningful connection to be drawn between such terms and a well-informed understanding of the fundamental purpose of CEPA and its regulations, which set out the rules for the manufacture, importation, processing, transport, sale, use, discard, or release of toxic substances into the environment. There is little evidence that CEPA's preamble has greatly affected the manner the Act has been interpreted, enforced, or applied.[20]

Whereas the Government of Canada recognizes that all governments in Canada have authority that enables them to protect the environment and recognizes that all governments face environmental problems that can benefit from cooperative resolution;

Whereas the Government of Canada recognizes the importance of endeavouring, in cooperation with provinces, territories and aboriginal peoples, to achieve the highest level of environmental quality for all Canadians and ultimately contribute to sustainable development;

Whereas the Government of Canada recognizes that the risk of toxic substances in the environment is a matter of national concern and that toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries;

Whereas the Government of Canada recognizes the integral role of science, as well as the role of traditional aboriginal knowledge, in the process of making decisions relating to the protection of the environment and human health and that environmental or health risks and social, economic and technical matters are to be considered in that process;

Whereas the Government of Canada recognizes the responsibility of users and producers in relation to toxic substances and pollutants and wastes, and has adopted the "polluter pays" principle;

Whereas the Government of Canada is committed to ensuring that its operations and activities on federal and aboriginal lands are carried out in a manner that is consistent with the principles of pollution prevention and the protection of the environment and human health;

Whereas the Government of Canada will endeavour to remove threats to biological diversity through pollution prevention, the control and management of the risk of any adverse effects of the use and release of toxic substances, pollutants and wastes, and the virtual elimination of persistent and bioaccumulative toxic substances;

Whereas the Government of Canada recognizes the need to protect the environment, including its biological diversity, and human health, by ensuring the safe and effective use of biotechnology;

And whereas the Government of Canada must be able to fulfil its international obligations in respect of the environment."

19 In the House of Commons debates, when Bill C-74 (CEPA) was introduced, the proposed preamble was described by the Opposition as "elegant prose … which really has no legal status at all." See *House of Commons Debates*, 33-2, vol 8 (25 September 1987) at 9325 (Hon W Rompkey).

20 According to David Boyd, there is a wide gap between Canada's regulation of chemical contaminants relative to the standards and guidelines in other industrialized nations. Boyd provides that

[b]illions of kilograms of toxic chemicals—including known carcinogens, endocrine disruptors, and chemicals that harm respiratory health, cardiovascular health, and neurological development—are discharged into Canadian air, water, and land by industry each and every year. Industrial chemicals

In consideration of the above, this chapter will attempt to give the reader some understanding of the complicated relationship (or lack thereof) between environmental ethics and environmental law. It will address the reality that this relationship is tenuous and poorly developed and will explore the reasons why this is harmful. The case summaries and questions for discussion at the end of the chapter are designed to encourage the reader to analyze the law and legal issues from an ethical perspective, consider some examples where legal decision-makers have been influenced by moral values or principles, and, finally, recognize and consider certain long-held assumptions in the Western philosophical tradition that create barriers in terms of our ability to ground our thinking about the environment in a respect for nature.

III. WHAT IS ENVIRONMENTAL ETHICS?

Environmental ethics is an area of applied ethics—branching off from moral philosophy—that is concerned with putting moral concepts (such as obligation and responsibility, good and bad, right and wrong, virtue and vice) to work in the context of environmental decision-making. Very generally, moral theories evaluate and take a stance on the human motives, actions, or dispositions best able to reduce harm or bring about happiness or well-being. Applied ethics, to some extent, relies on the work done by moral theorists to attempt to find answers to ethical problems in a given context. The field of environmental ethics specifically tackles ethical problems related to our relationship to nature; our degree of accountability for the health of the planet; our responsibility to preserve and protect nature, its resources, and inhabitants; and the extent to which we ought to alter our current choices to protect and preserve our natural environment in the present and for the future.

A. APPROACHES TO ENVIRONMENTAL ETHICS

[See the Questions and Context section at the end of this chapter to gain a better understanding of the moral theories being referenced below and their application.]

To answer the ethical problems previously identified, we must consider who is accountable and to whom; what value we place upon animals, who cannot themselves be held morally accountable; and whether we believe nature has a value beyond its resources or is for our enjoyment. As we sort out our position on these questions, we need to know not just who or what we value, but also why we hold this point of view. We may focus on the idea that we have a duty to one another, based upon our intrinsic value or human dignity, and so make decisions that are consistent with preserving and protecting this value/dignity. Based on this idea, moral actions require morally defensible motives, regardless of the outcome in a particular case.

In the alternative, our ethical questions may be answered with a special interest in the consequences of our actions, and in consideration of making choices that maximize the current and future well-being of our moral community, as we have defined it. These ethical questions may relate to how we travel, source our food, or heat our homes. They may include where we work, what we work at, or who we vote for. Environmental decision-making occurs at the level of the individual, the family, community, municipality, province, nation, and

spewed into the Canadian environment in large quantities include arsenic, cadmium, formaldehyde, toluene, and xylene.

See David R Boyd, *Cleaner, Greener, Healthier* (Vancouver: UBC Press, 2015) at 139 and then at 25 [Boyd, *Cleaner, Greener, Healthier*], referencing "About the National Pollutant Release Inventory" (6 December 2018), online: *Government of Canada* <https://www.canada.ca/en/environment-climate-change/services/national-pollutant-release-inventory/about-national-pollutant-release-inventory.html>.

internationally. Weighing the relevant consequences of our decisions requires considering how our choices contribute to or mitigate problems on a global scale, with an awareness of environmental as well as socio-economic impacts, and considering the reality that some people may be affected disproportionately and so unfairly, with a sense of how these problems may evolve or compound over time.

As a virtuous or caring person is arguably the one best able to make choices that are environmentally just, we may approach ethical issues with a focus on our moral character, and the value in cultivating a love and respect for our natural environment. We may abandon the notion of objectivity and instead recognize that relationships of humans to the non-human environment are, in part, constitutive of what it is to be human.[21] In this vein, a question about whether to eat meat versus become vegetarian, for example, yields an answer not based upon a sense of obligation or cost-benefit analysis, but rather upon a deep understanding about the intrinsic value of all sentient beings and the survival of the Earth.

We may further choose to turn our focus more directly and immediately on the environmental problems we humans are facing, worrying less about what to value or why and attempting to be pragmatic about building consensus and getting things done. Globally, environmental problems relate to air and water pollution; water scarcity; deforestation and a loss of biodiversity; species and ecosystem extinction; waste disposal and plastics; climate change; and environmental justice issues (*intergenerational justice*: the rights of future generations; *intra-generational justice*: the idea that environmental harms and goods should be equitably and not unfairly affected by race, gender, or socio-economic status; and *inter-species justice*: the idea our human-centred laws are a form of discrimination). In Canada more specifically, the central problems of environmental ethics could include the oil sands; pipeline development; coal exports; mining; deforestation; fisheries; and Aboriginal rights issues (for example, the traditional or cultural value of exploited land, or access to clean drinking water on remote reserves). Law and policy implications will differ depending on whether or how we answer these questions, and ultimately which theory best explains our environmental decision-making.

IV. THE CURRENT STATE OF OUR ENVIRONMENT

[See the Questions and Context section at the end of this chapter to learn how Canada is reacting to the United Nations position and policy on climate change.]

Whatever approach one takes to answer the central problems within the field of environmental ethics, there is no question that we are, at this time, in need of some greater understanding of how to minimize the effects of pollution, environmental degradation, and environmental disasters. We need to get a grip on the irreconcilable relationship between our economic reliance on nature's resources to maintain our way of life, and science's reality that such a way of life must be altered in order to avoid human suffering. In order to do this, we may need to explore our most basic assumptions about our relationship to nature or nature's *purpose*, and also accept the strong relationship between prudent environmental decision-making and relevant scientific considerations (including taking a precautionary approach where scientific evidence is indeterminate).

At an international level, we humans are undeniably failing each other in terms of our ability to understand how to care for one another where environmental welfare is concerned. A 2016 United Nations report on the issue of human rights and obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment provides a poignant sense of the

21 Karen J Warren, "The Power and the Promise of Ecological Feminism" in Byron Willison, ed, *Environmental Ethics for Canadians* (Oxford: Oxford University Press, 2012) at 167.

weightiness of our place in history, in terms of the extreme nature of the effects of humans' environmental decision-making to this point, and the hyper-importance of our environmental choices to address these consequences, going forward:

> As average global temperatures rise, deaths, injuries and displacement of persons from climate-related disasters such as tropical cyclones increase, as do mortality and illness from heat waves, drought, disease and malnutrition. In general, the greater the increase in average temperature, the greater the effects on the rights to life and health as well as other human rights. The foreseeable consequences of even a 2°C rise in average global temperature are dramatic. ...
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> Climate change will compound the problem of access to safe drinking water, currently denied to about 1.1 billion people. It has been estimated that about 8 per cent of the global population will see a severe reduction in water resources with a 1°C rise in the global mean temperature, rising to 14 per cent at 2°C. ...
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> With respect to the right to food, climate change is already impairing the ability of some communities to feed themselves, and the number affected will grow as temperatures rise. The Intergovernmental Panel on Climate Change states that "all aspects of food security are potentially affected by climate change, including food access, utilization, and price stability." ...
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> As the Human Rights Council has recognized, the worst effects of climate change are felt by those who are already vulnerable because of factors such as geography, poverty, gender, age, indigenous or minority status, national or social origin, birth or other status and disability. In the words of the Intergovernmental Panel on Climate Change, "People who are socially, economically, culturally, politically, institutionally or otherwise marginalized are especially vulnerable to climate change and also to some adaptation and mitigation responses."
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> Climate change also threatens to devastate the other forms of life that share this planet with us. As the world warms, increasingly disastrous consequences will ensue. One study has found that if global temperatures increase by more than 2 to 3°C, 20 to 30 per cent of the assessed plant and animal species are likely to be at a high risk of extinction. The decimation of other species will harm the human species too.[22]

These harms and threats to human life and well-being caused by climate change (as above, relating to environmental disasters, the scarcity of food and water, social injustices, and endangered species), and similarly the harms and threats to human life and well-being caused by pollution and resource depletion, are the consequences of our modern industrial society. This includes resource extraction—its methods and consumption, using the environment as a vehicle for waste disposal, creating imbalances in the chemistry and biochemistry of the Earth, and the like. To the extent that the law is one of the most practical and powerful tools to offer protection, it is critical that the law's authors, interpreters, and implementers understand the current state of environmental problems, and their effect on the people whom the law is designed to protect.

On the best evidence available (given the predicted trajectory of environmental degradation, pollution, and climate change), our environmental laws are not doing enough. According to Canadian David Boyd, the United Nations' special rapporteur on human rights and the environment:

22 United Nations General Assembly, Human Rights Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UNGAOR, 31st Sess, UN Doc A/HRC/31/52 (1 February 2016) at paras 24-30.

Contrary to the myth of a pristine green country providing environmental leadership to the world, a huge pile of studies proves beyond a reasonable doubt that Canada lags behind other nations in terms of environmental performance. According to researchers at Simon Fraser University, Canada's environmental performance ranks twenty-fourth out of the twenty-five wealthiest nations in the Organisation for Economic Co-operation and Development (OECD). The OECD has published blistering criticisms of Canada's weak laws and policies, perverse subsidies for unsustainable industries, and poor environmental performance.[23]

Boyd further observes that

this conclusion holds true across the entire spectrum of environmental issues, including air quality, drinking water, food safety, toxic substances, climate change and biodiversity. The consequences of these weak environmental laws and policies include thousands of premature deaths, millions of preventable diseases, billions of wasted dollars, and troubling injustices in the distribution of negative health outcomes.[24]

Based on Environment and Climate Change Canada's 2019 repo

Canada's climate has warmed and will warm further in the future, driven by human influence. Both past and future warming in Canada is, on average, about double the magnitude of global warming. Northern Canada has warmed and will continue to warm at even more than double the global rate.

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The effects of widespread warming are evident in many parts of Canada and are projected to intensify in the future. The rate and magnitude of climate change under high versus low emission scenarios project two very different futures for Canada. Scenarios with large and rapid warming illustrate the profound effects on Canadian climate of continued growth in greenhouse gas emissions. Scenarios with limited warming will only occur if Canada and the rest of the world reduce carbon emissions to near zero early in the second half of the century and reduce emissions of other greenhouse gases substantially.

Beyond the next few decades, the largest uncertainty about the magnitude of future climate change is rooted in uncertainty about human behaviour, that is, whether the world will follow a pathway of low, medium, or high emissions. Given this uncertainty, projections based on a range of emission scenarios are needed to inform impact assessment, climate risk management, and policy development.[25]

A. THE CURRENT STATE OF OUR ENVIRONMENTAL LAW

In *Cleaner, Greener, Healthier*, Boyd explains how environmental laws, regulations, and policies, intended to protect human health from environmental hazards but watered down by economic and political factors, are failing Canadians.[26] Boyd argues that because our environ-

23 David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012) at 6.

24 Boyd, *Cleaner, Greener, Healthier*, *supra* note 20 at 199.

25 Canada, Environment and Climate Change Canada, *Canada's Changing Climate Report—Executive Summary* (2019) at 5, 16, online (pdf): <https://changingclimate.ca/site/assets/uploads/sites/2/2019/03/CCCR_ExecSummary.pdf> (internal references omitted).

26 For more information, see Chapter 20 of this text; Boyd, *Cleaner, Greener, Healthier*, *supra* note 20; or Stepan Wood, Georgia Tanner & Benjamin Richardson, "What Ever Happened to Canadian Environmental Law?" (2010) 37 Ecology LQ 981, online: <http://digitalcommons.osgoode.yorku.ca/scholarly_works/1>.

mental laws are not written, interpreted, enforced, or applied in consideration of Canadians' right to a healthy environment, they are weak, easily changed, and poorly enforced. Boyd's arguments support the more general claim made at the beginning of the chapter that Canadian environmental law lacks a moral foundation.

According to Boyd, there are certain "fundamental constraints" that limit the effectiveness of environmental law and that can be applied at a global level. These constraints are as follows:

1. Environmental laws generally ignore the laws of nature, by ignoring the reality that the Earth and its resources are finite.
2. Environmental laws are made and then enforced by governments who are reliant on the revenue generated by the ecologically destructive activities they regulate.
3. Environmental laws exist within a context that tends to value and thus prioritize limitless growth, consumerism, the primacy of property rights over the public good, and the domination of transnational corporations.[27]

Boyd further argues that Canada's environmental laws, in comparison to those of other UN nations, stand out as particularly weak, and there are further economic, political, and legal factors that uniquely explain this vulnerability. These are as follows:

1. The false idea that Canada's economy depends on the extraction and export of natural resources (with industry holding the power to influence the government to delay, weaken, or reverse the impact of environmental laws).
2. The basic functioning of our first-past-the-post political system (leaving the smaller political parties with less populist priorities—such as the Green Party—at a substantial disadvantage in terms of their ability to influence policy or law-making.
3. The silence of our Constitution on the question of who, between Parliament and the provinces, holds law-making authority over the environment (leaving both the federal and provincial governments hesitant to create and enforce environmental laws, with governments either passing the buck or resisting enforcement by the other level of government). This problem is then further exacerbated by the lack of a constitutionally protected right to a healthy environment.[28]

In her essay "Complexities and Uncertainties in Matters of Human Rights and the Environment: Identifying the Judicial Role," Dinah Shelton discusses the elements required for a state to ensure a clean and healthy environment consistent with the enjoyment of human rights. These include the following: (1) the state should adopt laws and regulations to control pollution and limit the unsustainable exploitation of natural resources, (2) these environmental laws and regulations should be based on agreed-upon and scientific definitions of what constitutes "pollution" and "unsustainable" exploitation, (3) the state should have relevant agencies or other governing bodies applying the law and evaluating proposed projects or activities within their jurisdiction to assess possible impacts on the environment and persons who may be negatively affected, and, finally, (4) the public and all those involved in the approval process should be fully informed of the risks and harm and be able to make their voices heard before a decision is made.[29] In her assessment of contexts in which these requirements may not be

27 Boyd, *Cleaner, Greener, Healthier, supra* note 20 at 200-1.

28 *Ibid* at 201-18.

29 Dinah Shelton, "Complexities and Uncertainties in Matters of Human Rights and the Environment: Identifying the Judicial Role" in John H Knox & Ramin Pejan, eds, *The Human Right to a Healthy Environment* (Cambridge: Cambridge University Press, 2018) 97 at 97. Note that a similar position was set out over 20 years ago by WA Tilleman in "Public Participation in the Environmental Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States, and the European Community" (1995) 33 Colum J of Transnat'l L 337 at 339.

met, Shelton suggests this may be due to states lacking the proper constitutional framework to prevent environmental harm that can infringe human rights or inadequacies in environmental laws or their enforcement (as suggested by Boyd). Shelton finds that the response in many countries to such failures of the law is litigation, with cases being brought forward to prevent projects, to challenge project approvals, to obtain redress when harm has occurred or is imminent, or to challenge the validity of inadequate laws for violating basic rights.[30]

B. UNARTICULATED VALUES

Without disagreeing with Shelton's suggestion about the potential role of the courts in ensuring environmental rights and health, Shelton's analysis of the necessary conditions for a robust environmental law that protects human rights ignores the role of moral values and principles in our ability to comprehend, or our willingness to enforce or uphold the law. In *Environmental Ethics*, Joseph R Desjardins writes:

> The tendency in our culture is to treat such issues as simply scientific, technological, or political problems. But they are much more than that. These environmental and ecological controversies raise fundamental questions about what we as human beings value, about the kind of beings we are, the kinds of lives we should live, our place in nature, and the kind of world in which we might flourish.[31]

Analysis of environmental law often focuses on the scientific, technological, economic, or political dimensions. Furthermore, a moral perspective is often perceived as facing off against these other lenses through which we view the law. Because of the idea that moral principles are in conflict with certain aspects of the law's purpose as opposed to being at the very heart of the law's purpose, we lack a shared understanding about why the law matters and what would be lost without it.

V. ENVIRONMENTAL ETHICS AND ENVIRONMENTAL LAW

In her paper "In Search of an Environmental Ethic," Alyson Flournoy argues that a robust environmental ethics is critical to the sound development of environmental law and policy.[32] Flournoy further argues that a better translation of our laws into a "language of ethics" is needed to facilitate this process.[33] Flournoy supports the earlier contention that to understand the ethic underlying our laws "we must uncover not just the objects of concern but the bases for our concern. … [T]he continued maturation of a body of law appropriate to our society's needs and values depends on greater awareness of the values and ethics we currently embrace through our laws."[34]

In her work, Flournoy discusses how our ethical attunement influences the law in reference to our identification and analysis of the moral basis for punishment in the criminal law context (which in Canada is grounded in utilitarian and retributive justifications for punishment):

30 Shelton, *supra* note 29 at 98.

31 *Environmental Ethics: An Introduction to Environmental Philosophy*, 5th ed (Boston: Wadsworth Cengage Learning, 2013) at xii.

32 Alyson C Flournoy, "In Search of an Environmental Ethic" (2003) 28:1 Colum J of Envtl L 63.

33 *Ibid* at 69.

34 *Ibid* at 68 and 118.

> These competing ethics and the values they advance are often discussed not just by philosophers but also by legal scholars and policymakers. In criminal law scholarship, it is not uncommon for the ethical justification for a particular rule or decision to be addressed by a scholar as part of legal analysis; it is part of the mainstream of criminal legal scholarship. Because the debate is grounded in traditional philosophies long identified as the core ethical force in this field, scholars are well versed in the subject. Either despite the fact that the paths for arguing these issues are fairly well trod—or because they are—discourse about the ethical theories that justify a given law, sentencing approach or reform proposal is quite common to mainstream criminal law scholarship.[35]

As in the case of Canada's decriminalization of physician-assisted suicide more than 20 years after this was first considered by the Supreme Court, the law's failure to properly represent our moral values becomes a means for criticizing the law or bringing about the evolution of the law. Furthermore, our understanding at the most basic level of why we have the rules we do, why they matter, what harm they prevent, and what is lost if the rule is ignored in a given instance grounds our ability to think critically and creatively about what the law should say and how it should be interpreted, applied, and potentially amended.

In contrast to the contracts example, where the connection between the law, our moral principles, and our values is easily traced, Flournoy states:

> The language of the law and the substance of public debate over environmental law both reveal scant attention to its ethical content. Our environmental laws remain politically controversial and subject to continuous debate over directions for reform. Yet there is only superficial discourse about the complex mix of values at stake. This limited discourse does not reflect the richness of the possibilities in this area. ...[36]
>
> Clearly, environmental laws and policies reflect normative or value judgments. As a society, we are making decisions about right and wrong, about priorities and imperatives, when we adopt policies and rules. If neither the public nor the decisionmakers articulate the ethical issues involved, we cannot ultimately know whether our laws and policies are consistent with our ethics. Just as in archery one learns from seeing where the last arrow struck and adjusts one's aim, we need to know what the bulls-eye is for environmental law, or else we're simply launching arrow after arrow with only random improvement. ...
>
> A more open process of identifying and debating the values at stake may allow a fuller development of the public's values. Ethics can broaden our ability to see and define the problem, by focusing us on what we care about. Also, there may be a risk that environmental values will not remain protected if they are poorly understood and articulated. Essential to long-term environmental protection is a clear understanding of the values that the laws serve. These values are and will continue to be in conflict with other values. If they are poorly articulated and understood, they can be too easily trumped.[37]

Flournoy highlights the problem:

> One possible explanation for why little attention has been paid to the ethical content of environmental law is that these ethics are inchoate. Articulating an ethic in this area is relatively challenging, involving—as environmental protection decisions do—complex technical decisions, significant uncertainty, a focus on the impacts of human actions on non-humans who may or may not be valued, and issues that may have long-term effects that extend far beyond a human lifetime. The complexity of environmental issues makes determining the values served by any given law or regulatory decision extremely difficult in many cases. Our

35 *Ibid* at 113.

36 *Ibid* at 109.

37 *Ibid* at 115-16.

limited understanding of the natural processes we continually affect makes uncertainty an unavoidable aspect of environmental decisions.[38]

VI. JUDICIAL INTERPRETATION OF ENVIRONMENTAL LAWS

The remainder of this chapter is designed to encourage conversation about the nature of environmental law in Canada, its moral foundation (or lack thereof), the question of whether or how Canadians value nature, and what this means for our choices (political, economic, moral, practical, and legal).

A. TO PUNISH VERSUS PROTECT

R v Hydro-Québec[39] is a leading case on constitutional law division of powers and a course-altering decision in the common law interpretation of Canada's environmental law. Hydro-Québec was charged with discharging polychlorinated biphenyls (PCBs) into the St Maurice River in Quebec in contravention of an order made under CEPA. Hydro-Québec challenged the constitutionality of the order. In its decision, the Supreme Court grounded Parliament's jurisdiction to govern a variety of environmental matters, including air and water pollution, waste management, and toxic substances, under its criminal law power under s 91(27) of the *Constitution Act, 1867*.[40] While the legislative scheme of CEPA clearly looks nothing like a standard criminal law prohibition, for constitutional purposes the courts have defined "criminal law" very broadly, requiring (1) a prohibition, (2) a penalty, and (3) a typically criminal purpose. While four out of nine members of the Supreme Court did not agree that CEPA fit within the criminal law framework, a five-member majority held that, because CEPA's administrative processes culminated in a prohibition enforced by a penalty, the scheme was sufficiently prohibitory to count as criminal law. The case is described above as "course-altering" because the Supreme Court could have considered an alternative to grounding Parliament's power to protect the environment in the criminal power, but chose not to do so in this case. With the benefit of hindsight, and in consideration of the current state of the global environmental crisis, the court might have found Parliament's jurisdiction over the environment to be a matter affecting the peace, order, and good government (POGG) of Canadians under s 91 of the *Constitution Act, 1867*. Ten years earlier in *R v Crown Zellerbach Canada Ltd*,[41] the Supreme Court upheld the validity of the *Ocean Dumping Act*[42] on the basis that all matters related to polluting the ocean were within the exclusive jurisdiction of the federal government, owing to the national concern branch of POGG. In *Crown Zellerbach,* the court explained the relevance of the national concern doctrine under POGG to matters touching all Canadians:

> [T]he true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole … then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the

38 *Ibid* at 110.

39 [1997] 3 SCR 213, 1997 CanLII 318.

40 (UK), 30 & 31 Vict, c 3, s 91.

41 [1988] 1 SCR 401, 1988 CanLII 63 [*Crown Zellerbach* cited to SCR].

42 SC 1974-75-76, c 55.

> provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen* [[(1882), 7 App Cas 829 (JCPC)]], Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province.[43]

Bolstering the possibility that Canada's environmental law may have been more fittingly identified in reference to Parliament's powers under POGG, Jocelyn Stacey has argued that "the best way to understand the challenge that environmental issues pose for law is through the lens of an ongoing emergency. Like emergencies, environmental issues require decisions to be taken under conditions of deep uncertainty where the possibility of a catastrophe cannot be reliably eliminated in advance."[44]

In *R v Hydro-Québec* the Supreme Court failed to grapple with policy arguments that were introduced by Environment Canada and the Law Reform Commission concerning the necessity of a healthy environment to Canadians' health and well-being. Additionally the court failed to grapple with its own previous reasoning in *Ontario v Canadian Pacific Ltd* and *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, where the court referred to "the right to a safe environment"; the importance of a "healthy environment"; and recognized that "[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment … environmental protection [has] emerged as a fundamental value in Canadian society."[45] Failing to further entrench such values into Canada's environmental law jurisprudence, *R v Hydro-Québec* marked Canada's environmental law as punitive at its core, undervalued the role of environmental law to protect Canadians' health, and ignored the reality that protecting the environment is essential to this role.

B. EXISTENCE AND INHERENT VALUE

In order to calculate the damages owed to the province as a result of a forest fire caused by Canadian Forest Products Ltd, the Supreme Court in *British Columbia v Canadian Forest Products Ltd* examined various approaches to assessing the value of the forest:

> "Use value" includes the services provided by the ecosystem to human beings, including food sources, water quality and recreational opportunities. Even if the public are not charged for these services, it may be possible to quantify them economically by observing what the public pays for comparable services on the market.
>
> • • •
>
> "Passive use" or "existence" value recognizes that a member of the public may be prepared to pay something for the protection of a natural resource, even if he or she never directly uses it. It includes both the psychological benefit to the public of knowing that the resource is protected, and the option value of being able to use it in the future. The branch of economics

43 *Crown Zellerbach*, *supra* note 41 at 423-24, quoting *Attorney-General for Ontario v Canada Temperance Federation*, 1946 CanLII 351, [1946] AC 193 at 205-6.

44 See Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Oxford: Hart Publishing, 2018) at 1, noting however that Stacey does not address Parliament's powers under POGG but takes a completely different line of argument.

45 *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at para 55, 1995 CanLII 112; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 1, [2001] 2 SCR 241.

known as "*contingent valuation*" uses survey techniques to attempt to quantify what the public would be prepared to pay to maintain these benefits. [Emphasis in original.]

• • •

Finally, an ecosystem may be said to have an "inherent value" beyond its usefulness to humans. Those who invoke inherent value argue that ecosystems should be preserved not just for their utility to humans, but because they are important in and of themselves. ... [T]o the extent humans recognize this inherent value, and are willing to forego income or wealth for it, it becomes a part of passive use value and becomes compensable.[46]

Though the court in this case did not award damages based on the "existence" or "inherent" value of the environment, the court stated that this was because of narrowly and commercially focused pleadings. Though the court was not given the tools to assess "ecological" or "environmental" losses in this case, it advised that it would have considered these things with the proper evidence.

C. CULTURAL VALUE

The court in *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*[47] introduced this case as one that highlighted the clash of "the desire for the economic development of the rich resources located on a vast tract of pristine land in a remote portion of Northwestern Ontario" and "an Aboriginal community fighting to safeguard and preserve its traditional land, culture, way of life and core beliefs."[48] Analyzing the potential harm that could result if an injunction to halt exploratory mining were not granted to the Kitchenuhmaykoosib Inninuwug First Nation, the court found:

It is critical to consider the nature of the potential loss from an Aboriginal perspective. From that perspective, the relationship that Aboriginal peoples have with the land cannot be understated. The land is the very essence of their being. It is their very heart and soul. No amount of money can compensate for its loss. Aboriginal identity, spirituality, laws, traditions, culture, and rights are connected to and arise from this relationship to the land. This is a perspective that is foreign to and often difficult to understand from a non-Aboriginal viewpoint.[49]

By granting the injunction, the Superior Court of Ontario arguably recognized the foundational relationship between Indigenous peoples' moral values and principles and the law (akin to the earlier discussion of the fundamental understanding of the importance of promise-keeping to contract law).[50]

46 2004 SCC 38 at para 138, [2004] 2 SCR 74.

47 2006 CanLII 26171, 272 DLR (4th) 727 (Ont Sup Ct J).

48 *Ibid* at para 1.

49 *Ibid* at para 80.

50 While there is no room in this chapter to explore the manner in which Indigenous peoples' relationship to nature may provide a valuable reference point to Canadians seeking some moral grounding for Canadian environmental law, a helpful reference is David Suzuki, "Indigenous People Are Fighting for Us All" (2 February 2017), online: <https://davidsuzuki.org/story/indigenous-people-are-fighting-for-us-all/>; and F Kohler et al, "Embracing Diverse Worldviews to Share Planet Earth" (2019) Conservation Biology, DOI: <https://doi.org/10.1111/cobi.13304>.

D. VALUING BIOLOGICAL DIVERSITY

In *Groupe Maison Candiac Inc v Canada (Attorney General)*,[51] the Federal Court upheld an emergency protection order issued by the governor in council under the *Species at Risk Act*[52] preventing the residential development of a Montreal suburb to protect the threatened western chorus frog. The protection order prohibited any removal of soil, alteration of surface water flows, draining of wetlands, or construction of infrastructure in portions of the region that constituted habitat for the western chorus frog, and the effect was that development could not proceed.[53]

In its decision the court referred to the following:

> The Earth Summit, held in Rio de Janeiro, Brazil, in June 1992 under the auspices of the United Nations, led to the signing of an important international agreement, the *United Nations Convention on Biological Diversity* [5 June 1992, 1760 UNTS 79, 31 ILM 818 (entered into force 29 December 1993) (the Convention on Biodiversity)]. This convention, which was ratified by 196 countries, is founded on a certain consensus, with the Contracting Parties stating, in particular, that they are:
>
> a. conscious of "the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity" and of "the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere."[54]

E. RULE OF LAW (ACCOUNTABILITY TO LEGISLATIVE INTENT/ CONSTITUTIONAL RIGHTS AND COMMON LAW INTERPRETATIONS)

In *Tsleil-Waututh Nation v Canada (Attorney General)*,[55] the court unanimously quashed an order in council approving the Kinder Morgan pipeline project, holding the National Energy Board to a strict interpretation of the requirements set out in legislation and case law for assessing and approving pipeline projects.

First, the court found that the National Energy Board had scoped the project too narrowly in its assessment, ignoring the environmental effects of increased marine tanker traffic on endangered southern resident orcas. The court also found that Canada had failed to discharge its constitutionally rooted duty to consult and accommodate affected Indigenous peoples.

The scoping of the project subject to an environmental assessment was a threshold issue under the *Canadian Environmental Assessment Act, 2012*.[56] Because the National Energy Board found the regulation of marine shipping to be beyond its jurisdiction, the board scoped the project in a manner that found marine shipping to be an effect of the project as opposed to a central element. As a result, the board concluded that the pipeline project was not likely to cause significant adverse environmental effects to the orcas. This finding was notwithstanding the fact that the National Energy Board had concluded that project-related marine shipping was likely to result in significant adverse effects to endangered orcas and would further contribute to cumulative effects that are already jeopardizing the survival and recovery of the orcas. The board had found that the project would affect numerous individuals of the orca

51 2018 FC 643.

52 SC 2002, c 29 [SARA].

53 For more information, see Shaun Fluker, "More Justice for the Western Chorus Frog" (12 September 2018), online (blog) (pdf): *ABLawg.ca* <http://ablawg.ca/wp-content/uploads/2018/09/Blog_SF_Groupe Candiac_Sept2018.pdf>.

54 *Groupe Maison*, *supra* note 51 at para 10.

55 2018 FCA 153.

56 SC 2012, c 19, s 52.

population in their habitat, which was was identified as critical to the orcas' recovery. Further, the project would result in vessel noise that would threaten the acoustic integrity of this habitat. The board further found that the project-related death of an individual orca could result in population level impacts that could jeopardize the entire population.

Because the Federal Court of Appeal disagreed with the board and found that the shipping of oil from Canada to its offshore markets was a central element of the Kinder Morgan project, the court concluded that the National Energy Board had failed to comply with its obligations under s 79(2) of SARA to ensure that if the project was carried out, measures would be≈taken to avoid or lessen effects on the orcas, and, further, that those measures would be monitored.

On the issue of whether the government had adequately discharged its duty to consult, the Federal Court of Appeal applied established legal principles underpinning the duty to consult Indigenous peoples and First Nations to find that Canada had failed to engage, dialogue, and grapple with the concerns expressed by all of the applicant/appellant First Nations in good faith. The court found that the Crown had simply reiterated the National Energy Board findings and conditions, without meaningfully engaging with the concerns that had been raised. The Crown consultation team construed its mandate in a way that was too limited, involving little more than note-taking, with no real and sustained effort to pursue a meaningful two-way dialogue.[57]

F. POLLUTER PAYS

In *Orphan Well Association v Grant Thornton Ltd*,[58] Redwater was an Alberta oil and gas company that owned over a hundred wells, pipelines, and facilities. In 2015, when most of its wells were dry, Redwater went bankrupt, and Grant Thornton became its trustee. In order to avoid properly dismantling and restoring its well sites at the time of bankruptcy, Grant Thornton attempted to, in essence, disown its useless wells and sell productive sites to pay creditors. The Alberta Energy Regulator ordered Grant Thornton to dismantle the disowned sites. The case involved an arguable conflict between federal bankruptcy laws and Alberta environmental laws requiring oil and gas companies to properly abandon wells, pipelines, and facilities, and to reclaim licensed land.[59]

The court found that Alberta's regulatory regime aligned with the "polluter pays" principle: "assign[ing] polluters the responsibility for remedying environmental damage for which they are responsible, thereby incentivizing companies to pay attention to the environment in the course of their economic activities."[60] The court further found that the regulator's abandonment orders had been issued in the public interest and for the public good.[61]

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57 In response to the Court overturning the original authorization of the pipeline in this case, the Canadian government re-initiated its consultations with Indigenous and First Nations groups. Following this, on June 18, 2019, the Governor in Council approved the Trans Mountain pipeline expansion. On September 4, 2019, however, the Federal Court of Appeal again granted Indigenous and First Nations leave to appeal the June 19, 2019 Order in Council on the basis that the duty to consult remained unsatisfied. See *Raincoast Conservation Foundation v Canada (Attorney General)*, 2019 FCA 224.

58 2019 SCC 5.

59 *Oil and Gas Conservation Act*, RSA 2000, c O-6 s 1(1)(cc); *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s 134(b)(vi); and *Pipeline Act*, RSA 2000, c P-15, s 1(1)(n).

60 *Orphan Well Association*, *supra* note 57 at para 29.

61 To consider the regulator's need to seek court orders to force companies to comply with its health or safety orders, see *Alberta Energy Regulator v Lexin Resources Ltd*, 2017 ABQB 219. Here Tilleman JA found that the regulator's governing legislation explicitly provides for the development of Alberta's energy resources only if this development is environmentally responsible.

G. ENVIRONMENTAL RIGHTS AND FUTURE GENERATIONS

In November 2018, ENvironnement JEUnesse (ENJEU), an environmental non-profit in Quebec, applied to bring a class action lawsuit against the Government of Canada on behalf of Quebec citizens aged 35 and under.[62] The claim alleged that the government failed to take sufficient action to reduce greenhouse gas emissions in the face of climate change and therefore failed to protect the fundamental rights of Quebec youth under both the Charter and Quebec's *Charter of Human Rights and Freedoms*.[63] If permitted to proceed, the claim seeks various declaratory orders and punitive damages. Similar cases have succeeded in The Netherlands (*Urgenda Foundation v The State of the Netherlands*),[64] Pakistan (*Leghari v Federation of Pakistan*),[65] and Colombia (*Decision C-035/16 of February 8, 2016*).[66] The Sabin Center for Climate Change Law at Columbia Law School estimates that more than 1,000 climate cases have now been commenced worldwide.[67]

QUESTIONS AND CONTEXT[68]

1. The various moral theories underlying the approaches set out in the chapter are, in order, deontological, utilitarian, virtue based, eco-feminist, and pragmatist, any of which could be explored further in Byron Williston, ed, *Environmental Ethics for Canadians*.[69]

   a. Imagine Jim, Gerry, and Jill, each of whom holds a different view about whether a company ought to be allowed to develop a ski resort on a piece of privately owned but environmentally sensitive land. Jim owns the land and wants to lease it to the company, Jill is an environmental activist, and Gerry is a municipal official in the town where the proposed development is to take place. Jim wants the development to go forward on a large scale. Gerry is cautiously supportive of development but wants it to proceed on a scale that is more limited than what Jim is proposing. Jill thinks that valuable and sensitive ecosystems will be damaged with any development and so opposes the project on any scale.[70]

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62 *Environnement Jeunesse c. Procureur général du Canada,* 2019 QCCS 2885 [ENJEU case]; Ingrid Peritz, "Quebec Group Sues Federal Government over Climate Change," *The Globe and Mail* (26 November 2018), online: <https://www.theglobeandmail.com/canada/article-quebec-group-sues-federal-government-over-climate-change/>. On July 11, 2019, the Superior Court of Quebec refused the class action suit. Relatedly, however, on October 25, 2019, fifteen young Canadians filed a statement of claim in Canada's Federal Court asking the Canadian government to develop a climate recovery plan using the best available science. The claim relies upon Charter ss 7 and 15(1). The likelihood of the claim's success is indirectly considered in Chapter 20 of this book.

63 CQLR c C-12.

64 [2015] HAZA C/09/00456689 (24 June 2015) (Hague Dist Ct), aff'd (9 October 2018) (Hague CA).

65 (2015) WP No 25501/2015 (Lahore HC).

66 Constitutional Court, Feb 8, 2016, Decision C-035/16. See United Nations Environment Programme, *The Status of Climate Change Litigation: A Global Review* (May 2017) at 15-19, online (pdf): <http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf>.

67 United Nations Environment Programme, *supra* note 66 at 10-11. ~~On July 11, 2019 the Superior Court of Quebec refused the class action suit. Relatedly however, on October 25, 2019, fifteen young Canadians filed a statement of claim in Canada's Federal Court asking the Canadian government to develop a climate recovery plan using the best available science. The claim relies upon Charter sections 7 and 15(1). The likelihood of the claim's success is indirectly considered in Chapter 20 of this book.~~

68 Thank you to Bruce Morito for his conversation and draft ideas, which led to the formulation of several of these questions and discussion topics.

69 (Oxford: Oxford University Press, 2012).

70 *Ibid* at 145.

i. Discuss the moral theories that could be used to defend these points of view.

ii. Paul Thompson[71] claims that participants of such disputes are more likely to reach a workable solution by refraining from theoretical arguments from a particular moral point of view, because moral justifications for differing positions will lead to incompatibility. Do you agree? If yes, what is the best way to reach consensus on a solution?

b. The question of what and if there is a moral foundation to our environmental laws in North America can be traced back to a debate in the late 1800s between John Muir and Gifford Pinchot (the first Chief of the Forest Service in the United States), with both men attempting to influence President Theodore Roosevelt in the writing of the United States' National Park policy. Muir pushed for a policy for United States wilderness parks that was rooted in the principle of preservation, based upon respect for the intrinsic value of nature and a duty to protect wilderness for its own sake. Pinchot lobbied for conservationism, based on the principle of the greatest good for the greatest number, recognizing the multiple values of the environment and arguing that the park system should allow multiple uses, including the exploitation of resources (in particular, forestry and mining). Arguably, the resource orientation of the United States' environmental law shows that Pinchot's conservation ethic won in the eyes of the US Park Service (though the US Forest Service claims that the two have been harmonized).[72] This debate between competing ethical frameworks continues today. Which of the ethical frameworks alluded to above are at play in this debate?

c. The *Canada National Parks Act*[73] provides:

> 4(1) The national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

The Act also states:

> 8(2) Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks.

"Ecological integrity" is defined in s 2(1) of the Act as "a condition that is determined to be characteristic of its natural region and likely to persist, including abiotic components and the composition and abundance of native species and biological communities, rates of change and supporting processes." Based on these sections of the legislation, is Canada taking a conservation, preservation, or harmonized approach to managing its national parks?

d. Pick an environmental issue discussed in class or in the media and attempt to frame it from various environmental ethical perspectives. Is there an ethical approach to the problem that you see as preferable? If yes, what is the reason you prefer it? Is the preference contextual (based on the particular question you have asked) or do you think that the approach which works best in this case would be preferable in other contexts? Think about the economic/political/scientific considerations that may be relevant to the selected issue. How do relevant ethical considerations bear up against these additional factors? Do you see values that ground your ethical approach to the issue at hand? Are these values or the ethical

71 Paul B Thompson, "The Case of Water" in Andrew Light & Eric Katz, eds, *Environmental Pragmatism* (London, UK: Routledge, 1996) at 187.

72 See Robert Hudson Westover, "Conservation Versus Preservation?" (22 March 2016), online (blog): *US Forest Service* <https://www.fs.fed.us/blogs/conservation-versus-preservation>.

73 SC 2000, c 32.

considerations recognized at all by the legal paradigm in which the environmental issue arises? If not, is this problematic?

2. According to David Boyd, one of the "fundamental constraints" inhibiting the effectiveness of environmental law is our human ignorance of the reality that the Earth and its resources are finite. Boyd argues that our environmental law is limited to mitigating the worst effects of the dominant model of economic development, as opposed to challenging or transforming that model.[74] Today, many theorists, environmentalists, academics, and lawyers are arguing that in order to transform the model upon which our environmental laws are based, we must first recognize the flawed assumptions upon which the current model relies. In this vein, consider the following philosophical theories and how they may contribute to or correct errors in our reasoning.

a. Philosopher René Descartes (1596-1650) viewed the human self (the mind) as fundamentally separate and different in kind from bodily existence (the body). Given this distinction, persons were free and independent of the machine-like mechanisms of nature. Human beings (divine-like in their reasoning capacities) had a special place in creation, as right-bearing agents who could use nature as they pleased, just as they could use machines as they pleased. In relation to developments in neurophysiology[75] and now-standard approaches to teaching in the philosophy of mind,[76] rationally, it has become next to impossible to hold to the traditional Cartesian concept of the mind and person. Hence, the factual supports that have given us confidence in traditional normative beliefs, especially those asserting that we have some divinely sponsored right to exploit the Earth, have eroded.

b. According to philosopher John Locke (1632-1704), human beings create value in a world that would otherwise remain valueless. Value is conferred on nature through the acts of human beings, who mix with it their labour to produce useful commodities. The results of such labour then become the property of the labourer:

> [I]f I hammer a bundle of logs and boards together and fashion a table, I can rightly call this table my own. I can do so because I have transformed an otherwise worthless pile of logs and boards into something of value, by using my own hard work and sweat. Once I have established that I am the owner of the table, I can then do with it as I wish. I can use it, I can sell it, or I can burn it. Prior to my ownership of the table, the bundle of logs and boards was just wood, belonging to nobody. It is my intervention, my creation, my labor, that gives the table its value and gives me the right to call the table my own.[77]

In this, not only do humans stand apart from nature, they give nature its value. Consider whether capturing or conquering the property of something wild can take away its real (or inherent) value.[78]

c. In 1973, Arne Naess introduced the term "deep ecology" into environmental ethics. Deep ecology asserts that a redesign of our entire system of values and methods is necessary in order to recognize human beings as only one among the many inherently valuable beings formed of ecosystem processes.[79] Compare the Deep Ecology Platform outlined below with the ideas of Descartes and Locke:

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74 Boyd, *Cleaner, Greener, Healthier*, *supra* note 20, chs 8, 9.

75 See Daniel C Dennett, *Consciousness Explained* (Boston: Little, Brown and Co, 1991).

76 See, for example, Brian Cooney, *The Place of Mind* (Belmont, Cal: Wadsworth Thomson Learning, 2000).

77 Benjamin Hale, "Private Property and Environmental Ethics: Some New Directions" (2008) 39:3 Metaphilosophy 402 at 406.

78 See *Pierson v Post*, 3 Cai R 175 (NY Sup Ct 1805).

79 Arne Naess & George Sessions, "The Deep Ecology Platform" (1984), online: *Foundation for Deep Ecology* <http://www.deepecology.org/platform.htm>.

1. The well-being and flourishing of human and nonhuman life on Earth have value in themselves ... independent of the usefulness of the nonhuman world for human purposes.
2. Richness and diversity of life forms contribute to the realization of these values and are also values in themselves.
3. Humans have no right to reduce this richness and diversity except to satisfy vital needs.
4. Present human interference with the nonhuman world is excessive, and the situation is rapidly worsening.
5. The flourishing of human life and cultures is compatible with a substantial decrease of the human population. The flourishing of nonhuman life requires such a decrease.
6. Policies must therefore be changed. The changes in policies affect basic economic, technological, and ideological structures. The resulting state of affairs will be deeply different from the present.
7. The ideological change is mainly that of appreciating life quality ... rather than adhering to an increasingly higher standard of living. ...
8. Those who subscribe to the foregoing points have an obligation directly or indirectly to participate in the attempt to implement the necessary changes.

Do you think our environmental attitudes, practices, and laws would be different if Naess's views had been introduced into Western philosophical thinking in place of those of Descartes and Locke?

d. In her 1993 book *Feminism and the Mastery of Nature*,[80] Val Plumwood introduced a theory of ecological feminism in which she tackled the dualism of Descartes and Locke, and also the failure of deep ecology to acknowledge difference. According to Plumwood, Western culture has adopted a "complex cultural identity of the master formed in the context of class, race, species and gender,"[81] which dominates our conception of reason and results in our inability to recognize humans' dependency on nature. Plumwood contrasts the concept of reason and the concept of nature, arguing that reason in the Western world has been constructed as the privileged domain of the master, with nature being conceived as the subordinate, or slave. Plumwood's work explores the category of nature as a field of exclusion and control.

3. Chapter 20 considers Canada's moral and legal obligations at a national and international level to mitigate climate change and other negative impacts as a result of environmental degradation. Considering Section IV of this chapter, how would you frame these obligations? Consider the environmental ethical frameworks and philosophical theories introduced above. Consider the following additional government actions, including argument(s) in *favour* of them. Identify whether these arguments are political, economic, ethical, or legal (or some combination). Can the argument(s) in favour be reconciled with the concerns with regard to environmental degradation/pollution/climate change raised in the chapter?

a. In 2002, Canada ratified the CITE (adopted in 1997), implementing the objective of the CITE to reduce the onset of global warming by reducing greenhouse gas concentrations in the atmosphere to "a level that would prevent dangerous anthropogenic interference with the climate system."[82] Canada's *Kyoto Protocol Implementation Act*[83] was assented to in 2007; however, Canada failed to meet its commitments under the protocol, and the Implementation Act was repealed in 2012 by Bill C-38, the *Jobs, Growth and*

80 (New York: Routledge, 1993).

81 *Ibid* at v.

82 *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994), art 2, online (pdf): *United Nations* <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

83 SC 2007, c 30.

Long-term Prosperity Act.[84] While this legislation was self-described as "an Act to implement certain provisions of the budget tabled in Parliament," it made broad and significant changes to many of Canada's federal environmental laws, including repealing and replacing the 1992 *Canadian Environmental Assessment Act*[85] with a completely new Act (*Canadian Environmental Assessment Act, 2012*), with a more limited focus on the environmental effects of projects, weakened powers of the Canadian Environmental Assessment Agency, and expanded powers for the minister. Other federal environmental legislation was also all amended and weakened. These changes were described by the Canadian government as consistent with "Responsible Resource Development, which seeks to modernize Canada's regulatory system for major projects."[86]

b. In 2015, Canada and 195 other countries signed the *Paris Agreement*.[87] The specific aim of this international climate change agreement is to limit global warming to 1.5-2°C above pre-industrial levels to prevent further or worse impacts as a result of climate change. Under the *Paris Agreement*, every country's commitment to reduce its emissions is measured according to NDCs (or nationally determined contributors), and each country is required to prepare, communicate, and maintain the NDCs it intends to achieve. According to the independent climate analytics of the website *Climate Action Tracker*, Canada's commitments to reducing carbon emissions, based on Canada's *Pan-Canadian Framework on Clean Growth and Climate*, are rated:

> Highly Insufficient
>
> [N]ot at all consistent with holding warming to below 2°C let alone with the Paris Agreement's stronger 1.5°C limit. If all government targets were in this range, warming would reach between 3°C and 4°C.[88]

4. In *Tsleil-Waututh Nation*,[89] the National Energy Board assessed the adverse effects of the Kinder Morgan pipeline project. In its assessment, the board framed project-related marine shipping as an effect of the project as opposed to as a central element. As a result of this, the board's findings concerning the effect of the project on endangered orcas did not heavily influence the final outcome of its assessment.

a. Use the environment ethical frameworks and philosophical theories introduced above to assess the conclusion of the National Energy Board that the effects of marine shipping were not a central element of the project.

b. The preamble to SARA, which goes to the interpretation of the legislation but is not legally binding, states:

> Canada's natural heritage is an integral part of our national identity and history, wildlife, in all its forms, has value in and of itself and is valued by Canadians for aesthetic, cultural, spiritual, recreational, educational, historical, economic, medical, ecological and scientific reasons,
>
> Canadian wildlife species and ecosystems are also part of the world's heritage and the Government of Canada has ratified the United Nations Convention on the Conservation of Biological Diversity.

84 SC 2012, c 19.

85 SC 1992, c 37.

86 Natural Resources Canada, *2011-2012 Departmental Performance Report* at 57, online (pdf): <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/performancereports/files/DPR%20-%20Final%20ENG.pdf>.

87 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1 (entered into force 4 November 2016).

88 "Canada" (30 November 2018), online: *Climate Action Tracker* <https://climateactiontracker.org/countries/canada/>.

89 *Supra* note 55.

Do you think that these ethical principles, articulated in SARA, are relevant?

c. In its decision, the Federal Court of Appeal recognized "the cultural importance of the killer whale to certain Indigenous groups."[90] What is the underlying moral value articulated in this finding? Compare this to the preamble to SARA.

5. In *Tsleil-Waututh Nation*, the Federal Court of Appeal found that the Crown had failed to discharge its duty to consult Indigenous peoples pursuant to s 35 of the *Constitution Act, 1982*.[91] The Federal Court of Appeal noted that the consultation process in this case was an opportunity for Canada to apply the court's directions from the 2016 decision in *Gitxaala Nation v Canada*,[92] which came out five months before the governor in council approved the Kinder Morgan Project. The court found that although Phase III of the consultation process had been the first opportunity for Indigenous applicants to dialogue directly with Canada about matters of substance as opposed to process, the Crown failed to "engage, dialogue meaningfully and grapple with the concerns expressed to it in good faith by the Indigenous applicants so as to explore possible accommodation of these concerns."[93]

a. What is the moral grounding beneath the Crown's duty to consult? Can this moral grounding, which relates to land use, be understood in terms of environmental ethics?

b. While there is now significant Supreme and Federal Court jurisprudence that fleshes out the content of the duty to consult, in your view, what is the effect of this duty being rooted in the Constitution?

c. What moral theory works best for understanding and articulating the value of land for cultural or traditional reasons? In answering this question, consider the case summary above for *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*.[94]

FURTHER READINGS

Callicott, J Baird & Michael P Nelson, *American Indian Environmental Ethics: An Ojibwa Case Study* (Indiana: Prentice Hall, 2004).

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Norton, Bryan G, *Toward Unity Among Environmentalists* (New York: Oxford University Press, 1991).

Taylor, Paul W, *Respect for Nature: A Theory of Environmental Ethics* (New Jersey: Princeton University Press, 1986).

World Commission on Environment and Development (Brundtland Commission), *Our Common Future* (Oxford: Oxford University Press, 1987).

90 *Ibid* at para 426.

91 In *R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104, the court provided a map for interpreting s 35 and found that "existing [A]boriginal and treaty rights" under s 35 included any right that had not been clearly and plainly extinguished before 1982. In *Sparrow*, the court also confirmed the Crown's constitutional duty to provide certain guarantees to Indigenous peoples (the Crown's fiduciary duty). In *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, the Supreme Court then found that, in accordance with this fiduciary duty, the Crown was required to consult and accommodate Indigenous peoples prior to exploiting land to which they have or may have a valid claim.

92 2016 FCA 187.

93 *Tsleil-Waututh Nation*, *supra* note 55 at para 754.

94 *Supra* note 47.