

UNIVERSITY OF CALGARY
FACULTY OF LAW

LAW 703: LEGAL RESEARCH AND METHODOLOGY

REGULATING HYDRAULIC FRACTURING:
COMMUNICATION ACROSS LEGAL BOUNDARIES

ANNOTATED BIBLIOGRAPHY
(In Progress)

COMPILED BY
KIMBERLY HOWARD
ID: 297746

DECEMBER 17, 2013

ANNOTATED BIBLIOGRAPHY

INTRODUCTION

This annotated bibliography was prepared for the Faculty of Law's Legal Research and Methodology Course (Law 703) for the fall term of 2013. In addition to providing a preliminary list of my primary sources of legislation and jurisprudence, this also includes an annotated list of the secondary sources of information relevant to my major research paper. This annotated bibliography is a work in progress and is not intended to be an exhaustive review of the relevant primary and secondary sources.

Focussing on issues arising from communication between wells, formations or other subsurface rights due to the propagation of fractures beyond legal and contractual boundaries, this paper will examine the Alberta Energy Regulator's (AER) jurisdiction and regulation of hydraulic fracturing in Alberta for the development of both conventional and unconventional oil and gas resources.

LEGISLATION

Alberta Land Stewardship Act, SA 2009 c A-26.8.

Energy Resources Conservation Act, RSA 2000, c E-10 (repealed by *Responsible Energy Development Act*, SA 2012, c R-17.3).

Environmental Protection and Enhancement Act, RSA 2000, c E-12.

Mines and Minerals Act, RSA 2000, c M-17.

Oil and Gas Conservation Act, RSA 2000, c O-6.

Oil Sands Conservation Act, RSA 2000, c O -7.

Public Lands Act, RSA 2000, c P-20.

Responsible Energy Development Act, SA 2012, c R-17.3.

REGULATIONS

Alberta Energy Regulator Rules of Practice, Alta Reg 99/2013.

Oil and Gas Conservation Regulations, Alta Reg 151/1971.

Oil Sands Conservation Regulation, Alta Reg 76/1988.

Responsible Energy Development Act Transition Regulation, Alta Reg 92/2013.

JURISPRUDENCE - CANADA

Alberta Energy Co v Goodwell Petroleum Corp, 2003 ABCA 277, [2003] AWLD 482, 233 DLR (4th) 341, 22 Alta LR (4th) 4.

Anderson v Amoco Canada Oil & Gas, 2004 SCC 49, 241 DLR (4th) 193, 40 Alta LR (4th) 1.

Borys v Canadian Pacific Railway, (1952) 4 WWR (NS) 481, [1952] 3 DLR 218 (Alta CA).

Giant Grosmont Petroleum Ltd v Gulf Canada Resources Ltd, 2001 ABCA 174, 286 AR 146.

Omers Energy Inc v Alberta (Energy Resources Conservation Board), 2011 ABCA 251.

Re Bearspaw Petroleum Ltd [2007] AWLD 2660 (AEUB).

Re Desoto Resources Ltd, 2008 ABCA 349, [2008] AWLD 4957 (Chambers).

Re Kallisto Energy Corp Application for a Well Licence Crossfield East Field, 2012 ABERCB 5, [2013] AWLD 396.

Re Kallisto Energy Corp Application for a Well Licence Crossfield East Field, 2013 ABAER 13, [2013] AWLD 3490.

JURISPRUDENCE – UNITED STATES

Coastal Oil & Gas Corp & Coastal Oil & Gas USA LP v Garza Energy Trust et al, 268 SW 3d 1 (Tex 2008).

SECONDARY MATERIAL: ARTICLES

Owen L Anderson, “Subsurface ‘Trespass’: A Man’s Subsurface is Not His Castle” (2010) 49:2 Washburn LJ 247.

Professor Owen L. Anderson is the Eugene Kuntz Chair of Law in Oil, Gas and Natural Resources, a George Lynn Cross Research Professor and the Director of the John B. Turner LLM Program in Energy, Natural Resources & Indigenous People Law at the University of Oklahoma.

The thesis of this paper is that “[w]hile the right to exclude trespassers is a fundamental incident to property ‘ownership,’ this right, like other incidents, is not and should not be absolute.” (at 247). Specifically in the context of subsurface trespass, Professor Anderson argues that a trespass that serves a societal need should not be actionable, so long as the subsurface owner did not suffer any harm (at 247). In making this argument, he draws an analogy to airspace trespass cases. In addition to enumerated circumstances where trespass should be actionable, such as where the trespassing injector is negligent, he goes further to assert that the decision of whether a particular subsurface invasion should be prohibited should be a decision by the regulator and not the courts. The intended audience for this article is legal practitioners and legal academics in the area.

In coming to his conclusion and thesis, Professor Anderson goes through the history of trespass and sets out the current state of the law of subsurface trespass within the following contexts: traditional oil and gas trespass cases; trespass resulting from hydraulic fracturing; trespass

resulting from horizontal drilling and unlawful pooling; trespass from subsurface use to access minerals beneath other land; trespass resulting from waste disposal operations; trespass from enhanced-recovery operations; and trespass from subsurface storage of natural gas.

Although relating to the state of the law of subsurface trespass in the United States, this article provides a relevant expert analysis of the various potential sources of subsurface trespass within the context of hydraulic fracturing.

Nigel Bankes, “Non-Conventional Oil and Gas Resources and the Legal Issues Associated with Hydraulic Fracturing in Canada”, *International Environmental and Resource Law Committee Newsletter* 15:4 (August 2013) 4.

Nigel Bankes is a professor at the Faculty of Law at the University of Calgary and is the Chair of Natural Resources Law. He is an expert in the area and his work will be helpful and influential in my research.

This article was intended not as an academic article but instead commentary on the legal issues associated with hydraulic fracturing in Canada. The commentary covers five subjects: (1) the development of the new “directive” on hydraulic fracturing by the Energy Resources Conservation Board (now the Alberta Energy Regulator); (2) developments in British Columbia (BC), including a report of the BC Oil and Gas Commission on induced seismicity associated with hydraulic fracturing operations in the Horn River Basin; (3) developments in Quebec; (4) developments in the Atlantic provinces of Nova Scotia and New Brunswick; and (5) the work of industry associations in adopting principles to establish best practices in relation to hydraulic fracturing.

This article was helpful in delineating the issues associated with the use of hydraulic fracturing and in highlighting recent regulatory developments.

Alastair R Lucas, Theresa Watson & Eric Kimmel, “Regulating Multistage Hydraulic Fracturing: Challenges in a Mature Oil and Gas Jurisdiction” in Donald N. Zillman et al, eds, *The Law of Energy Underground* (London, UK: Oxford University Press [forthcoming in April 2014]).

This chapter within a book was authored by Professor Alastair R. Lucas, QC, a Professor at Law at the University of Calgary, Theresa Watson, a professional engineer and board member with the Alberta Energy Conservation Board (now the AER) and Eric Kimmel, an economist and senior advisor to the Alberta Energy Conservation Board (now the AER). The intended audience is scholars and students of energy law, practitioners and policy makers working in this area.

In this chapter, the authors assess “the response by an established regulatory regime to a fundamentally new form of activity (hydraulic fracturing) by the upstream oil and gas sector” (at 1). This article will be an important part of my research as it focusses on the Alberta Energy Conservation Board’s (now the AER) regulation of multistage hydraulic fracturing (MSHF). The analysis within this chapter is framed by the theme that there is a credibility gap between public concern and the regulator and how this is fueling a more public centred approach to regulation.

The article begins with a succinct description of MSHF, including how it works and depictions of drilling activity in Alberta. One key concept that bridges my research from the United States’ case law is the issue of whether private law liability principles lead to judicial decisions that in turn influence regulatory approaches. The discussion of this issue within the article will be

helpful determining the relevance of the United States case law to the regulatory regime in Alberta.

Kevin Luft, Thomas O’Leary & Ian Laing, “Regulatory and Liability Issues in Horizontal Multistage Fracturing” (2012) 50:2 *Alta L Rev* 403.

This article provides an overview of the regulatory environment in Canada and the United States with respect to horizontal multi-stage hydraulic fracturing. The purpose of this article is to provide a basic understanding of the current legal climate and to signal potential trends and developments. The potential trends and developments highlighted include: the adaptation of traditional tort law; the goal of mandating transparent best practices as guiding regulatory documents; and the development of operational safeguards.

Although this article provides an in-depth discussion of the history of horizontal multi-stage fracturing, the analysis and discussion of potential trends and developments is superficial. As a result, this article will be helpful for issue identification but not for assessing various regulatory options for hydraulic fracturing.

David E Pierce, “Developing a Common Law of Hydraulic Fracturing” (2011) 72 *U Pitt L Rev* 685.

This article was prepared by David E. Pierce, a Professor of Law at Washburn University School of Law, who is recognized by other experts as a legal expert in the area of hydraulic fracturing. As such, I expect that all of his writing will be of assistance in my research. Unlike many of his other articles cited in this bibliography, this paper was not delivered at a conference or other speaking engagement as such the research and commentary is more formal and his references are more fulsome and will therefore be very helpful in finding additional articles and resources.

In this article, Professor Pierce examines “three common law dimensions of hydraulic fracturing: property, tort and contract”(at 686). In his discussion of what he calls the “reservoir community analysis” he asserts that the main virtue of the leading United States decision on hydraulic fracturing, *Coastal Oil & Gas Corp v Garza Energy Trust* (as cited above) is its definition of the path courts should avoid. This analysis may be beneficial in assessing the regulatory regime in Alberta, comparing its relative strengths and considering the application of a “reservoir community analysis” in Alberta. Professor Pierce believes that the application of the rule of capture to the common law of hydraulic fracturing is a detour and the law ought to proceed in a direction that takes into account the existence of a reservoir community.

---. “Trespass Issues in a Shale Play,” (Paper delivered at the Development Issues in Major Shale Plays Program sponsored by the Rocky Mountain Mineral Law Foundation and the Energy & Mineral Law Foundation, 6 December 2010).

This is another article authored by Professor David E. Pierce (described above). This article highlights the issue that “[b]ecause horizontal drilling and formation fracturing are essential to any shale play, every jurisdiction where commercial shale formations are found will, of necessity, have to address these trespass issues at some point in time” (at 7.1). The purpose of this paper aligns with my research and focus on communication issues. Professor Pierce’s division of the communication issues into two categories may be a helpful dichotomy for my analysis. His first category of trespass claims involve traditional boundary lines and the second deals with regulatory boundaries or those lines created by oil and gas regulators to achieve orderly development and to prevent waste (at 7-1).

Professor Pierce confirms the position that the law of trespass cannot be applied until the property interest at issue is clearly defined and I intend to carry over this idea into my analysis of the communication issues in Alberta and the availability and application of the tort of trespass. This article undertakes a critical analysis of the United States case law and the application of the tort of trespass and rule of capture. One of the limitations to the application of some of the United States case law will be the existence of split titles in Alberta.

Professor Pierce also discusses the concept of correlative rights and argues that the “correlative rights confer on operators community rights that authorize development techniques, such as hydraulic fracturing, that transcend intra-reservoir boundaries” (at 7-12) and as such may prevent waste and ought not to be discouraged outright.

---. "Common Interests Created in Oil and Gas;" "The Oil and Gas Lease: Implied Covenants;" "Environmental Regulation of the Oil and Gas Industry;" "Oil & Gas Conveyancing Issues;" 30th Annual Oil & Gas Law Short Course; Rocky Mountain Mineral Law Foundation, four hours of presentations, Houston, Texas, October 23 & 24, 2012.

This is another article authored by Professor David E. Pierce (described above) from the Washburn University School of Law. This paper was delivered at an annual course put on by the Rocky Mountain Mineral Law Foundation and was presumably targeted at legal practitioners and academics in the field.

Professor Pierce examines the role of implied covenant law in the context of the development of a formation by horizontal drilling and hydraulic fracturing. Specifically, he emphasizes that the development and production from shale formation is different and requires different technologies which will have an impact on the development covenant, within standard oil and gas leases. While I do not intend to draw from the analysis with respect to the oil and gas leases and the application of implied covenants, the discussion about correlative rights and the challenges associated with hydraulic fracturing may be helpful in my analysis and classification of the Alberta regulatory regime and in assessing any regulatory reform. In reviewing Professor Bankes blog post (listed below), I want to determine whether the approach set out in the ERCB’s Discussion Paper is one akin to correlative rights.

Theresa D Poindexter, “Correlative Rights Doctrine, Not the Rule of Capture, Provides the Correct Analysis for Resolving Hydraulic Fracturing Cases [*Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W. 3d 1 (Tex. 2008)]” (2009) 48:3 Washburn LJ 755.

Theresa D. Poindexter was, at the time this case comment was written a Juris Doctor candidate at the University of Texas. The article was written under the guidance of Professor David Pierce, a known expert in the field.

This article comments on the *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W. 3d 1 (Tex. 2008) decision and examines the applicability of the rule of capture and the courts’ analysis of the tort of trespass as remedies for claims caused by hydraulic fracturing. She also examines how the concept of “correlative rights’ can diminish a landowner’s right to sue for subsurface trespass when his land lies over a common reservoir” (at 757). This source of the application of this concept is arguably Professor David Pierce, whose commentary as referenced in this bibliography advocates for the use and application of correlative rights by regulators.

The recommendation coming from this case comment is that courts ought to apply the correlative rights concept to define property rights before applying the rule of capture and trespass principles.

For my research, this article reinforces the research by Professor Pierce and provides insight into the court's reasoning in the *Garza* decision and will be helpful in assessing the relevance of this decision to the Alberta regulatory regime.

Joe Schremmer, "Avoidable 'Fractident': An Argument Against Strict Liability for Hydraulic Fracturing" (2012) 60 Kan L Rev 1215.

At the time this article was published, Joe Schremmer was a J.D. candidate and an M.B.A. candidate at the University of Kansas School of Law and the School of Business. The paper was prepared under the guidance of Professor John Peck of the University of Kansas.

This argument argues that hydraulic fracturing that contaminates water sources should not be subject to strict liability. Instead, the article advocates that the courts should combine a negligence standard with *res ipsa loquitur* to determine liability of fracking companies that contaminate water sources.

The author comes to this conclusion first by an overview of the history of fracking and the development of current laws of strict liability for dangerous activities and then by applying the law to the fracking. This article focuses on the law as it stands in the United States and as such will have limited application to Alberta. It may be helpful as an example of alternative regulatory methods or causes of action and provides examples of how fracking has been regulated within jurisdictions in the United States.

SECONDARY MATERIAL: OTHER

Nigel Banks, "A new approach to regulating unconventional resource plays in Alberta: the ERCB takes a bold step forward" ABlawg (10 January 2013). online: ABlawg: The University of Calgary Faculty of Law Blog on Developments in Alberta Law <<http://ablawg.ca/2013/01/10/a-new-approach-to-regulating-unconventional-resource-plays-in-alberta-the-ercb-takes-a-bold-step-forward/>>.

This blog post by Professor Nigel Banks, as described above, was intended for a broad audience of both scholars, practitioners and industry. He comments on the Energy Resource Conservation Board's Discussion Paper, *Regulating Unconventional Oil and Gas in Alberta, 2012* (as listed and cited below) (ERCB Discussion Paper).

This post provides a succinct and helpful summary of the ERCB Discussion Paper and states that the need for a different regulatory regimes for unconventional resources is due to two factors: (1) the geography or scale of development; and (2) the application of hydraulic fracturing. This post provides a helpful summary of the ERCB Discussion Paper and will be reviewed in connection with it to help focus my review and analysis of the regulatory changes proposed.

British Columbia, BC Oil and Gas Commission, *Investigation of Observed Seismicity in the Horn River Basin*, (British Columbia: 2012).

Energy Resources Conservation Board, Discussion Paper: *Unconventional Gas Regulatory Framework – Jurisdictional Review*, Report 2011-A (Alberta: January 28, 2012).

The ERCB Discussion Paper was prepared in 2011 by the Energy Resources Conservation Board (now the AER) and articulates the AER's mission and explores a new approach for regulating unconventional oil and gas resource development. Some of

the challenges highlighted within this paper for the regulation of unconventional oil and gas resource development include: (1) unlike conventional hydrocarbon pools, unconventional resource development requires a greater scale of development and intensity of infrastructure; (2) challenges related to protecting water; (3) issues around high pressure hydraulic fracturing; and (4) the regional effects such activities can have on the landscape.

This paper sets out the two basic principles that the AER's new framework is based upon: (1) risk-based regulation; and (2) play focussed regulation. This paper provides a summary and weighs the benefits of challenges of the new regulatory approach. I anticipate that it will be key document in my research as it provides the foundation upon which any new regulation is based. As part of my analysis, I intend to examine this paper to see if there is any weight given to commercial certainty, which is the criteria I have chosen

Nova Scotia, Department of Energy and Nova Scotia Environment, *Jurisdictional Review of Hydraulic Fracturing Regulation* (Nova Scotia: Nova Scotia's Hydraulic Fracturing Review Committee, 2012).

This report by the Nova Scotia Department of Energy canvasses and summarizes the regulatory framework in Alberta, B.C., New Brunswick, Saskatchewan, New York, Pennsylvania, Texas and Wyoming to provide an overview of the regulatory processes and challenges with respect to the following broad key issues: well casing and cementing; protecting water well and groundwater; water allocations; public disclosure of injection additives; fluid handling and management; older wells and well communication and public concerns. The goal of this report's jurisdictional review was to assist Nova Scotia in learning how other jurisdictions regulate unconventional resource development and in particular, hydraulic fracturing and to identify current regulatory best practices for activities related to hydraulic fracturing.

This report provides summary charts on each issue and lists applicable legislation, regulations, directives and guidelines. The summary charts on each issue are an excellent resource and starting place for my research, as they have already done the heavy lifting on compiling and summarizing all of the jurisdictional approaches to hydraulic fracturing. As a result, the conclusions and summaries about best practices are directly relevant to my assessment of Alberta's regulation of hydraulic fracturing.

“What is Hydraulic Fracturing?” online: Alberta Energy Regulator <<http://www.aer.ca/about-aer/spotlight-on/unconventional-regulatory-framework/what-is-hydraulic-fracturing>>.

Shale Gas, online: Canadian Association of Petroleum Producers, <<http://www.capp.ca/canadaindustry/naturalGas/ShaleGas/Pages/default.aspx>>.

OTHER MATERIALS

Baseline Water Well Testing Requirement for Coalbed Methane Wells Completed Above the Base of Groundwater Protection, AER Directive 035 (8 May 2006).

BC Oil and Gas Commission, Information Bulletin INDB 2013-03, “Hydraulic Fracture Data” (4 April 2013).

Casing Cementing Minimum Requirements, AER Directive 009 (1 June 1990).

Energy Development Applications and Schedules, AER Directive 056 (1 September 2011).

Hydraulic Fracturing Injection Test Submission and Content Requirements, AER Directive 083 (21 May 2013).

Resources Applications for Oil and Gas Reservoirs, AER Directive 065 (14 March 2012).

Surface Casing Depth Requirements, AER Directive 008 (14 December 2010).

Well Abandonment, AER Directive 020 (9 June 2010).

Well Drilling and Completion Data Filing Requirements, AER Directive 059 (19 December 2012).

THE APPLICABILITY OF PROVINCIAL LIMITATION RULES IN RELATION TO ABORIGINAL LAND CLAIMS AND TREATY RIGHTS IN ALBERTA

ANNOTATED BIBLIOGRAPHY (IN PROGRESS)

Compiled by Philippa J. Kentish
LL.M. Candidate, University of Calgary
December 18, 2013

This annotated bibliography was compiled for the course Law 703: Graduate Research and Methodology at the University of Calgary, under the instruction of Professor Jonnette Watson-Hamilton. It contains a portion of the relevant sources I shall be utilizing for my LL.M Major Research Paper and shall be divided into four sections; (a) legislation, (b) treaties (c) jurisprudence and (d) secondary materials. For the purposes of this assignment only twelve of the secondary materials shall be provided with annotations. This bibliography is an example of a work in progress, alongside my Major Research Paper and therefore, does not represent an exhaustive list of the literature involved. The principal purpose of my research is to examine whether provincial limitation laws are *ultra vires* the Constitution Act 1982 and therefore inapplicable to Aboriginal land claims. More specifically, I will be focusing on the situation relating to this matter in Alberta and in light of Section 13 of the Limitations Act 2000.

LEGISLATION

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982.

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

Indian Act, RS, 1951, c. I-5.

Limitations Act, RSA 2000, c. L-12.

Limitations Act, SA 1996, c. L-15.1.

Limitation of Actions Act, RSA 1980 c. L-15.

TREATIES

Treaty No.6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions, Canada, 9 August 1877, R33-0664, (made and concluded near Carlton on 23 August and 28 August of said month respectively, near Fort Pitt on 9 September 1977).

JURISPRUDENCE

Attorney General Canada v Canard, [1976] 1 SCR 170.

Canada (AG) v Lameman, 2008 SCC 14.

Calder v British Columbia (Attorney General), [1973] SCR 313.

Cardinal v Attorney General of Alberta, (1974) 40 DLR (3d) 553 (SCC).

Delgamuukw v British Columbia, [1997] 3 SCR 1010.

Dick v The Queen, [1985] 2 SCR 309.

Lovelace v Ontario, [2000] 1 SCR 950.

Paul v British Columbia, [2003] 2 SCR 585.

Re Stony Plain Indian Reserve, [1982] 1 WWR 302.

R v Badger, [1996] 1 SCR 771.

R v Côté, [1996] 3 SCR 139.

R v Hill, (1907) 15 OLR 406 (CA).

R v Sparrow, [1990] 1 SCR 1075.

R v Sundown, [1999] 1 SCR 393.

R v White Bob (1965) 52 DLR (2d) 481n (SCC).

Simon v The Queen, [1985] 2 SCR 387.

St Catherine's Milling and Lumber Co. v The Queen, (1888) 14 App Cas 76.

SECONDARY MATERIAL: ARTICLES

Nigel Bankes, "Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 UBC L Rev 317.

Nigel Bankes is a Professor of Law and the Chair of Natural Resources at the University of Calgary. The scope of this article provides a case comment on the Supreme Court of Canada's decision in *Delgamuukw v British Columbia* and how the court deals with the division of powers doctrine. The central theme of this article addresses the *validity and application* of provincial resource laws, which affect lands that are subject to an existing Aboriginal title or right. Bankes argues that provincial resource disposition laws affect the primary jurisdiction of the federal government over Indian lands, reserved under Section 91 (24) of the Constitution Act and therefore concludes that these laws are inoperative insofar that they relate to lands, subject to Aboriginal title. This article contributes to my research project as it supports the notion that provincial laws cannot extinguish aboriginal rights because the intention to do so would be *ultra vires* the provincial jurisdiction, under Section 91 (24) of the Constitution Act 1867. The intended audience for this article will be lawyers in the natural resources and Aboriginal fields and scholars specializing their research in this particular area of interest. This article is similar to the other sources I have cited that discuss the application of *Delgamuukw* and how it affects provincial laws and Aboriginal peoples.

C. Bell, "Have You Ever Wondered Where s.91 (24) comes From?" (2004) 17 Can. J. Con. Law 285.

J. Burrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37 Osgoode Hall LJ 537.

John Burrows is a Professor of Law at the University of Minnesota and is a leading scholar in indigenous, constitutional and environmental law. His work involves issues surrounding Aboriginal legal rights, traditions, Treaties and land claims. This article suggests that although the decision in *Delgamuukw v British Columbia* has somewhat positively changed the law to protect Aboriginal title, it has also managed to simultaneously undermine Aboriginal land rights, by placing Aboriginal title in a subordinate position to other legal rights. Burrows concludes that the rule of law needs to be applied more rigorously to the Crown in its dealing with Aboriginal people in order to achieve greater equality and justice between the Aboriginal people of Canada and the Federal State. This article is directed at other scholars that specialize in the areas of Aboriginal and constitutional law. In contrast to the other

articles that comment on *Delgamuukw*, it refers to the significant flaws in the judgment that fail to give precedence to Aboriginal rights, rather than just confirming that it promotes the protection of Aboriginal rights from provincial interference. This article will provide a valuable source to my research, as I will be able to use the balanced discussion Burrows provides for *Delgamuukw* in light of the situation in British Columbia, to test my suggested framework for how Alberta should address their provincial laws, when it involves Aboriginal people.

D. Gibson, “The Federal Enclave Fallacy in Canadian Constitutional Law” (1976) 14 *Alta L Rev* 167.

Ronald Dale Gibson is a Distinguished Professor Emeritus at the University of Manitoba and his scholarly work specializes in constitutional law. This article discusses the dissenting opinion of Chief Justice Bora Laskin in *Cardinal v Attorney General of Alberta* and states that if his remarks are misconstrued, this could potentially cause unfortunate consequences for Canadian Constitutional Law. Gibson criticizes Laskin J’s comment of calling Indian reserves federal “enclaves” and suggests that this indicates to “the fallacy that provincial laws have no operation within the territorial boundaries of provincially sited federal property,” a view which he disagrees with. This article will contribute to an interesting discussion in my paper as it will support the idea that provincial laws will be applicable to federally owned lands in certain instances. As this article does not support my argument it will be used as a valuable resource to test the strength of my research question. This article was written for legal scholars with an interest in constitutional law and especially for those who have contributed or are interested in the discussion of how provincial laws affect Aboriginal rights.

P. Hughes, “Indians and Lands Reserved for the Indians: Off Limits to the Provinces?” (1983) 21 *Osgoode Hall L.J* 82.

Dr. Patricia Hughes is the Executive Director of the Law Commission of Ontario and holds a career in academia of more than thirty-five years. She was a Professor of Law at various Canadian Universities and has written extensively in a number of areas including constitutional law. This article addresses the issue that despite that fact the federal government has jurisdiction over Indians and reserves, there has been an

“area” allocated to the provinces, with respect to the application of their laws to Indians. Hughes implies that the well-being and independence of Native peoples should be the criterion in determining whether any particular legislation, provincial or federal, be applied. This article provides another dimension to my argument as it implies that provinces may pass legislation, in respect to Aboriginal people however in their application and interpretation, they must uphold their values by making them a primary consideration. Hughes’ views in this article are similar to those laid out by Slattery in that she is hopeful the Constitution Act 1982 will put a stop to legislation which threatens the traditional rights and protections of Indians. This article is intended for an academic audience and to those with an interest in the jurisdiction of the Canadian government and Aboriginal peoples.

K.M. Lysyk, “The Unique Constitutional Position of the Canadian Indian” (1967) 45 Can. Bar Rev 513.

Kenneth Martin Lysyk, a Justice of the Supreme Court of British Columbia was a former Professor of Law and Dean of the University of British Columbia, Faculty of Law. He was an expert in constitutional law and his writings on the legal status of native peoples still have fundamental importance to the issues faced today. Lysyk states that “the purpose of this article is to examine the constitutional base upon which Canadian ‘Indian law’ rests” and he concludes, in light of Section 87 of the Indian Act, a provincial law that conflicts with Indian Treaties or with legislation under the jurisdiction of the federal government will not be applicable to Indians. This article is unique in the fact that it provides some historical background to the construction of the separate heads of power, under Section 91 and 92 of the Constitution Act. Lysyk’s comments on the history and development of Section 91 (24) will be particularly useful to my research, as I will use them to formulate part of my introductory paragraphs. This article is intended for legal scholars in constitutional and Aboriginal law but would also be an appropriate resource for law students to gain a deeper understanding of the constitutional status of Aboriginal people in Canada.

K. McNeil, “Aboriginal Title and the Division of Powers” (1998) 61 Sask. L. Rev 431.

Kent McNeil is a Professor of Law at York University and a faculty member at Osgoode Hall Law School. McNeil’s research specializes in the rights of Indigenous peoples in Canada, Australia and the United States. His work involves land rights,

Treaty rights and self-government. In this article, McNeil calls for a re-examination of a number of significant Aboriginal rights issues, in relation to the decision of *Delgamuukw v British Columbia* and his primary analysis focuses on the Division of Powers. McNeil confirms that the federal government has exclusive jurisdiction over Aboriginal title lands, which means that provinces are barred from infringing or extinguishing Aboriginal title and also regulating the use of those lands. McNeil concludes that this limitation upon provinces is essential to the fulfillment of the federal government's jurisdiction for "securing the welfare of Canada's Aboriginal peoples." The article will contribute to the arguments I shall put forward in my research project as it states that provincial infringements of Aboriginal title are unconstitutional because they offend the Division of Powers by encroaching upon the exclusive jurisdiction of the federal government. The article is intended for an academic audience that has read his previous work in this area.

K. McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993-94) 19 Queen's LJ 95.

D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" (1983) 1 Beck and Bernier (eds.), *Canada and the New Constitution*, 225.

B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983) 8 Queen's L.J. 232.

Brian Slattery is a Professor of Law at the Osgoode Hall Law School. Slattery is well known for his foundational work on Aboriginal and Treaty rights and constitutional theory and he continues to research and write in these areas. Slattery served as a senior advisor to the Federal Royal Commission on Aboriginal Peoples and his extensive knowledge in this area of research is highly authoritative due to his experiences with Aboriginal issues. This article was written fairly recently after Section 35 and other provisions of the Constitution Act were passed and attempts to suggest a workable framework for the application of those provisions, in relation to Aboriginal people. Slattery states that his suggestions are merely speculative, however this article will be useful in the sense that it will provide me with a simplistic ideal as to how the Constitution should be interpreted when dealing with Aboriginal people. Slattery states that the new

provisions of the Constitution have a positive impact in that they addresses some of the major grievances, that have long been held by Aboriginal peoples. Despite this, Slattery is still wary to the fact that as the language is of a general nature, much will be left to the courts' discretion and to the mercy of judicial interpretation. This article will provide an important contribution to my work, as it will highlight the fact that the courts have not been as generous as hoped in certain instances, in their interpretation of legislation towards Aboriginal rights. This article is intended for legal scholars and also for students studying constitutional law.

B. Slattery, "First Nations and the Constitution: A Question of Trust (1992) 71 Can. Bar Rev 261.

B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727.

SECONDARY MATERIAL: BOOKS

Peter W. Hogg, *2012 Student Edition Constitutional Law of Canada*, (Toronto; Carswell, 2012).

Peter Hogg is Canada's leading scholar in constitutional law, a Professor Emeritus at Osgoode Hall Law School and a Scholar in Residence at Blake, Cassels & Graydon LLP in Toronto. This book is the fifth edition of the Constitutional Law of Canada series and provides the most up to date and broad analysis of constitutional law in sixty chapters. Hogg states that his reason for writing this edition is due to the fact that ten years have elapsed since the publication of the fourth edition and necessary updates were required. Hogg writes about the law in Canada and despite making references to other jurisdictions, makes no intention to conduct a comparative study. Hogg has used his citations sparingly by concentrating on the leading cases and commentaries, in order to keep his writing concise and relevant, he explains that decisions cited from any court below the Supreme Court of Canada and secondary literature are only cited if they are especially interesting and important. This book is directed at a student audience who are in their first year of law school or to law students/lawyers from other jurisdictions who have not studied Canadian

Constitutional Law. This book may also act as a useful resource for law professors who teach in the area of Constitutional Law.

Richard T. Price, *The Spirit of the Alberta Indian Treaties*, (Edmonton; University of Alberta Press, 3rd edition, 1999).

Richard Price is a Professor Emeritus of Native Studies at the University of Alberta and he specializes in negotiations with western and Indigenous dispute resolution and has published widely in the field of Treaty and land claim negotiations. This book is a well-acknowledged authoritative source for perspectives on Alberta Treaties. It has been cited in landmark decisions of the Supreme Court of Canada at least twice since its original publication in 1979. Historically, the Canadian government and First Nations leaders have tended to operate within two very different systems of perception and in his writing, Price intends to support and promote a growing understanding between leaders of government and First Nations people in Alberta and Canada, regarding Treaty rights issues. This book is intended for those with an interest in the history of First Nations and Treaty rights in Alberta. I will use this book to gain a deeper understanding of Treaty 6.

Ken Coates, *Aboriginal Land Claims in Canada A Regional Perspective*, (Toronto; Copp Clark Pitman Ltd, 1992).

Ken Coates is a Professor and Canada Research Chair in Regional Innovation at the University of Saskatchewan. His areas of interest, amongst others involve regional innovation, Aboriginal rights and land claims. In this book, Coates attempts to bring the complex Aboriginal land-claims issue into focus. I will use this book for my research to try to understand the debate around Aboriginal land claims and what has led them to be so misunderstood and misrepresented. In order to provide readers with some of the raw data necessary to judge the complexity of the issues for themselves, Coates includes extensive selections of original documents to be considered. Coates essentially argues that in the development of lands and resources in Canada, First Nations are being disproportionately treated. This is because, as development continues to proceed under the controls of government, First Nations are struggling to secure control of their traditional lands. As this book is designed to be an introduction to Native land claims in Canada, no prerequisite knowledge is required so it is aimed at an audience that shares an interest in this area.

Frank Cassidy, *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*,
(Lantzville; Oolichan Books, 1992).

Dr. Frank Cassidy was an Associate Professor in the School of Public Administration at the University of Victoria. He was the founding director of the Administration of Aboriginal Governments Program and wrote many publications on Aboriginal self-government. As a pioneer in the area of Aboriginal rights, title and governance, Cassidy served as a Senior Research Associate for the Royal Commission on Aboriginal Peoples and as the Advisor for Aboriginal policy to the Privy Council of the Province of British Columbia. This book contains a selection of essays, which discuss the significance of the case *Delgamuukw v The Queen* and its ruling over Aboriginal title in the province. Cassidy, among other contributors to the book argue that the judgment constitutes a denial, fundamental misunderstanding and ignorance of the rights of First Nations across Canada. The passion Cassidy feels towards his argument is amplified by words such as “no court can extinguish the fire that burns within us” and it is the power and strength of this passion that I intend to use when formulating my arguments, in the construction of my research paper. This book is intended for an academic audience that has read Price’s book *The Spirit of the Alberta Indian Treaties* and for scholars conducting research in Aboriginal land and Treaty rights.

Richard H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada A Homeland*,
(Saskatoon; Richard H. Bartlett, 1990).

Richard Bartlett is a Professor of Law at the University of Western Australia; he was a Professor at the University of Saskatchewan and was the holder of the Chair of Natural Resources at the University of Calgary in 1990. His research interests include Native title in Australia, however he has also published works relating to Aboriginal lands in Canada. The purpose of this book is to determine a comprehensive study of ownership, power and responsibility in law with respect to Indian reserves and lands set apart for Aboriginal peoples in Canada. Bartlett concludes that the fiduciary obligation of the Crown should correlate with the power it exercises over Indian reserve lands and other lands set apart for Aboriginal peoples. Bartlett states that such obligations should ensure the fulfillment of the objectives for which the lands were

first set apart. I shall use the ideas set forth by Bartlett in arguing that reserves set apart by Treaties should not be violated to serve provincial interests and that the interests of Aboriginal peoples should not be transferred to the jurisdiction of the provinces. This book is for an academic audience with a research interest in Aboriginal lands held under Treaties.

RESPONSIBLE RESOURCE DEVELOPMENT:
REGULATORY REFORMS TO FACILITATE MARKET ACCESS FOR GROWING
OIL SANDS PRODUCTION

By: Sonya Savage

This annotated bibliography is in progress and will be expanded as further research is conducted.

The subject matter of the paper concerns regulatory reforms under the umbrella of “Responsible Resource Development”, a policy of the Federal Conservative Government to ensure market access for growing oil sands crude production. Under this mandate, the Federal government brought in a series of reforms to legislation and regulations that are meant to facilitate approvals of major infrastructure, including pipelines to facilitate market access. Since the policies and the legislative changes are of relatively recent history, there is very little published scholarly material to date. I expect that there will be further published materials in the months ahead, particularly as the regulatory proceedings of two pipeline projects, the Northern Gateway Pipeline and the Line 9B Pipeline reversal, are concluded. These two pipeline projects have concluded their hearings following the implementation of the regulatory reforms that are the subject of this paper. Given the degree of public opposition to both of these projects, the amount of published secondary materials can be expected to be significantly increased in the months ahead. In lieu of published scholarship, which is scarce, research has looked to alternate sources for research, including online commentaries, press releases, reports and studies by think tanks and industry associations.

I also felt it was important to include annotations for the legislation being reviewed, as much of the paper will revolve around regulatory reforms and changes to legislation. It is helpful to see an annotated overview of the legislation that was subject to the reforms.

ANNOTATED BIBLIOGRAPHY (in progress)

LEGISLATION

Canada Shipping Act, SC 2001, c 26.

This legislation is under review. An expert tanker panel was appointed in March, 2013, to explore the rules relating to Canada’s ship sourced oil spill preparedness and emergency response management. The panel tabled a report on December 3, 2013. The report is expected to lead to significant legislative changes. The expert panel report and review is part of the Responsible Resource Development policies promoted by the Federal Conservative Government.

Canadian Environmental Assessment Act, SC 2012, c. 19.

New legislation replacing the previous act was enacted in 2012 and was part of the omnibus Bill C-38 Budget Bill passed by the Conservative Government under the

Responsible Resource Development Umbrella. The new legislation set maximum timelines for review, reduced duplicated procedures and allowed for delegation and substitution of environmental assessments to provinces.

Fisheries Act, RSC 1985, c. F-14.

Significant changes to eliminate the habitat protection provisions under s. 35(1) of the *Fisheries Act* were brought in through Bill C-38. This was seen as a “gutting” of environmental legislation by environmental organizations opposed to the Responsible Resource Development agenda.

Jobs, Growth and Long-term Prosperity Act, S.C. 2012, c. 19.

Known as Bill C-38, this is the omnibus 2012 Budget Bill that brought forward a number of the proposed changes under the Responsible Resource Development umbrella. The goals of the proposed changes included eliminating duplications and inefficiencies in order to access export markets for Canadian crude.

Marine Liability Act, SC 2001, c 6.

The review of this legislation, which covers the financial responsibility for ship sourced oil spills, was announced in March, 2013 under the Responsible Resource Development umbrella. A recommendation to increase the present liability cap under the Ship Source Oil Pollution fund from \$161 million to unlimited liability was proposed by the expert panel on December 3, 2013. Amendments to the legislation are expected in 2014.

National Energy Board Act. RSC 1985, c. N-7.

Changes to this legislation were enacted in 2012 under Bill C-38. Changes included binding timelines, consolidated responsibilities for environmental assessments for NEB projects, limiting standing in NEB hearings to those “directly affected”, and gave the final approval to the Federal Cabinet, based on recommendations by the NEB and the national interest.

Further changes to this legislation were proposed in June, 2013. These changes are meant to address safety and environmental concerns by establishing significant monetary penalties for safety contraventions, imposing safety audits, and enshrining the polluter pay principal by requiring pipeline companies to have \$1 billion in financial capacity to respond to spills. Proposed amendments to the legislation were expected in the fall of 2013, but have yet to be tabled.

Navigable Waters Protection Act, RSC 1985, c. N-42

Changes to this legislation were made in accordance with the government’s intent to avoid duplication. The amendments exempted pipelines from the operation of the legislation, giving jurisdiction to the NEB to authorize water crossings for pipelines post

NEB approval. This eliminated the requirement for secondary permits following NEB approvals for water crossings. These changes addressed some of the delays experienced by the Alberta Clipper Pipeline, where delays receiving secondary permits required to cross rivers during the construction stage were experienced.

JURISPRUDENCE

Chief Clifford Stanley et al v. Governor in Council et al, Federal Court Docket No. T-44-13, filed January 8, 2013.

Chief Steve Courtoreille et al v the Governor in Council et al, Federal Court Docket No. T-43-13, filed January 8, 2013.

These two cases challenge Bill C-38 regulatory reform provisions, alleging that the Federal government had a duty to consult aboriginal groups prior to enacting sweeping legislative changes.

Forest Ethics Advocacy Association and Donna Sinclair v. the National Energy Board and the Attorney General of Canada, Federal Court Docket No. A-273-13, filed August 13, 2013.

This litigation was commenced by the Environmental Group, Forest Ethics, opposing the new restrictions to standing in NEB hearings to those “directly affected”. Using a litigant who was denied standing to participate in the Enbridge Line 9B NEB hearings to reverse the flow of an existing pipeline, the case alleges a violation of freedom of expression under the Charter of Rights and seeks to strike down the new s. 55 of the *National Energy Board Act*.

SECONDARY MATERIAL: BOOKS

Kirk N. Lambrecht Q.C., *Aboriginal Consultation, Environmental Assessment and Regulatory Review in Canada* (Regina, University of Regina Press, 2013).

This book provides an overview of many of the current issues facing project proponents before the National Energy Board. Chapter 5 of the book analyzes the regulatory approval process for 3 recent pipeline projects, including the Alberta Clipper Pipeline approved by the NEB in 2008. The author explores the litigation related to the approval processes for the Alberta Clipper Pipeline. While most of the focus is on aboriginal consultation litigation, which is beyond the scope of this research paper, the author explores it in the context of the previous regulatory regime that was in place prior to the reforms under Responsible Resource Development.

SECONDARY MATERIAL: ARTICLES AND REPORTS

Gerry Angevine and Vanadis Oviedo, “Ensuring Canadian Access to Oil Markets in the Asia-Pacific Region” (July 2012) Fraser Institute, online: <http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research_news/research/publications/ensuring-canadian-access-to-oil-markets-in-asia-pacific-region.pdf>.

The authors published this study for the Fraser Institute, a think tank based in Calgary, Alberta. The report examines regulatory and other barriers that the authors believe inhibit the development of pipelines to the west coast that are needed to open new markets for Canadian crude. They suggest a number of regulatory reforms, which they believe would mitigate these barriers. The authors approach their study from an economic perspective, assuming that economic development and opening markets to increase jobs and employment is fundamentally a good thing. Accordingly, they approach their recommendations for regulatory reform in a manner that suggests that a streamlined and quick regulatory review of pipelines projects is essential to ensure economic prosperity. Some of the recommendations in the report included limitations to standing in regulatory hearings by the NEB, maximum timelines for review and joint federal-provincial environmental assessments. Many of their recommendations are included in the Bill C-38 regulatory reforms. Though this report is not published in a journal and the authors do not have a legal background, the report itself is extremely helpful in understanding the underlying issues that regulatory reforms were meant to address.

Pamela Baxter and Susan Jack, “Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers” (2008) 13 *The Qualitative Report*, 544, at 545.

This article will be used to help frame methodology for the paper, particularly how to structure a simplified case study.

Dayna Nadine Scott, “Situating Sarnia: Unimagined Communities in the New National Energy Debate” (2013) 25 *J Envtl L & Prac* 81.

This article is written by Dayna Nadine Scott, an Associate Professor at Osgoode Hall Law School. In the article she discusses the Harper government’s Responsible Resource Development vision of Canada becoming an energy superpower and focuses on the various pipeline projects under proposal in 2013. She discusses the regulatory changes in Bill C-38, focusing on the shortened environmental assessments. Her paper argues that communities at the end of such pipelines need to be “unimagined” if we are to believe that everyone will benefit from increased development of the oilsands and increased pipeline infrastructure. The paper demonstrates a point of view that questions the Federal Government’s Responsible Resource Development policies and is helpful to understand the dynamics of opposition to the regulatory reforms.

Energy Policy Institute of Canada, “A Canadian Energy Strategy Framework” (Final Report August 2012), online: Energy Policy Institute of Canada >.

The Energy Policy Institute of Canada formed in 2009 for the purpose of proposing an energy framework and strategy to governments. Their goal was to engage governments and provide recommendations on energy and environment policy. The group was composed of groups such as the Canadian Chamber of Commerce, the Council of Chief Executives, and the Canadian Energy Pipeline Association along with industry representatives such as TransCanada Pipelines, Enbridge Pipelines and many of the upstream producers. This publication was the culmination of over two years of work by the group and contained many recommendations for regulatory reform. The group’s proposed regulatory reforms were presented to the government ahead of the reforms announced in Bill C-38.

This is just one of many studies and reports that industry groups presented prior to the regulatory changes proposed in Bill C-38. This and other similar reports will be examined as part of the statutory review process for this research paper.

Terry Hutchinson & Nigel Duncan, “Defining and Describing What We Do: Doctrinal Legal Research” (2012) 17 Deakin L. Rev. 83 at 101-119

This article will be used to help frame research methodology for the paper, focusing on doctrinal analysis methodology.

Mathias M. Siems, “The Taxonomy of Interdisciplinary Legal Research: Finding the Way out of the Desert” (2009) 7:1 Journal of Commonwealth Law and Legal Education 5, at 12.

This article will be used to help frame research methodology for the paper, focusing on interdisciplinary research methodology.

Winfield, Mark, “Dirty Oil, Responsible Resource Development and the Prospects for a National Conversation about Energy Sustainability in Canada” (2013) 25 J Envtl L & Prac 19.

This article published in the Journal of Environmental Law and Practice is written by York University Professor Mark Winfield. (PhD Political Science). In this paper, he covers a number of issues related to energy policy. In particular, he discusses the Harper Government’s approach to energy issues and suggests that there is a need to balance the interests of the environment and the economy, as well as regional interests, if the government is to achieve the goal of developing export markets for Canadian crude. It is a good overview of the policy objectives driving the Federal government, that led to the pursuit of regulatory reforms under Responsible Resource Development.

OTHER MATERIALS

Canadian Energy Pipeline Association, Press Release, “Regulatory Reforms Focus On Issues Important To The Pipeline Industry” (29 March 2012) online: CEPA <<http://www.cepa.com/regulatory-reforms-focus-on-issues-important-to-the-pipeline-industry>>.

The Canadian Energy Pipeline Association is the industry group that represents major pipeline companies in Canada. In this press release, issued the day that the Federal Government tabled the regulatory reforms in Bill C-38, the industry association praised the Federal government’s reforms, focusing on the streamlining and the one-project one review focus of the reforms. This press release and other online materials will be explored in order to understand the reaction of industry to the regulatory reform initiatives.

David Suzuki Foundation, “Bill C-38: What you need to know” (May 2012), online: David Suzuki Foundation <<http://www.davidsuzuki.org/publications>>.

EcoJustice and West Coast Environmental Law, “What Bill C-38 means for the Environment” (May 2012), online: West Coast Environmental Law <http://wcel.org>.

These two articles from Environmental Organization’s websites are a sampling of the types of internet documents that will be explored in order to understand the position of Environmental organizations relating to the Responsible Resource Development regulatory reforms. The EcoJustice article outlines the top ten concerns that the organization has with the reforms under Bill C-38. The David Suzuki Foundation Article covers 11 areas of concerns.

Gail Henderson, “Pipelines and Public Participation, Part II: Freedom of Expression” (30 November 2013) *University of Alberta Faculty of Law Blog*, online: University of Alberta Law <<http://ualbertalaw.typepad.com/faculty/2013/11/pipelines-and-public-participation-part-ii-freedom-of-expression.html>>.

The author in this online blog from the Faculty of Law at the University of Alberta discusses the issue of standing to participate in NEB hearings and the restricted definition of standing enacted in the Bill C-38 regulatory reforms. She believes that the new restrictive approach to standing in hearings where there is organized opposition have led to new opportunities for litigants to present innovative constitutional arguments to challenge pipeline approval hearings. She refers specifically to the Line 9B reversal project and the constitutional challenge brought by Forest Ethics to the new restrictions to standing.

There are many similar blog commentaries from legal scholars, which will be studied alongside of published scholarship.

Natural Resources Canada, Access to Information Act request,

This 105 page Access to Information (ATIP) request is the first of many government ATIPs that will be examined and reviewed. The documents contained in this request show the Department of Natural Resources' key messages relating to Responsible Resource Development. The documents include briefing materials to Natural Resources Minister Joe Oliver, including key messages for news conferences and appearances before the Standing Committee of Natural Resources, which consists of Members of Parliament from all parties.

Many more of these requests will follow.

Government of Canada, "Canada's Economic Action Plan" online: Government of Canada, <<http://actionplan.gc.ca/en/initiative/responsible-resource-development>>.

This government of Canada website comprehensively covers all of the government's initiatives and announcements under "Responsible Resource Development". It outlines their key regulatory reform initiatives and places those initiatives into the broader context of the government's overall jobs and prosperity agenda.

Government of Canada, Press Release, "Harper government announces first steps towards World-Class Tanker Safety System" (18 March 2013), Press Release, online: Transport Canada <<http://www.tc.gc.ca/eng/mediaroom/releases-2013-h031e-7089.htm>>.

This is one of many press releases that will be reviewed. In this press release and accompanying background material, the government announces the legislative reviews that are meant to provide the public assurance that Canada's emergency preparedness and response and liability regimes relating to oil tanker traffic meet or exceed world class standards.

House of Commons Debates, 37th Parl, 1st sess, No. 121 (10 May, 2012) at 1415 (Thomas Mulcair)

The Parliamentary debates following the tabling of Bill C-38 were acrimonious and politically charged. This particular date, May 10, 2012, was dominated by the Liberal and NDP opposition criticizing the government's environmental and regulatory reforms. While there are several debates contained in the Debates in the House of Commons, this particular date set the tone of the rhetoric to follow. In particular, it framed the NDP's

position that the government had “gutted” environmental legislation to facilitate the expansion of the oil sands.

MEDIATION AT THE “AER”: ARE COWBOYS RIDING A TROJAN HORSE?

ANNOTATED BIBLIOGRAPHY (IN PROGRESS)

S. Cyril Bandyopadhyay

This is a partial annotated bibliography of materials for graduate research. It is a work in progress and should not be taken as an exhaustive review of the relevant literature. The research will contribute to a prescriptive analysis of the legal doctrine of privilege as adapted for disputes pertaining to mediated agreements. The recommendations will be specific to the context of Alberta's energy and natural resources regulatory scheme and will be framed by constitutionalism and regulatory theory.

SECONDARY MATERIALS: MONOGRAPHS

Ackerman, Bruce. *Private Property and the Constitution* (Yale University Press, 1977).

Alfini, James J et al. *Mediation Theory and Practice*, 2nd ed (LexisNexis, 2006).

Gutterman, A. *A Short Course in International Joint Ventures: Negotiating, Forming and Operating the International Joint Venture* (World Trade Press, 2001).

Hogg, Peter W. *Constitutional Law of Canada*, 5th ed (Carswell, 2007).

Nelson, Robert M. *Nelson on ADR* (Thompson Carswell, 2003).

The author of this introductory text on ADR wrote it as the Former Executive Director of the ADR Institute of Canada Inc. and a senior lawyer at the law firm of Gowling Lafleur Henderson LLP (Ottawa). This book is very useful to anyone wishing to delve into ADR for the first time. It is geared towards practitioners but is also useful to any researcher interested in ADR. It provides a theoretical outline for different forms of ADR and a thorough summary of the major elements and issues involved. The chapters on negotiation theories, conflict analysis, mediation models and mediation “in real life” will be of particular use to those curious about mediation and can be read on their own along with an important chapter on confidentiality and privilege. Beneficial to lawyers first taking an interest in ADR, it is also accessible for anyone wishing to educate themselves or enter the field.

Regimbald, Guy. *Canadian Administrative Law*, 1st ed (LexisNexisCanada Inc. 2008).

SECONDARY MATERIAL: ARTICLES

Anderson, Barry et al. *Veils and Cloaks of Ignorance* (2011), online: SelectedWorks <<http://www.works.bepress.com>>.

This article may be useful to those seeking an interdisciplinary approach to mediation research. A theoretical foundation with which to understand mediation based on the structured limitation of information based on Rawls's “veil of ignorance” is presented and psychological evidence is

provided for the usefulness of various degrees of information control coined as thin veils, thick veils, and cloaks. The authors bring a collaborative interdisciplinary perspective to mediation scholarship. Barry Anderson is a professor emeritus of psychology at Portland State University. Les Swanson is a lawyer and mediator in private practice, a former Professor of Humanities at the Portland State University Graduate Program in Conflict Resolution, and is a former Visiting Professor of constitutional law and legal philosophy at the University of Oregon, School of Law. Sam Imperati is a public policy facilitator and mediator, an ADR trainer, lawyer, and Contributing Faculty at the Willamette University Atkinson School of Management. This article is written for both scholars and practitioners.

Barry Barton, "Theoretical Context of Regulation", in Barry Barton, Alastair Lucas, Lila Barrera-Hernandez, and Anita Ronne, eds., *Regulating Energy and Natural Resources* (Oxford: Oxford University Press, 2006) 11.

Chilton, Stephen & Maria Salza Wyant Cuzzo. "Habermas's Theory of Communicative Action as a Theory for Mediation Practice" (2005) 22:3 *Conflict Resolution Quarterly* 325.

This article is very useful as it provides a succinct explanation of the theory of communicative action and how it applies to mediation. It seems to be written for both academia and a professional audience that wishes to reflect on mediation and how it is informed by a particular theoretical foundation. It provides a thorough overview and a useful examination of how Habermas's theory lends itself to concrete applications in the mediation context. This will be useful anyone who wishes to apply these criteria to a discussion of mediation and will help elucidate some of the perspectives on mediation for any mediation related research.

Deason, Ellen. "Procedural Rules for Complimentary Systems of Litigation and Mediation – Worldwide" (2004) 80 *Notre Dame Law Review* 553.

Ellen Deason was a professor at the Ohio State University Moritz School of Law when this article was written. This article is extremely useful to anyone wishing to garner information about the nature of mediation, especially how it might be handled by courts and enforced. The focus of this paper is on mediation connected to civil litigation and the international context. The paper begins with introductory material about mediation and its principles. It then examines options for how to treat certain mediated agreements with a technical discussion of international legal forums and related frameworks such as the Unified Mediation Act in the U.S. and UNCITRAL.

Endicott, Timothy. "Adjudication and the Law" (2007) 27:2 *Oxford J Legal Stud* 311.

Hamilton, J. "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan" (1999) 24 *Queen's LJ* 561.

Heley, Mark J. "Mediation of Construction Cases Using 'Blind Negotiations': Can Providing Less Information Generate Better Results?" (2007-2008) 34:1 *William Mitchel Law Review* 273.

This article is very useful for anyone interested in strategic considerations behind design options for facilitated negotiations. The author is a partner at a law firm and served as Chair of the Minnesota State Bar Association's Construction Section and on the Governing Committee of the ABA Forum on the Construction Industry. He points out that one of the advantages to mediation

in cases involving many parties with long term projects together is the use of blind negotiations. Restricting information may seem counter-intuitive for mediation but it may in fact offer a better mechanism than previously understood. This is particularly true for cases in which the complete removal of an adversarial relationship may not be realistic but the author demonstrates that there are also distinct advantages to the various uses of blind negotiations with a neutral facilitator. This article is useful to any practitioner involved in negotiation as well as to researchers.

Izumi, Carol. "Implicit Bias and the Illusion of Mediator Neutrality" *Washington University Journal of Law and Policy* (22 June 2010), online: <<http://www.thefreelibrary.com>>

Gaudet, Serge. "Inexistence, nullité, et annulabilité du contrat: essai de synthèse" (1995) 40 *Revue de Droit de McGill* 291.

Gray, Owen V. "Protecting the Confidentiality of Communications in Mediation" (1998) 36:4 *Osgoode Hall LJ* 667.

Korobkin, Russell. "Against Integrative Bargaining" (2007-2008) 58 *Case Western Law Review* 1323.

The author wrote this paper as a professor of law at UCLA. This paper is very useful for anyone interested in the debate over the benefits of mediation. This professor argues that while integrative bargaining is desirable and can play a beneficial role in settlements, its presentation to the public and the professional community as a revolutionary panacea has been largely overblown. He provides an excellent argument for why integrative bargaining is actually quite limited in its potential use and why much of mediation depends more on distributive bargaining than is claimed. This article is written for professionals, academia, and the public but appears to be primarily motivated by a response to certain academics.

Kruk, Gerry. "The Appropriate Dispute Resolution Initiative of Alberta's Energy and Utilities Board" (2000-2001) 14 *Can J Admin L & Prac* 293.

Gerry Kruk is a long time regulatory and risk communications executive in the petroleum industry who then became an oil and gas lawyer. His article is helpful in providing an overview of the factors leading up to the implementation of ADR at the then EUB and describing how it works. He provides an assessment of the benefits of ADR and welcomes its introduction. He believes that mediation that is facilitative and employs collaborative problem-solving allows for a balanced means of achieving consensus. This includes building trust, using scientific information, and addressing questions of risk as well as of normativity.

Legrand, Pierre. "The Impossibility of 'Legal Transplants'" (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

Libecap, Gary D & James L Smith. "The Self Enforcing Provisions of Oil and Gas Unit Operating Agreements" (1999) 15:2 *JL Econ & Org* 526.

This article is very useful to any researcher interested in efficiency driven evaluations of contracts between various industry parties in oil and gas. It offers a detailed discussion of relevant provisions in oil and gas unit operating agreements in particular, providing important insights into elements of agreements which can lead to disputes and how market based rational

decision making helps explain their neutralization. Gary D. Libecap works out of the University of Arizona and the National Bureau of Economic Research and James L. Smith works out of Southern Methodist University. It appears to be written for practitioners and academics familiar with the oil and gas industry or with the field of law and economics.

Low, Cecilia A. "Energy and Utility Regulation in Alberta: Like Oil and Water?" (2009), online: Canadian Institute of Resource Law <<http://www.cirl.ca/OP>>.

The author is a lawyer and geophysics engineer who is now a commissioner at the Alberta Energy Regulator. She wrote this paper as while an LLM candidate in Calgary. This paper provides a useful background to the development of the regulatory frameworks relating to natural resources in Alberta. Written for both academics and the public, Low compiles a chronology of the regulatory scheme in Alberta and offers insight into the driving forces behind its various mutations. An analysis of the advantages and disadvantages of separate and unified administrative boards is also offered.

Low, Cecilia A. "The 'Public Interest' in Section 3 of Alberta's *Energy Resources Conservation Act*: Where Do We Stand and Where Do We Go From Here?" (2011), online: Canadian Institute of Resource Law <<http://www.cirl.ca/OP>>.

Peppet, Scott R. "Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?" (2004) 19:2 Ohio St J Disp Resol 283.

Scott R. Peppet is an associate professor at the University of Colorado School of Law. This article is useful in that it provides an outline of transactional mediation and its application in business. The author makes provides an overview of the bargaining process in the life of a business agreement. He then provides several arguments in favor of transactional mediation as a means of enhancing this process. He is persuasive in arguing that transactional mediation diminishes strategic posturing and allows for better deals to be made in certain situations. He appears to be writing for a general audience in the legal and business world. This article elucidates the potential of mediation for enhancing deal-making in a commercial context and expands one's presumptions about how mediation can be applied. His argument is framed by a law and economics perspective and demonstrates that a third party neutral at the beginning of deal formation can provide a quantifiable value to commercial relations.

Shapiro, Sidney A. & Christopher H. Schroeder. "Beyond Cost-Benefit Analysis: A Pragmatic Reorientation" (2008) 32 Harvard Environmental Law Review 433.

Silbey, Susan S. "The Emperor's New Clothes: Mediation Mythology and Markets" (2002) Journal of Dispute Resolution 171.

This article is extremely enlightening to anyone who seeks a full spectrum of debate on the sustained expansion of mediation that invites the reader to interrogate themselves about their own sense of epistemological security. Though it does not delve into any technical arguments such as Bayesian probability, laws of evidence, or other methods of justifying credibility, it legitimately challenges the presumptions often relied on in supporting the expansion of mediation. Using Hans Christian Andersen's fairy tale as an apt metaphor, Silbey persuasively argues that mediation has been propagated much as would an ideological campaign be for reasons far removed from those overtly stated. Beginning with its early history and initial love

affair with the civil rights movement in the United States, the author demonstrates how disingenuous certain publicly supported explanations for the growth of mediation truly are, citing empirical studies and historical facts to support her theory. She provides a convincing and well-written outline of how a trend in the legal system can be understood as a politically inspired phenomenon that thrives on an interdependent network of self-interested dishonesty akin to willful blindness. Susan S. Silbey wrote this article while affiliated with MIT. This article appears to be written for both academics and the public at large.

Thompson, Peter N. "Enforcing Rights Generated in Court-connected Mediation – Tensions Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice" (2003-2004) 19 Ohio St. J. on Disp. Res. 509.

Welch, Nancy A. "The Thinning Vision of Self-determination in Court-connected Mediation: the Inevitable Price of Institutionalization?" (2001) 6:1 Harvard Negotiation Law Review 1.

This paper is extremely useful to anyone wishing to examine some of the theoretical bases for mediation and how this might affect its legal treatment. Various approaches to mediation are discussed in relation to the central issue of self-determination. Possible recommendations are also offered and evaluated at the end of the paper, such as providing a cooling off period before signing a final agreement. Nancy Welch wrote this paper as an assistant professor of law at Penn State University. The paper offers a balanced evaluation of the pros and cons of mediation and how to address difficult procedural problems that arise when mediation is connected to further litigation.

**UNIVERSITY OF CALGARY
FACULTY OF LAW**

LAW 703: LEGAL RESEARCH AND METHODOLOGY

ANNOTATED BIBLIOGRAPHY (WORK-IN-PROGRESS)

BY

CHINOMSO O. ILIYA-NDULE

18TH DECEMBER, 2013

ANNOTATED BIBLIOGRAPHY

This annotated bibliography contains primary and secondary sources that will contribute to my LL.M major research paper. The topic of my major research paper is “Redefining the Land Reclamation Laws for the Nigerian Oil Sands Industry: Lessons from Alberta”. The focus of my major research paper is to identify the legal issues associated with land reclamation of mined lands in Nigeria and to highlight the need for reform. It also seeks to propose recommendations for reform, using Alberta as a model. This annotated bibliography is a work in progress and is therefore not a comprehensive list.

PRIMARY MATERIALS: LEGISLATION

Nigeria

Nigerian Minerals and Mining Act, 2007, Laws of the Federation of Nigeria, cap A469.

This is the primary legislation regulating the extraction and exploration of solid minerals, including oil sands, in Nigeria. The Act is concerned with ensuring environmental protection, and land restoration and reclamation. It establishes an Environmental Protection and Rehabilitation Program and Fund which are aimed at accomplishing the objectives of the Act. This Act is useful in this research because it forms the basis of my research, which is to highlight the shortcomings of the land reclamation laws in Nigeria and propose recommendations for reform.

Alberta

Environmental Protection and Enhancement Act, RSA 2000, c E-12.

This Act is concerned at ensuring the protection of Alberta’s environment from adverse effects cause by human activity. It provides for the compulsory reclamation of land and contains regulations aimed at ensuring that land is reclaimed, by the holders of mineral rights, to the equivalent land capability that existed prior to the carrying of any activities. It provides the basis from recommending the reform of the Nigerian legislation.

SECONDARY MATERIALS: MONOGRAPHS

Aston, Robert Lee. *The Legal, Engineering, Environmental and Social Perspectives of Surface Mining Law and Reclamation by Landfilling* (Singapore: Imperial College Press, 1999).

The author was a legal practitioner, mining engineer and geologist. He had a Doctor of Philosophy degree in Civil Engineering-Law and a Doctorate of Engineering (D.E. in engineering law) from the University of Missouri- Rolla. The book aims at developing a model which will guarantee the reclamation of mined land through landfilling of municipal waste. It provides a legal as well as engineering perspective of surface mining reclamation and addresses the social and environmental concerns of land reclamation. This book targets law students, legal practitioners, scholars and non-legal trained readers.

Harris, JA, P Birch & JP Palmer. *Land Restoration and Reclamation: Principles and Practice* (UK: Addison Wesley Longman, 1996).

This book provides a comprehensive examination of land restoration and reclamation. It sets out the objectives of land reclamation, the processes available for the establishment of fully self-sustaining ecosystems and how land reclamation can be assessed. This book is relevant to my research paper because it provides the requisite understanding of what land reclamation is and what it entails. It also provides information on the different uses of reclaimed land which is essential to recommending reform. The end use of reclaimed land will inform the objective of the legal regime. The intended audience includes senior undergraduates, post graduate students and professionals dealing with land reclamation issues.

SECONDARY MATERIALS: COLLECTION OF ESSAYS

Funk, MYP & TM Macyk. "Reclamation of Oil Sands Mining Areas" in RI Barnhisel, RG Darmody & WL Daniels, eds, *Reclamation of drastically disturbed lands* (Madison, USA: American Society of Agronomy, 2000).

The authors are both affiliated in the oil sands industry in Alberta. Funk is affiliated with Syncrude Canada Ltd and Macyk is with Alberta Research Council. This book chapter provides a detailed examination of the oil sands mining and extraction process in Alberta. It also describes the characteristics of land surfaces requiring reclamation and the land reclamation legislation. It discusses land reclamation monitoring strategies and the various uses of reclaimed land. The information derived from this book chapter is relevant to my research paper because it provides a better understanding land reclamation in the Albertan context, which will aid in identifying the relevant provisions that will constitute the platform for the suggested reform.

Hoskin, MA Wanda. "Mine Closure: The 21st Century Approach - Avoiding Future Abandoned Mines" in Elizabeth Bastida, Thomas Walde & Janeth Warden-Fernandez, eds, *International Comparative Mineral Law and Policy Trends and Prospects* (UK: Klumer Law International, 2005) 627.

The author has extensive experience in the mining industry. She was senior advisor on mining and environment with the United Nations Environmental Program Division of Technology, Industry and Economics where she advanced key initiatives relating to abandoned mines. Prior to that, she was the Assistant Director, International Minerals Division at Natural Resources Canada. This book chapter analyses the problems associated with land reclamation and examines the reasons why land reclamation should meet specified standards of best industry practices. She suggests that legal and financial responsibility is at the core of any land reclamation project, and advocates that legislative frameworks should be clear, stable and predictable. This work is relevant to my paper as it provides a general idea of the problems associated with land reclamation, which will assist in highlighting the problems with Nigeria's legal regime. The target audience of the book are scholars, students, government officials and mining companies.

Sipasi, Olusina. "Nigeria" in Carolyn Boyle, Per Vestergaard Pedersen, eds, *Minerals and Mining: A Practical Guide* (UK: Global Business Publishing Ltd, 2125) 173

The author is a partner at Aelx Legal Practitioners & Arbitrators law firm in Nigeria. He has over ten years' experience in Energy, Natural Resources and Environmental Law. This book chapter provides an overview of the relevant laws and regulations governing mining in Nigeria. It describes the legal instruments relating to mining activities, environmental protection and liability, and land reclamation. It also explains the procedure for decommissioning of mining assets in Nigeria. It is important to my research paper because it provides an insight into the relevant legal instruments available for land reclamation in Nigeria. It is targeted at individuals who require background knowledge on the mining industry in Nigeria.

SECONDARY MAETRIALS: ARTICLES

Adefulu, Adeoye. "An Overview of the Nigerian Minerals and Mining Act 2007" (2010), online: Mondaq
<http://www.mondaq.com/x/95916/Mining/An+Overview+Of+The+Nigerian+Minerals+And+Mining+Act+2007>

The author is a partner at Odujinrin & Adefulu Law Firm in Nigeria, where he practices in the Energy and Natural Resources department. He qualified to practice law in 1998 and obtained a Doctor of Philosophy degree (Ph.D) in 2007. He lectured at the University of Stirling, Scotland and at the Center of Law & Business, Nigeria. This article provides an overview of the Nigerian Minerals and Mines Act, 2007, which is the major legislation

regulating land reclamation of mined lands in Nigeria. It serves as a general guide and provides a good starting point for this research. The article is written for anyone who wants to have a general understanding of the Nigerian Minerals and Mines Act, 2007.

Aigbedion, I & SE Iyayi. "Environmental Effect of Mineral Exploitation in Nigeria" (2007) 2:2 International Journal of Physical Sciences 33.

This article focuses on the environmental effects of mineral development in Nigeria. The authors examine in detail the types of environmental damage that result from exploration, mining and processing of minerals in Nigeria. The article focuses on the environmental damage caused by mined minerals. The authors argue that due to the inevitability of the occurrence of some of the environmental damage, precautionary and remedial legislation need to be in place to minimize the effects of the environmental damage. The information derived from this article emphasizes the scholarly significance for my research paper and provides an insight into the problems of land reclamation which may not be addressed in Nigeria's current regime.

Alexander, Michael J. "A Review of the Bureaucratic, Political and Legislative Problems Encountered in the Reclamation of the Plateau Tinfields of Nigeria" (1989) 17 Landscape and Urban Planning 35.

This article analyses the legislative problems encountered in reclamation of mined lands in Nigeria. It provides a historical perspective of the development of land reclamation laws in Nigeria and the problems that resulted. It is relevant to my research paper which aims at recommending the reform of the current land reclamation regime. It is targeted at researchers who are interested in problems associated with the previous land reclamation laws in Nigeria.

Lawrence, David. "Optimization of the Mine Closure Process" (2006) 14:3-4 Journal of Cleaner Production 285.

This article provides an overview of mines closure and the major risks associated therewith. It focuses on identifying and quantifying mine closure and reclamation risks. This article will aid in the analysis of the Nigerian legal regime and in highlighting any lacunae or shortcomings regarding the mitigation of risks associated with land reclamation that are not mitigated against in Nigeria's legal regime. It will also aid in identifying the relevant provisions in Alberta's legal regime which mitigate against land reclamation risks. An understanding of how these risks can be quantified is also invaluable in making recommendations for reform. This article is targeted towards mine operators, government regulators and scholars.

Patel, S. "Canadian **oil sands**: Opportunities, Technologies and Challenges" (2007) 86:2 Hydrocarbon Processing 65.

The author is a chemical engineer with Petro-Canada. He has over fifteen years of experience in the oil sands industry. His expertise includes environmental issues and preparation of Environmental Impact Assessments. This article provides a detailed examination of the oil sands industry and identifies a number of environmental challenges and impacts associated with the industry. This article is valuable to this research because it provides an insight into the environmental challenges that informed Alberta's oil sands land reclamation regime, which will assist in the analysis of Alberta's regime and in recommending reform.

Perry, Chrysten & Craig Saloff. "Oil Sands Mining Reclamation in Alberta: A Discussion of the Prior Regime and the New Mine Financial Security Program" (2011-2012) 49 Alta L Rev 277

Chrysten Perry is a partner at Macleod Dixon LLP in Alberta and Craig Saloff is a general counsel with Total E& P, Canada Ltd. This article describes the nature of oil sands mining and analyses the need for a reclamation regime. It focuses on the problems of the Alberta's previous land reclamation regime and the reasons for the establishment of the current regime. It also analyses the extent to which the current regime has solved the problem for which it was established. The relevance of this article to my research is the historical perspective it offers and the requisite knowledge it provides in understanding some of the reasons behind the Albertan reclamation legal regime. It will aid in highlighting the problems with Nigeria's reclamation regime and in making suggestions for reform, using Alberta's regime.

Sheldon, Christopher G, John E Strongman & Monika Weber-Fahr. "Global Mining: It's Not Over When It's Over: Mine Closure around the World" (2002) online: The World Bank <<http://siteresources.worldbank.org/INTOGMC/Resources/notoverwhenover.pdf>>

The authors are specialists in the World Bank Group's Mining Department. This article explains the elements of good mine closure planning and what a legal framework for mine closure should entail. It further provides for the roles and responsibilities of the various stakeholders involved and who should bear the cost of mine closure. The target audience include mining companies, government officials and scholars.

SECONDARY MATERIALS: REPORTS

Cowan, WR, WO Mackasey & John GA Robertson. *The Policy Framework in Canada for Mine Closure and Management of Long-Term Liabilities: A Guidance Document* (2010), online: National Orphaned/Abandoned Mines Initiative <<http://www.abandoned-mines.org/pdfs/PolicyFrameworkCanforMinClosureandMgmtLiabilities.pdf>>.

This report examines the main components of mine closure and land reclamation management in Canada. It provides information that focuses on preventing the abandonment of mined lands in Canada. It provides background information on the issues associated with mine closure and already abandoned mines. It also examines monitoring liabilities that may be required after land reclamation. The report also describes the legal requirements and elements which must be embedded within a legislative framework that seeks to minimize and avoid the abandonment of mined lands. This report is targeted towards all stakeholders involved in mining activities and scholars interested in mine closure and land reclamation.

Law 703
Annotated Bibliography

**Common Law Interests In Land:
The Relative Certainty and Security of Aboriginal Rights & Title**

Esteban Kähs
LL.M Candidate, University of Calgary
December 18, 2013

INTRODUCTION

This thesis will attempt to ascertain the relative certainty and security of Aboriginal rights in land. Specifically, it will consider the procedural and substantive protections offered to Aboriginal rights and title under the duty to consult and accommodate doctrine, and compare these with the same offered to fee simple and leasehold *profit-à-prendre* under expropriation statutes. Additionally, it will assess the basis for, and potential implications of, any disparity between the qualities of protection offered by these two regimes. Finally, in light of the preceding analysis, it will consider the existence and effectiveness of “functional equivalents”, and propose ways in which Aboriginal rights in land could be made more certain and secure.

This thesis is intended to examine and assess the duty to consult and accommodate doctrine. By intensively evaluating its adequacy to provide certainty and security, and providing a normative assessment for further development, it will also be reform-oriented.

The following annotated bibliography forms part of the research toward this LL.M. thesis.

A. SECONDARY MATERIAL: MONOGRAPHS

Borrows, John J. & Leonard I. Rotman. *Aboriginal Legal Issues: Cases, Materials & Commentary*, 4th. ed. (Markham, Ont.: LexisNexis Canada Inc, 2012).

Professor Borrows and Professor Rotman are both well-regarded scholars in the area of indigenous law. This comprehensive casebook is intended as a general reference for students, lawyers, First Nations leaders and policy-makers. It is helpful to my research as it surveys much of the salient case law concerning Aboriginal rights and title, offers historical and social context, and provides insights into how the law may develop in this area.

G. Newman, Dwight. *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009).

Professor Newman researches in the field of indigenous rights in constitutional and international law. This book sets out four theoretical approaches to the duty to consult, which Professor Newman suggests will allow for a deeper understanding of the doctrine and an estimation of likely future directions: maintaining the Crown's honour; promoting negotiated settlements of Aboriginal claims; promoting reconciliation; and supporting ongoing, dynamic

relationships in a "generative constitutional order." Especially relevant to my research is Chapter 3, which discusses the duty to accommodate, economic accommodation, legally acceptable consultation and good consultation. While Professor Newman notes that much of the language on accommodation remains "quite open textured", he argues it is still possible to comment on differing possibilities for economic accommodation in different places, but especially British Columbia where the lack of historical treaties means that much of the province is subject to Aboriginal title claims.

Flanagan, Tom. *et al. Beyond the Indian Act: Restoring Aboriginal Property Rights*, 2nd. ed. (Montreal & Kingston: McGill-Queen's University Press, 2011)

The book's contributors, who include Tom Flanagan, Christopher Alcantara, Andre le Dressay and C.T. (Manny) Jules, have backgrounds in political science, economics, or First Nations governance. The book assists my research as it investigates the current forms of property rights on reservations, and exposes the limitations of each system. It argues that current court decisions and legislation have contributed to the insecurity of First Nations' property rights, and economic losses for their communities.

Imai, Shin. *Aboriginal Law handbook*, 3d. ed. (Toronto: Thomson Canada Ltd., 2008).

Professor Imai instructs and researches in the area of indigenous rights in Canada and Latin America. This book is intended as a practical guide to the law affecting Aboriginal peoples and organizations. I will reference it for its summary of the current state of the law and policy about Aboriginal self-government and sovereignty under Canadian and international law.

McHugh, P.G. *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (New York: Oxford University Press, 2011)

Professor McHugh is a New Zealand scholar, who is extensively published in the field of common law Aboriginal rights, and constitutional (imperial and colonial) history and historiography. This book looks critically at the early conceptualization of the doctrine of Aboriginal title and its doctrinal elaboration in Canada and Australia. I will refer to this work for its consideration of Aboriginal title in Canada, but also its survey of other common law jurisdictions, including in Australia, Kenya, New Zealand and Tanzania.

Mainville, Robert. *An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach* (Saskatoon: Purich Publishing, 2001).

The author, now Judge of the Federal Court of Appeal, lectured on aboriginal law at McGill University when this book was written. The book analyzes three main legal foundations for compensation: fiduciary law, expropriation law and American jurisprudence. The author concludes that the latter two may be inadequate or too foreign to properly address the special issues that arise in the Canadian-Aboriginal context, and that fiduciary law is likely the best means to determine compensation. While some of this analysis could be considered outdated, it nonetheless provides a solid foundation for further consideration, especially in light of more recent developments concerning Aboriginal title and the duty to consult. Others, most notably Kent McNeil, have also compared principles of Aboriginal law to those of expropriation law in

this particular context.

UNANNOTATED: MONOGRAPHS

Lambrecht, Kirk N., *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013)

Usher, Peter J. & Nigel Bankes, *Property, The Basis of Inuit Hunting Rights: A New Approach* (Ottawa: Inuit Committee on National Issues, 1986)

B. SECONDARY MATERIAL: ARTICLES

Christie, Gordon. "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39 U.B.C.L. Rev. 139.

Dr. Christie researches in the areas of Aboriginal legal issues, legal theory, and tort. In this paper, Dr. Christie outlines the historical development of the duty to consult doctrine, and attempts from this to predict future developments as well as their on the ground implications for Aboriginal rights and title. The article is insightful for its doctrinal and critical analysis of the "four epochs" of the doctrine's development. Dr. Christie, whose ancestry is Inupiat/Inuvialuit, is extremely critical of the doctrine's current iteration under *Haida*, which he feels is "doubly assimilative" by drawing arbitrary distinctions between "settled" and "unsettled" claims.

Gogal, Sandra *et al.*, "Aboriginal Impact and Benefit Agreements: Practical Considerations" (2005) 43 Alta. L. Rev. 129.

The authors of this article are all lawyers with expertise in energy and/or Aboriginal law. The article's purpose is "to put into context why developers negotiate IBAs, to identify what needs to be considered during project planning and Impact Benefit Agreements (IBAs) negotiations, and to discuss some of the key and often contentious provisions contained in IBAs." Although intended for a corporate audience, this article is helpful to my research as it provides a glimpse of how proponents attempt to structure commercial relationships with Aboriginal communities with the goals (sometimes competing) of reducing legal risk and minimizing financial costs. I will consider this article when assessing the effectiveness of "functional equivalents".

Holub, David. *et al.* "The New Dawn - Commercial and Regulatory Considerations Affecting Liquefied Natural Gas Export from British Columbia" (2012) 50:2 Alta L Rev. 301.

This article, written and researched by lawyers at Apache Canada Ltd. and Osler, Hoskin & Harcourt LLP, explores a sampling of commercial and regulatory issues encountered in the development of the Kitimat Liquefied Natural Gas (LNG) project. It is clearly intended for a commercial audience. The article is helpful as it describes the several regulatory and environmental agencies involved in the approval process of large scale energy projects in British Columbia, and, where applicable, their associated Aboriginal consultation guidelines. Also relevant for my research, is its discussion of the various types of commercial agreements available, which according to the authors may help proponents mitigate "Aboriginal risk". This too is relevant to the consideration of "functional equivalents".

Morellato, Maria. "The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights, Research Paper for the National Centre for First Nations Governance" (February 2008) online: First Nations Governance
<http://fngovernance.org/resources_docs/Crown_Duty_to_Consult__Accommodate.pdf>.

Ms. Morellato is a lawyer, specializing in the area of Aboriginal rights and title, and First Nations self governance. This paper was prepared for the National Centre for First Nations Governance in February 2008. Morellato provides "on the ground" observations of current Crown consultation processes, and outlines a pragmatic approach to incorporating court-enunciated principles into possible remedies toward greater self-governance and improved reconciliation. After examining major Aboriginal and treaty cases and highlighting their key principles (i.e. *bona fide* government to government consultation and accommodation), Morellato argues that the Crown's practice of unilateral decision-making, where such decisions have the potential to impact Aboriginal rights, is no longer legal. Morellato argues that to address the current imbalance between the lands and resources allocated to First Nations and those allocated to third party interests, full and honourable accommodation will likely entail the re-allocation of Crown-held land and resources through joint decision-making and negotiated agreements or, alternatively – where agreement cannot be reached – through specialized dispute resolution mechanisms.

Treacy, Heather L. *et al.* "The Current State of the Law in Canada on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development" (2007) 44 Alta. L. Rev. 571.

This article was written by lawyers from the Calgary-based firm, Davis LLP. With the "prudent proponent" in mind, the article provides a good overview of the court's pronouncements – from *Sparrow* to post-*Haida* – on the duty to consult and accommodate, looking at both leading and lower court decisions. It also provides a good description of the federal and provincial (Alberta and British Columbia) policy in place that purports to mandate a framework for the administration of Crown consultation and accommodation. According to the authors, while certain aspects of the duty remain unclear, some trends may be observed from the recent cases, including most conspicuously the repeated focus of reconciliation of Aboriginal interests with those of the broader society. While emphasizing that the obligation to consult and accommodate is the Crown's alone, the authors also foresee a growing and substantial role for project proponents in this regard.

McNeil, Kent. "Aboriginal Title as Constitutionally Protected Property Right" in Owen Lippert eds., *Beyond the Nass Valley: Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: The Fraser Institute, 2000) 55.

Professor McNeil is the author of numerous publications on the rights of indigenous peoples in Canada, Australia, and the United States. This article was presented as part of a conference, hosted by the Fraser Institute, on the national significance of the *Delgamuukw* case. The article discusses the status of Aboriginal title following *Delgamuukw*, but also in light of the central position, and significant protection, traditionally given real property under the common law. McNeil points out that despite the constitutional entrenchment of Aboriginal title, it may still be

infringed so long as the infringement is of sufficient importance to the general public, and the Crown's fiduciary obligations are respected. Given that this caveat appears to go beyond that envisaged by expropriation statutes, McNeil concludes that one should be skeptical of the value of constitutional protection. This article is highly relevant to my research for its comparison of the procedural safeguards granted to individuals under expropriation legislation to those granted under Aboriginal title. I will extrapolate this comparison to my analysis of the procedural safeguards provided by the duty to consult and accommodate doctrine.

McNeil, Kent. "Aboriginal Rights, Resource Development, and the Source of the Provincial Duty to Consult in *Haida Nation* and *Taku River*" (2005) 29 S.C.L.R. (2d) 447.

In this article, Professor McNeil criticizes the underlying assumption in *Haida* and *Taku River* that British Columbia has authority to infringe Aboriginal title in appropriate circumstances for the purposes of forestry and mining. Pointing to early Aboriginal case law, including *St. Catherine's Milling* and *R v. Dick*, Professor McNeil makes a strong argument for the proposition that irrespective of satisfying any duty of consultation owed in the asserted rights stage, provinces have neither a proprietary right nor the jurisdictional authority to infringe Aboriginal rights. Moreover, given their lack of jurisdictional authority, McNeil asserts that without sufficient accommodation provinces could incur significant liability in damages when Aboriginal rights are later proven. I will rely on this article for McNeil's expository of sections 91(24), 92(13), and 109 of the Constitution Act, 1867; and the jurisdictional foundations upon which Aboriginal rights may or may not be infringed.

Sossin, Lorne. "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23 Can J Admin L & Prac 93.

This paper was originally prepared for Osgoode Hall Law School 5th Annual National Forum on Administrative Law & Practice (October 16, 2009). Lorne Sossin is both Dean and Professor at Osgoode Hall, and is extensively published in the areas of administrative and constitutional law, the regulation of professions, civil litigation, public policy and the judicial process. This paper explores the development and application of the "duty to consult and accommodate" from an administrative law perspective, and considers to what extent the duty relies on administrative law concepts such as the duty of fairness and the standard of review of reasonableness and whether this is appropriate. By examining the difference between the duty of fairness and the duty to consult and accommodate, Sossin generally agrees with other commentators, such as Huyer, Pape and Potes, that an "accommodation" approach relying too heavily on just procedure would be inappropriate ("a recipe for confusion, incoherence and cynicism as time goes by"). However, pointing to both leading and lower court decisions, which have required more substance of the duty to consult and accommodate, Sossin concludes that is likely too early to reach definitive conclusions regarding its success or failure as a tool for reconciliation. This paper is helpful for its overview of case law, which outlines the principle differences between the administrative law duty of fairness and the duty to consult and accommodate.

Lippert, Owen. "Costs and Coase" in Owen Lippert eds., *Beyond the Nass Valley: Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: The Fraser Institute, 2000) 397

As McNeil's above, this article was presented as part the Fraser Institute' national conference on

the national significance of the *Delgamuukw* case. Owen Lippert writes and researches on intellectual property, aboriginal, legal and trade issues. In this article, Lippert examines the economic implications of the *Delgamuukw* decision's conceptualization of Aboriginal title, namely the direct and indirect costs associated with resulting negotiation and litigation. Employing Coase's economic theory, Lippert concludes that the *Delgamuukw* decision has “in essence unbundled and reassigned the provincial government’s rights to Crown land”, thus increasing transaction costs. He posits that negotiation (preferable to litigation) could reduce such costs, but only if a workable set of Aboriginal property rights – formal or informal – are first defined. While this article considers *Delgamuukw* and its implications for economic efficiency, it foreshadows comments made by others, across the political spectrum (see Christie, Potes), that Aboriginal rights require clearer elucidation. I will incorporate Lippert’s method into my research, but in view of more recent decisions and with a more comparative analysis.

Potes, Verónica. “The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?” (2006) 17 J. Env'tl. L. & Prac. 27.

Potes was a graduate student at the Faculty of Law at the University of Calgary when she wrote this article. The paper outlines the duty to accommodate doctrine, arguing the case law elucidating the duty's content is vague and sometimes even contradictory. Potes further states there are two main approaches to the duty to accommodate: the "procedural approach" and the "purposive approach". Reviewing critiques against the notion of accommodation raised in human rights law, she argues that the procedural approach, by emphasizing process over outcome, risks turning accommodation into an assimilationist tool. She concludes that under a purposive approach the duty to accommodate has the potential to become a means of reconciliation between the Crown and Aboriginal Peoples, but only if the standard of accommodation is set sufficiently high to protect rights.

UNANNOTATED: ARTICLES

Akee, Randall. “Checkerboards and Coase: the effect of property institutions on efficiency in housing markets” (2009) 52:2 JL & Econ 395.

Passelac Ross, Monique. *et al.*, “*Crown Consultation with Aboriginal Peoples in Oil Sands Development: Is it Adequate, Is it Legal?*”, Occasional Paper #19 (Calgary: Canadian Institute of Resources Law, 2007).

UNIVERSITY OF CALGARY

FACULTY OF LAW

LAW 703: LEGAL RESEARCH AND METHODOLOGY

FALL 2013

Annotated Bibliography

RECOGNIZING TITLE RIGHTS OF OUR FOREST DWELLING

TRIBES: IS INDIA TRULY INTERNATIONAL?

BY

GARIMA

28 DECEMBER 2013

ANNOTATED BIBLIOGRAPHY
(In Progress)

This is an annotated bibliography for my research project as an LL.M. (thesis) candidate at the Faculty of Law, University of Calgary. It is a work in progress and should not be taken as exhaustive of the relevant literature.

The question sought to be answered in my research project is whether laws governing title rights of tribal population in India over forestland are in conformity with the standards set by international human rights instruments concerning the rights of people in general and tribals and minorities in particular?

This annotated bibliography is divided into five sections: (a) international conventions; (b) legislation; (c) monographs; (d) articles; and (e) websites. Only twelve entries are annotated for the purpose of Law 703 assignment.

PRIMARY MATERIAL: INTERNATIONAL CONVENTIONS

Indigenous and Tribal Populations Convention, 26 June 1957 (entered into force 2 June 1959, ratified by India 29 September 1958), online: International Labour Organization <www.ilo.org>.

Indigenous and Tribal Peoples Convention, 27 June 1989, 1650 U.N.T.S. 383 (entered into force 5 September 1991, not ratified by India), online: International Labour Organization <www.ilo.org>.

International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 UNTS 211 (entered into force 21 December 1965, Ratified by India 3 December 1968), online: United Nations Treaty Collection <<http://untreaty.un.org>>.

International Convention on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, Accession by India 10 April 1979), online: United Nations Treaty Collection <<http://untreaty.un.org>>.

PRIMARY MATERIAL: LEGISLATION

Constitution of India 1950, Act 2 of 1950.

Panchayat (Extension to the Scheduled Areas) Act 1996, Act 40 of 1996.

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, Act No. 2 of 2007.

SECONDARY MATERIAL: MONOGRAPHS

Gadgil, Madhav & Ramachandra Guha. *This Fissured Land: An ecological History of India* (California: University of California Press, 1993).

Both the authors are renowned writers in the field of environment. The book is divided into three parts on the basis of four themes: prudence, profligacy, resource use strategies and the resultant conflicts. The British Raj brought about a change in the management and ownership of Indian forests which is discussed in part three of this book. It is this part, and chapters 5 and 7 in particular that are of relevance to me. Even though I am yet to carefully examine the book, I believe that these chapters will assist me in understanding the tribal claims on the forests in some detail.

MacKay, Fergus. *A Guide to Indigenous Peoples' Rights in the International Labour Organization* (2003), online: Forest Peoples Programme <<http://www.forestpeoples.org/sites/fpp/files/publication/2010/09/iloguideiprightsjul02eng.pdf>>.

At the time of writing this guide, the author was the Coordinator of the Legal/Human Rights Programme under the Forests People Programme. Forest Peoples Programme (FPP) was founded in 1990 in response to the forest crisis, specifically to support indigenous forest peoples' struggles to defend their lands and livelihoods. It registered as a non-governmental human rights Dutch Stichting in 1997, and then later, in 2000, as a UK charity. The guide contains a summary review of the specific rights that have been recognized and protected under the ILO Convention 107 and 169. The piece primarily deals with the procedure, particularly under ILO Convention 169, by which an individual can file a case directly before the Governing Body under the Conventions alleging violation of the rights protected under the Conventions. The Report also contains several examples of such cases and the decision on each one. This guide will be useful to my research as it gives a general understanding of the ILO Conventions and their working.

Morse, Bradford & Thomas R. Berger, *Sardar Sarovar: The Report of The Independent Review* (Ottawa: Resource Futures International, [nd]).

This book is the final report of an independent Review Panel. The World Bank appointed Bradford Morse as the Chairman of the Review Panel in 1991. Formerly, he has served as the Under-Secretary-General of the UN and headed the UNDP for 10 years. The latter author had formerly conducted the Mackenzie Valley Pipeline Inquiry and was appointed as the Deputy Chairman. Sardar Sarovar Project was partially completed in 2009. This project is one of the most ambitious dam projects by the Indian Government and has been fret with controversies. The project has resulted in the displacement of the Indian tribals among others. The provision of ILO 107 that resettlers should be at least as well off after displacement as before lie at the heart of this controversy. Chapters 3 and 5 of this Report deal with the tribal people affected by this project and their resettlement issues including land claims and hence are relevant to my research. Chapter 5 provides an overview of tribal inhabitants of the Narmada valley.

Thornberry, Patrick. *Indigenous peoples and human rights* (Manchester: Manchester University Press, 2010).

The author of this book was a Professor (currently Emeritus Professor) of International Law in the School of Politics, International Relations and the Environment, University of Keele, and a member of the UN Committee on the Elimination of Racial Discrimination at the time of authorship. It is one of the leading works on the issue of human rights of indigenous peoples in international law. The book deals with the concept of indigenous. The book is restricted in scope to dealing with human rights instruments and procedure pertaining to the indigenous peoples in international law. A detailed analysis of both the ILO conventions as well as Article 27 of the ICCPR has been attempted by the author. It is relevant for my research as it explains three of the international instruments I would also be dealing with in an attempt to answer my research question. Part 1 of the book also makes an in-depth analysis of the definition of indigenous in particular and also touches upon tribals and minorities. This will enable me to justify my choice of sources based on the criteria of the definition of tribals assumed by me.

SECONDARY MATERIAL: ARTICLES

Bankes, Nigel. "International Human Rights Law and Natural Resources Projects Within the Traditional Territories of Indigenous Peoples" (2010) 47:2 *Alta L Rev* 457.

This Article in the *Alberta Law Review* explores the relevance of international human rights law in those cases where natural resources are developed within the traditional territories of the indigenous peoples. The author has argued that international law has set standards that restrict the right of the State to allow such development. This article is highly relevant to my research since it employs international law as a standard setting tool, which is the essence of my methodology.

Barsh, Russel Lawrence. "An Advocate's Guide to the Convention on Indigenous and Tribal Peoples" (1990) 15 *Okla City UL Rev* 209 (HeinOnline).

Professor Barsh is currently the Director of the Samish Indian Nation's research program in human ecology, archaeology and marine biology in the San Juan Islands of Washington State. In the past 25 years, Prof. Barsh has been involved with various projects concerning indigenous peoples and tribes in Canada and abroad. In this article, the author discusses ILO Convention 169 in considerable detail. In part IV of the article, the author discusses specific rights of self-definition, participation, self-government, territorial rights, cultural rights, implied and reserved rights. The discussion of territorial rights in this article is of particular importance to me. This section of the article deals with the drafting problems encountered in redefining land rights in the revised ILO Convention 169. An understanding of how the relevant provisions came to be in the new Convention is necessary for me to understand the exact scope of the land rights under the Conventions.

Bijoy, C.R. "Adivasis Betrayed: Adivasi Land Rights in Kerala" (1999) 34:22 *Economic and Political Weekly* 1329 (Google Scholar), online: jstor <<http://www.jstor.org/stable/4408014>>.

The author is an independent researcher and activist in India who is primarily involved with tribal peoples' struggles, such as the Campaign for Survival and Dignity that emerged to counter the repression of forests and forest peoples in India in 2002. The author critically discusses The Kerala Restriction on Transfer by and Restoration of Lands to Scheduled Tribes Bill, 1999. Even though the article mainly concerns the tribals of one particular province of India, it gives valuable insight into the historical aspects of tribal life in India and the constitutional obligations of the State to secure land rights to the tribes. This will be helpful for of my project.

Graver, Hans Petter & Geir Ulfstein. "The Sami People's Right to Land in Norway" (2004) 11 *International Journal on Minority and Group Rights* 337 (HeinOnline).

This Article is a translation of the opinion provided by the two authors. At the time of writing this extremely interesting opinion, Graver was serving as a Professor, Department of Private Law and Ulfstein as a Professor and Director, Norwegian Centre for Human Rights at the University of Oslo. This opinion was a result of a reference made by the Norwegian Ministry of Justice. To put it broadly, the authors were asked to evaluate the proposed Finnmark Bill in relation to international law. The main question addressed in this Article is whether the Bill is sufficient to grant the Sami people rights to land and natural resources? The article analyses the ILO Conventions and the relationship between Article 1 and 27 of ICCPR. ICERD is also briefly considered. This Article is the most relevant to my research since it considers the international obligations of Norway in granting land rights to the Sami people. The international human rights law dealt with in this article is primary to my research.

Guha, Ramachandra. "Forestry in British and Post-British India: A Historical Analysis" (29 October 1983) 18:44 *Economic and Political Weekly* 1882 (Google Scholar), online: jstor <<http://www.jstor.org/stable/4372653>>.

The author is an Indian historian and writer with varied research interests including environment and social history. He has written for several papers and magazines and has held visiting position at several Universities world-over including the London School of Economics and Political Science. This article is written in two parts and the author has traced India's forest policy in the pre-and post-colonial era. Even though the article may not be of direct use to my paper, but an understanding of the genesis of the Indian Forest laws and policies is essential in understanding the provisions of the contemporary forest legislations in India.

Swepston, Lee. "A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989" (1990) 15:3 Okla City UL Rev 677 (HeinOnline).

The author has served with ILO for 35 years before retiring in 2007. He has created and is responsible for teaching a Masters Degree in International Human Rights and International Labour Law at University of Lund, Sweden. In this Article the author has discussed the creation of ILO Convention 169 and the detailed reasons behind the revision of the landmark Convention 107. The Article discusses the land rights of the indigenous and tribal populations in considerable detail. The author has discussed the land right provisions contained in the two ILO Convention in detail in this Article. Thorough understanding of land right provisions in two conventions is essential to my research.

Swepston, Lee & Roger Plant. "International standards and the protection of the land rights of indigenous and tribal populations" (1985) 124:1 International Labour Review 91 (HeinOnline).

Swepston has served with ILO for 35 years before retiring in 2007 He has created and is responsible for teaching a Masters Degree in International Human Rights and International Labour Law at University of Lund, Sweden while Plant is an independent researcher on rural development and human rights. In this article the authors have discussed ILO 107 and Recommendation no. 104 of 1957 from the perspective of land questions. This article has examined the difficulties faced by ILO in setting standards for the tribals and indigenous peoples in matters of land rights. This article is highly relevant to my research since it discusses the various provisions of ILO 107 and the Recommendation as international standards and the different questions associated with them.

Thornberry, Patrick, "Self-Determination, Minorities, Human Rights: A Review of International Instruments" (1989) 38 ICLQ 868 (HeinOnline).

In this article the author has attempted to present a picture of the rights of minorities under the international instruments. However, the article is not exhaustive on this point. In this article, the relationship between minorities and the concept of self-determination has been discussed at length. Certain pertinent questions are raised at page 868. This relationship is explored by reference to the UN Charter, the Belgium claim with regard to Chapter XI of the Charter, General Assembly Resolution 2625(XXV) and Articles 1 and 27 of the International Covenant on Civil and Political Rights. References are also made to the Genocide Convention and ILO Convention 107, The African Charter on Human and Peoples Rights 1981 and the Helsinki Declaration. Even though I will not

be dealing with most of these instruments in my project, this Article offers valuable insight into the rights of minorities to self-determination under the international instruments. The part of the article dealing with Articles 1 and 27 of the ICCPR is of direct importance to my project.

SECONDARY MATERIAL: WEBSITES

ST Statistics –At a Glance, *Tribal Profile at a Glance, May 2013*, online: Ministry of Tribal Affairs
<<http://tribal.nic.in/WriteReadData/CMS/Documents/201306061001146927823STProfileataGlance.pdf>>.

Forests and Tribals: a symposium on the proposed bill recognising tribals rights on forest lands, *The Right to Live with Dignity*, online: Seminar <<http://www.india-seminar.com/2005/552/552%20pradip%20prabhu.htm>>.

COMMODITY OR CURRENCY: A THEORETICAL ANALYSIS OF THE INTERNATIONAL LEGAL CHARACTER OF CARBON CREDITS

ANNOTATED BIBLIOGRAPHY

Josephine Victoria Yam
Master of Laws (LLM) Candidate, Faculty of Law
University of Calgary
December 2013

This annotated bibliography is submitted in partial fulfillment of the requirements of the Legal Research and Methodology Course (Law 703), which is a required course in the Thesis-based Master of Laws (LLM) Program in Natural Resources, Energy & Environment Law at the Faculty of Law, University of Calgary. As a work in progress, this submission does not represent an exhaustive bibliography of relevant academic literature on the research topic of my thesis. Fifteen secondary sources are annotated for purposes of this submission.

The research question of my thesis is: Should the international legal character of a carbon credit be a commodity or a currency in order to facilitate linking of emissions trading schemes? Addressing this question is crucial so that emissions trading schemes can link with one another to collectively mitigate climate change on an international scale. In evaluating the legal character of a carbon credit, I will be using three standard criteria from the environmental economics field to assess its legal character under both commodity trading and currency trading schemes. These criteria are environmental integrity, cost effectiveness and political feasibility.

Secondary Sources

Aldy, Joseph E, Scott Barrett, & Robert N Stavins, "Thirteen Plus One: A Comparison of Global Climate Policy Architectures" (2003) 3:4 *Climate Policy* 373.

The authors' thesis is that the Kyoto Protocol and the thirteen alternative policy architectures to the Kyoto Protocol for addressing climate change that the authors evaluated did not fare well against six criteria used for assessing global climate policy regimes. The six criteria were environmental outcome, dynamic efficiency, dynamic cost-effectiveness, distributional equity, flexibility in the presence of new information, and participation and compliance. None of the policy architectures met all the evaluative criteria because of the conflicting values and tensions that are intrinsic in some criteria. Their assessments have revealed the complex challenge of developing and implementing a global climate policy regime that is efficient, fair and inclusive. Joseph Aldy is an Assistant Professor of Public Policy at the John F. Kennedy School of Government at Harvard University. Scott Barrett is a leading adviser on transnational and global challenges to the United Nations and was previously a lead author of the Intergovernmental Panel on Climate Change. Robert N. Stavins is the Director of the Harvard Environmental Economics Program at the John F. Kennedy School of Government at Harvard University. Their expertise is clearly manifested in their insightful analyses of the various global climate policy regimes using the six

evaluative criteria. The article addresses a specialized audience comprised of international environmental lawyers, public policy and regulatory experts in the field of climate governance and legal scholars of environmental economics. The strength of the article is that it provides a comprehensive discussion of the key performance criteria they used and how these criteria interact with each other in dynamic and sometimes conflicting ways. The weakness of the article is that because it was written in 2003 before the Kyoto Protocol came into force in 2005, it was mostly theoretical and predictive in its analysis. It would be interesting to learn how the authors would evaluate the Kyoto Protocol's first commitment period of 2008-2012 using their six evaluative criteria given that they now have the benefit of hindsight. Nevertheless, I find this article to be very useful for my thesis because it provides a robust and in-depth discussion of key performance criteria, some of which I can use for my assessment on the legal character of a carbon credit.

Bank of England, "Emission Allowances: Creating Legal Certainty - Legal Assessment of Lacunae in the Legal Framework of the European Emissions Trading Scheme and the Case for Legislative Reform". Comments, (2009) Financial Markets Law Committee Issue 116.

The Bank of England's Financial Markets Law Committee (FMLC) asserts that legal uncertainties regarding the nature of carbon allowances need to be resolved. This is because parties that engage in carbon trading in the European Union Emissions Trading Scheme (EU ETS) need the legal certainty to confidently know what it is they are exactly trading in order to spur carbon market growth. The legal nature of an emission allowance is relevant in determining which law governs the creation, transfer and cancellation of such allowance, and whether and how security rights can be created over it. Nothing in the EU ETS regulatory scheme defines the legal nature of carbon allowances, though they embody the traits of both an administrative license and private property. While different EU member states have determined what the legal nature of carbon allowances is in their own jurisdictions, the EU Commission must resolve this matter to provide legal coherence at the European level. The FMLC set out three options for achieving legal coherence and harmonization on the nature of carbon allowances. They are harmonization of member states' conflict of law rules, partial harmonization of substantive law, and complete harmonization of substantive law or the adoption of a EU Community Code. The FMLC, which authored the report, has a mandate to identify legal issues that might give rise to material risks in the wholesale financial markets framework and to consider how such issues should be resolved. The report is written with a credible, independent and balanced view on the various challenges that arise when the legal nature of carbon allowances is not resolved. The strength of the report is that because it is centrally relevant to my thesis, it will significantly inform my discourse on the legal character of carbon credits. The weakness of the report is that it provides detailed analysis on the EU's legislative and regulatory frameworks for wholesale financial markets, which is not be directly applicable to my thesis. Nevertheless, I find this report provides extremely relevant material to my thesis because it provides both the legal significance of my thesis problem as well as possible solutions for providing legal coherence of the universal legal character of carbon allowances at an international level.

Bogojevic, Sanja, *Emissions Trading Schemes Markets, States and Law* (United Kingdom: Hart Publishing, 2013).

The author challenges the common perception of emissions trading as a straightforward regulatory strategy that can automatically be implemented in any jurisdiction. Her challenge arises from her keen recognition that emissions trading is a complex regulatory policy tool subject to the legal characteristics of governance structures that are both contextual and culture-specific. In this regard, the author proposes a pluralistic legal framework for analyzing emissions trading by establishing the following three overarching models: First is the Economic Efficiency model in which emissions trading addresses the lack of externalities to protect the commons by turning externalities into tangible rights that are cost efficiently allocated through the market to the highest bidder. Second is the Private Property Rights model, in which the emissions trading diminishes government control of common resources by creating private property rights that are tradable in an emissions market. Third is the Command-and-Control model, in which emissions trading incorporates flexibility into direct regulation, resulting in more administratively effective regulation of the emissions market. The author is a Lecturer and Co-Director of the Master Programme in European Business Law at the Faculty of Law of the University of Lund in Sweden. Her specialized expertise in emissions trading is manifest in the way she has dexterously framed the three models of emissions trading by identifying the nuanced functions they serve in addressing environmental outcomes. The book addresses a specialized audience comprised of environmental legal scholars, international lawyers, and public policy and regulatory experts who are involved in the conceptualization, design and implementation of emissions trading schemes. The strengths of this book are that it unearths the legal complexities within emissions trading scholarship and provides the underlying reasons why the oversimplified concept of emissions trading exists. It also provides an innovative methodology for rethinking about how market-based instruments work to achieve positive environmental outcomes. The weakness of this book is that it has some very technical discussions on the European Union Emissions Trading Scheme that only those who are well versed in it will understand its complex design. Nevertheless, this book will be very useful for my thesis because it provides an in-depth understanding of how the varying perspectives of emissions trading can affect the legal character of a carbon credit that is traded. It is noted that this book has similar arguments to those in Dan Farber's blog entitled "The Rhetoric of Cap and Trade" that is annotated below.

Boyd, William & James Salzman, "The Curious Case of Greening in Carbon Markets" (2011) 41 *Environmental Law* 73.

Button, Jillian, "Carbon: Commodity or Currency? The Case for an International Carbon Market Based on the Currency Model" (2008) 32 *Harv Envtl L Rev* 571.

The author's thesis is that while there is no consensus on the legal character of a carbon credit, it should be treated like a currency. She argues that the currency-trading model will allow for more market participation and enhanced environmental integrity. She notes that the legal character of carbon has not been carefully determined in the past because there was no need to consider it when carbon markets were not yet thinking of linking with each other. At

the time this was written, the author was a Master of Laws student at Harvard Law School in Massachusetts, USA. Button ably provides very compelling policy and legal arguments on why carbon should be treated like a currency by showing the flaws of the commodity model in terms of environmental integrity. Her arguments are clearly presented in a very logical and persuasive manner. What is lacking in her article is a solid discussion of why it is important to have a universal legal character for carbon credits. She also did not define what she means by “environmental integrity”. She assumes that the reader already understands why this matter is important for climate change mitigation. She also assumes that the reader shares her specialized vocabulary, including “environmental integrity”. This source is quite advanced for a general audience as it assumes that the reader is steeped in carbon finance. Her article is geared towards a very specialized audience, particularly academics in the law, economics and public policy as well as public policy makers and legislators who have the authority to design carbon markets in their jurisdictions. Nevertheless, she provides very compelling and novel ideas on this currency model perspective and thus has been frequently cited by other experts in the field. In this regard, I will be using her persuasive arguments to inform the discussion in my thesis on the advantages of the currency model for carbon credits.

Chan, Michelle, “Smaller, Simpler and More Stable: Designing Carbon Markets for Environmental and Financial Integrity”, Report for Friends of the Earth, (2009) 1.

Daskalakis George, Gbenga Ibikunle & Ivan Diaz-Rainey, “The CO₂ Trading Market in Europe: A Financial Perspective” in Andre Dorsman et al, eds, *Financial Aspects in Energy: The European Perspective* (Berlin: Springer, 2011) 51.

The authors’ argument is that while carbon is being traded as a commodity in the European Union (EU)’s Emissions Trading Scheme, there were a lot of problems that the EU experienced during the period 2005 to 2007 from a financial markets perspective. These problems emanate from the fact that carbon as a commodity has very unique features in contrast to the other energy commodities like electricity. They do not discuss why carbon, despite its unique features, should be treated like a commodity. Rather they assume that it is a commodity because the markets are currently trading carbon in the commodity markets. At the time of this writing, the authors were students at the Norwich Business School, University of East Anglia in the United Kingdom. Thus, it is clear why their arguments address the issue of accurate carbon pricing using the commodity model. This article’s intended audience is principally EU policymakers, particularly in respect of how they can address some problems that happened during the relevant period. It also addresses the financial markets industry because it explains how commodity trading differs between carbon and other energy commodities. The article is useful for my thesis in that it confirms that trading carbon as a commodity is complex because it is a very unique commodity. Beyond that however, the article does not illuminate my topic because it does not provide the underlying policy rationale of precisely why carbon is being treated as a commodity.

Dyck, Tyson W, “Missing Linkages? Canada, Cap-and-Trade and the International Climate Architecture” (2009) 8:1 Canadian International Lawyer 1.

European Commission, News Release, “General Questions and Answers on Registries” (May 2013) online: European Commission Climate Action Policies <<http://ec.europa.eu>>.

Farber, Dan, “Carbon as Commodity and Currency” (12 May 2012), online: Legal Planet, The Environmental Law and Policy Blog <<http://legal-planet.org>>.

The author posits that a carbon credit functions both like a commodity and a currency. It functions like a commodity because parties buy and sell carbon permits in regular commodity exchanges. It functions like a currency because it serves as a medium of exchange for emission reductions between jurisdictions. Like money, it also becomes a way of storing value for future use if it is “banked” and “borrowed” from one compliance period to another. He notes that the dual function of carbon heralds the growth of a “new global economy of carbon, where carbon flows will cross the world... in a wide range of sectors”. The author is a law professor at the University of California Berkeley (UC Berkeley) School of Law. His legal expertise is manifest in the way he keenly identifies the complex characteristics of carbon that make it function both as a commodity and currency. The article addresses a specialized audience comprised of lawyers as well as public policy and regulatory experts in the field of emissions trading. The strength of the article is that it clearly identifies the complex nature of carbon, such that it cannot be categorized simply as a commodity or a currency precisely because it acts like both. The weakness of the article is that, because it is a blog, it only sets out a short discussion on how carbon functions like a commodity and a currency, without providing for their definitions and further analysis. Nevertheless, I find this article to be very useful for my thesis because it emphasizes that the legal character of a carbon credit should be determined in order to facilitate carbon trading on a global scale.

_____. “The Rhetoric of Cap and Trade” (14 November 2013), online: Legal Planet, The Environmental Law and Policy Blog <<http://legal-planet.org>>.

The author posits that four different frameworks for discussing cap-and-trade influence the ongoing debates on its merits and shortcomings. The first framework is the “Economic Frame”, which uses an economist’s view of cap-and-trade as a tool to solve an economic problem at the least cost possible. In this instance, the economic problem is that polluters impose the cost of carbon emissions on others because it is not internalized. The second framework is the “Free Market Frame”, which views cap-and-trade as an instrument that transforms pollution into a new form of property and then harnesses the free market forces to trade such property to improve the environment. The third framework is the “Regulatory Frame”, which views cap-and-trade as another tool of government regulators to achieve their environmental protection goals under the auspices of administrative law. The fourth framework is the “Tax Frame”, which views cap-and-trade as a tax that provides the government with an added revenue stream under the auspices of fiscal policy. The author is a law professor from the University of California Berkeley (UC Berkeley) School of Law. His legal expertise is clearly apparent in the way he clearly delineates the different cap-and-trade frameworks. The article addresses a specialized audience comprised of lawyers as well as public policy and regulatory experts in the field of emissions trading. The strength of the article is that it clearly identifies the different frameworks that underlie the varying debates

that people engage in regarding emissions trading. Thus, when one is confronted with another person's views for or against emissions trading, it will be very useful to link those views with the underlying framework that such person may be using in order to better understand his views. The weakness of the article is that, because it is a blog, it only sets out a short discussion on the four frameworks, without elaborating further on their implications and potential overlaps. Nevertheless, I find this article to be very useful for my thesis because it provides an insightful perspective on how the different frameworks of emissions trading can influence the legal character of a carbon credit. It is noted that this article complements the arguments made in Sanja Bogojevic's book entitled "Emissions Trading Schemes Markets, States and Law" that is annotated above.

Friends of the Earth, "New Market-Based Mechanisms to Enhance the Cost-Effectiveness of, and Promote, Mitigation Actions", Comment to the Ad Hoc Working Group on Long-term Cooperative Action under the United Nations Framework Convention on Climate Change, (2011) 1.

Gilligan, Jonathan M & Michael P Vandenberg, "Accounting for Political Feasibility in Climate Instrument Choice", Note, (2013) Vanderbilt Law and Economics Research Paper Number 13-4 1.

Goulder, Lawrence H & Ian WH Parry, "Instrument Choice in Environmental Policy", Discussion Paper for Resources for the Future, (2008) RFF No. 08-07 1.

Harrison, Rachel Feinberg, "Carbon Allowances: A New Way of Seeing an Invisible Asset" (2009) 62 SMUL Rev 1915.

Intergovernmental Panel on Climate Change, *Working Group I Contribution to the IPCC Fifth Assessment Report Climate Change 2013: The Physical Science Basis Summary for Policymakers*, IPCC, 12th Sess, IPCC WGI AR5, (2013).

Jaffe, J & Robert Stavins, "Linking Tradable Permit Systems for Greenhouse Gas Emissions: Opportunities, Implications, and Challenges" (Paper delivered for the International Emissions Trading Association at the United Nations Climate Change Conference, COP13/CMP3, Bali, Indonesia, November 2007).

Kosoy, Alexandre & Pierre Guigon, *State and Trends of the Carbon Market 2012* (Washington, DC: World Bank, 2012).

Kosoy, Alexandre et al, *Mapping Carbon Pricing Initiatives: Developments and Prospects* (Washington, DC: World Bank, 2013).

The authors present a comprehensive overview of all current and emerging carbon markets that have or are being established by national and sub-national jurisdictions. These carbon markets have incorporated price mechanisms that stabilize carbon prices in order to address the depressed prices of carbon credits that were caused by the global economic recession of 2008. Because carbon credits are still hovering at very low prices, private

industry players have no compelling incentive to invest in low-carbon technologies to reduce their emissions because it is cheaper for them to buy such credits in order to comply with their emission reduction obligations. The authors also discuss that linking carbon markets is an emerging trend in various jurisdictions, such as those taking place between the European Union and Switzerland and between California and Quebec. Because carbon markets are developing in a fragmented way, they need to forge linking arrangements in order to take advantage of larger economies of scale to make emissions trading more cost effective. The lead author of the report, Alexandre Kossoy, is a Senior Financial Specialist at the Carbon Finance Unit of the World Bank. The report addresses a broad audience comprised of those in the government, private sector, academia and non-governmental organizations that wish to have a high-level, accurate and unbiased overview of the various carbon market that are developing internationally. The strength of the report is that it gives a very comprehensive snapshot of the various carbon market initiatives that are taking place internationally. The weakness of the report is that lacks detailed analysis on the design features of each jurisdiction's carbon market and the particular challenges that each jurisdiction is facing in implementing its carbon market scheme. Despite the lack of detail that may be expected of an annual global report, it nevertheless provides a helpful starting point for one's understanding of carbon markets from a macro perspective.

Mace, M. J. et al, "Analysis of the Legal and Organisational Issues Arising in Linking the EU Emissions Trading Scheme to Other Existing and Emerging Emissions Trading Schemes", Report to European Commission, (2008) 1.

Meckling, Jonas, *Carbon Coalitions: Business, Climate Politics, and the Rise of Emissions Trading* (Massachusetts: The MIT Press, 2011).

In this book, the author provides sharp insights into the major role of business in the emergence of global environmental governance and more particularly, in the rise of carbon markets. He argues that the strong business support is imperative for the success of emissions trading schemes. While industry may generally support the concept of emissions trading, it will likely oppose governmental moves that intend to strongly regulate business through detailed designs of such trading schemes. Such designs generally include methods of allocating carbon credits, methods of accounting for carbon credits on the balance sheet and varying determinations of which industries will be covered with compliance obligations for emissions reduction. He notes the "paradox of pollution markets", which attempts to achieve the balance between the mobilization of market forces that engage in carbon trading and the blockade of such market forces from weakening effective government regulation. When this book was written, the author was a Research Fellow at the John F. Kennedy School of Government at Harvard University. He is currently Senior Adviser to the German Government on Energy and Climate Change. The article addresses a specialized audience comprised of business lawyers and professionals as well as public policy and regulatory experts in the field of climate change mitigation. The strength of the book lies in the keen recognition that the business sector's buy-in is extremely integral to the success of emissions trading. Particularly, governments must ensure that industry players accept the stringency of emissions trading policies so that they are politically feasible to implement. The author warns, however, that governments must not bend over backwards to accommodate industry

demands for free allocation of allowances and weak compliance regulations. If governments do otherwise, the environmental integrity of the emissions trading scheme will be severely compromised. The weakness of the book is that it did not provide case studies illustrating the actual political tensions arising from the “paradox of pollution markets”, particularly in respect of whether governments actually struggled to achieve this equilibrium of market forces interfacing with government regulations. Nevertheless, I find this article to be very useful for my thesis because it provides a framework for understanding the apparent conflicting tensions that exist among the evaluation criteria that I will be using to assess what the legal character of a carbon credit should be. For example, if a carbon credit should be treated as a commodity, it may rate well using the criteria of political feasibility because industry favours minimal regulatory enforcement that exists under the commodity trading scheme. However, this may lead to the commodity trading scheme rating poorly using the criteria of environmental integrity precisely because of the weak compliance mechanism that emanates from its being politically feasible.

Revesz, Richard L & Robert Stavins, “Environmental Law and Policy”, Working Paper, (2007) National Bureau of Economic Research 13575 Working Paper 1.

Salzman, James & JB Ruhl, “Currencies and the Commodification of Environmental Law” (2000) 53:3 Stan L Rev 607.

The authors challenge the assumption that environmental trading markets (ETMs) exchange commodities that are readily fungible. This assumption on fungibility means that goods that are exchanged are similar in identity and impact in such a way that apples are indeed being traded for apples. This assumption is important for ETMs because commodities must be similar in order to have comparable impacts to the goals of environmental protection and resource allocation efficiency. If commodities are not fungible, then their exchanges would so disparate that they would have incoherent and erratic impacts on such goals. The authors note that this assumption of fungibility can be readily challenged because commodities in ETMs are most often so different from one another in such a way that their exchanges are like trading apples for oranges. Thus, an analytical framework for assessing ETMs with non-fungible commodities is necessary so that ETMs can deliver on their goals of environmental protection and resource allocation efficiency. The authors present an analytical framework comprised of three standards of adequacy that ensure that ETMs achieve positive environmental outcomes of instrumental adequacy, procedural adequacy and substantive adequacy. The authors are renowned international experts in the field of environmental law. James Salzman is an environmental law professor at Duke University while J. B. Ruhl is an environmental law professor at the Vanderbilt University. Their specialized expertise in environmental law is clearly evident in the way they marshal their arguments on how ETMs can achieve environmental integrity despite the non-fungibility of their commodities. The article addresses a specialized audience comprised of lawyers, economists and public policy and regulatory experts in the field of market-based instruments to address environmental problems. The strength of the article is that delves into the underlying problems in ETMs of commodities that are very difficult to measure. The weakness of the article is that it has some very technical discussions that are more appropriate for those who are steeped in environmental economics and the workings of

ETMs. Nevertheless, I find this article to be very useful for my thesis because it provides insightful legal analysis of how the commodity-trading scheme of carbon credits can be properly analyzed. It will significantly inform my analysis of how the legal character of a carbon credits as a commodity can be evaluated using the environmental integrity criterion.

Sovacool, Benjamin K, “The Policy Challenges of Tradable Credits: A Critical Review of Eight Markets” (2011) 39 Energy Policy 575.

The author’s thesis is that tradable permit markets do not perform according to expectations of environmental economists because of the barriers such markets face that hinder them from functioning as robust markets. His article provides in-depth analysis of eight tradable permit markets and illustrates their complexities arising from information asymmetries, information lags, transaction costs and the inherent complexity of climate change. He notes that permit markets are prone to a plethora of challenges that include compromises in program design, transaction costs, price volatility, leakage and environmental degradation. He provides an in-depth discussion of the consequences of these challenges so that public policy experts can be cognizant of them and thus design more equitable carbon policies that effectively address climate change. The author is a Visiting Associate Professor at Vermont Law School and founding manager of its Energy Security and Justice Program at the Institute for Energy & the Environment. His deep expertise in the field of energy and environment policy illuminates his writing as he dexterously compares the various trading markets with ease. The article addresses a specialized audience comprised of lawyers, economists and public policy and regulatory experts in the field of climate change mitigation. The strengths of the article are that it provides a useful framework for critically reviewing emissions trading schemes by setting out the thematic challenges that may arise in designing emissions trading schemes. The weakness of the article is that it was heavily focused on the challenges and problems of the emissions trading systems. It did not provide a perspective on their benefits and achievements thus creating the perception that such systems have not achieved a modicum of environmental success. The author could have provided a more balanced perspective on the strengths and weaknesses of tradable permit markets. Nevertheless, I find this article to be very useful for my thesis because it has made me cognizant of possible design flaws in emissions trading markets. This awareness informs my analysis of whether the legal character of a carbon credit as a commodity or as a currency lends itself to either increasing or diminishing those design flaws accordingly.

Stavins, Robert N, “Policy Instruments for Climate Change: How Can National Governments Address a Global Problem” (1997) 1997 U Chi Legal F 293.

The author’s argument is that it is important to carefully examine environmental policy instruments to reduce greenhouse gas emissions from theoretical and practical perspectives. While theoretically, market-based policy instruments appear to be effective in addressing climate change, they need to also be assessed based from a practical perspective. This means that an assessment of the political feasibility of implementing such instrument must be also undertaken. At the time of this writing, the author was Associate Professor of Public Policy, John F. Kennedy School of Government at Harvard University in Massachusetts, USA. His

solid expertise in this field shines through his entire article as he undertakes a thorough and detailed analysis of the different regulatory and market-based policy instruments to address climate change from a national and international perspective. The strength of this article is his keen analysis in evaluating and comparing the different policy instruments available for climate change mitigation. So far, this article is one of the most comprehensive discussions I have read on the advantages and disadvantages of emissions trading. The article is intended for public policy makers, economist, lawyers and political scientists who are involved in designing institutional frameworks for climate change mitigation in various countries. This article will be very helpful for my thesis because the evaluation criteria that the author used in assessing the various policy instruments will inform the criteria I use in evaluating the proposed commodity and currency models that can be used for carbon credits.

Tietenberg, Tom, “Tradable Permits in Principle and Practice”, in Jody Freeman & Charles D Kolstad, eds, *Moving to Markets in Environmental Regulation: Lessons from Twenty Years of Experience* (New York: Oxford University Press, 2006) 64.

The author’s argument is that the performance of various environmental tradable permits systems can be evaluated against three criteria: implementation feasibility, environmental effectiveness, and economic effectiveness. The challenge in such evaluations is that the distinct characteristics of a particular permit system (i.e. air pollution regulation or wetlands preservation) affect the evaluation of its substantive performance accordingly. The author also provides keen insight into the methodological challenges of ex post evaluations. For example, he notes that not all evaluative studies provide for uniform definitions of “economic efficiency” or “environmental effectiveness”. Hence the evaluative criteria are not applied in a standard and predictable manner. At the time of this writing, the author was an economics professor of the Colby College’s Economics and Environmental Studies Departments. He is the author or editor of eleven books on environmental and natural resource economics including notable publications on emissions trading. His sophisticated expertise in environmental economics is evident in the way he explains the various ways in which the three evaluative criteria can be used. The article addresses a specialized audience comprised of lawyers, economists and public policy and regulatory experts in the field of environmental and natural resource economics. The strength of the article is that it provides a very comprehensive evaluation of the various dimensions of each evaluative criterion. This enables readers to understand how the nuanced definitions of the various criteria significantly influence the performance assessment of a particular environmental tradable permits system. The weakness of this article is that it assumes that one is very well versed in the economic theories underlying environmental regulatory schemes. Thus, unless one is so versed in such theories, one will be unable to fully grasp the sophisticated arguments he brings forward. Nevertheless, I find this article to be very useful for my thesis because it provides me with directly relevant conceptual definitions of the three criteria of implementation feasibility, environmental effectiveness, and economic effectiveness. These criteria are very similar to those that I will be using in my assessment of which legal character should be attributed to a carbon credit.

Victor, David F & Joshua C House, “A New Currency: Climate Change and Carbon Credits”, Harvard International Review (Summer 2004) 56.

The authors’ thesis is that carbon credits are emerging as a new currency for the world economy. It is different kind of currency because it is used to buy pollution permits as contrasted to the regular foreign currencies (i.e. dollar, euro and yen) that are used in exchange for goods and services. Creating a new currency for global trade will be difficult because a new monetary system based on carbon will need strong global institutions that will require coordination on an unprecedented scale. The European Union (EU)’s successful creation of the Euro monetary system was attributed to the sophisticated and strong institutions that supported it. The authors note that an economic zone like the EU can create a new currency only if it creates its own system for central banking, emissions exchange and accounting. Countries that have the greatest opportunity for low cost emission controls like developing countries and Russia have the weakest institutions and thus are most likely unable to monitor and enforce the emissions trading system. Thus their participation may degrade the confidence and value of the carbon currency if they are allowed to print currency, which will drive out bona fide emissions reductions with bogus credits. Except for the United States, the authors believe that many governments and companies around the world are serious about addressing climate change and are moving towards a bottom-up approach of linking carbon markets because they want to “kick the carbon habit”. This emerging market for carbon contrasts with the traditional thinking in environmental law regarding the need for international agreements that are implemented using a top-down approach. If the world is keen to combat climate change, the most effective action is to create strong national carbon currencies in key zones like the EU and then linking such zones to each other. At this time, the author, David Victor, was a law professor at Stanford University while his co-author, Joshua C. House, was a Research Fellow at the Stanford University. This article is very helpful because it provides a strong analogy of carbon as currency with the EU’s Euro currency and thus supports the currency model of carbon credits in my thesis. This article is quite advanced for a general audience as it assumes that the reader is steeped in carbon finance. It is geared towards a very specialized audience, particularly academics in the law, economics and public policy fields as well as public policy makers and legislators who have the authority to design carbon markets in their jurisdictions. Nevertheless, the authors provide very compelling and novel ideas on the carbon as currency model perspective and have been frequently cited by other carbon experts in the field. In this regard, I will be using their persuasive arguments to inform the discussion in my thesis on the advantages and challenges of the currency model for carbon credits.

Wemaere, Matthieu, Charlotte Streck & Thiago Chagas, “Legal Ownership and Nature of Kyoto Units and EU Allowances” in David Freestone & Charlotte Streck, eds, *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and beyond* (New York: Oxford University Press, 2009) 36.

The authors’ thesis is that because the Kyoto Protocol has created various flexible mechanisms for compliance that have generated different carbon units, it is important to examine the legal nature of such carbon units. Such examination may provide governments and private parties with legal security and certainty as to what this type of assets really are. It

may also provide more security and confidence to market participants as they exchange different carbon units in emissions trading that cross borders through linking. The authors are carbon finance experts who have written extensively in environmental and carbon finance. In their article, they exude a certain mastery of the subject matter as they clearly explain why the legal character of carbon credits is a very important matter to carefully examine. They note that this issue will become more significant when carbon markets start to link with each other. The article addresses a specialized audience comprised of lawyers, economists and public policy and regulatory experts in the field of climate change mitigation. The strength of this article is that it discusses the underlying rationale as to why the legal nature of carbon credits must be resolved for effective climate change mitigation. The weakness of this article is that it does not propose any recommendations as to how this important issue can be resolved. It merely hopes that there will be a gradual consensus among carbon markets internationally on this issue without saying more. Nevertheless, I find this article to be very useful for my thesis because it provides a legal analysis of how different countries are treating carbon in their respective jurisdictions as well as why those differing treatments have actually been problematic for carbon market harmonization.

**UNIVERSITY OF CALGARY
FACULTY OF LAW**

**LAW 703
LEGAL RESEARCH & METHODOLOGY**

ANNOTATED BIBLIOGRAPHY

**EXPLORING THE LEGAL CHARACTERIZATION OF THE
OIL AND GAS LEASE AS A *PROFIT A PRENDRE* IN THE CONTEXT
OF OIL AND GAS EXPLORATION IN THE PHILIPPINES**

BY

RABIEV TOBIAS M. RACHO

December 18, 2013

**EXPLORING THE LEGAL CHARACTERIZATION OF THE
OIL AND GAS LEASE AS A *PROFIT A PRENDRE* IN THE CONTEXT
OF OIL AND GAS EXPLORATION IN THE PHILIPPINES**

BY: RABIEV TOBIAS M. RACHO

**ANNOTATED BIBLIOGRAPHY
(IN-PROGRESS)**

This is an in-progress annotated bibliography of the secondary legal materials that I intend to use for my research paper. Upon a preliminary review of these materials, I find them germane to address my research question: Whether the common law concept of *profit a prendre* is relevant, necessary and feasible under the Philippine legal framework for oil and gas exploration?

The list should not be taken and understood as a complete and exhaustive reference guide for my research topic. Other references will be available after further research and verification.

LEGISLATION

Canada

Bankruptcy and Insolvency Act, RSC 1985 c- B-3 (CanLII).
Mines and Mineral Act, RSA 2000, c M-17 (CanLII).
Oil and Gas Conservation Act, RSA 200, c O-6 (CanLII).
Personal and Property Security Act, RSA 2000, c P-7 (CanLII).

Philippines

Oil Exploration and Development Act of 1972, Presidential Decree No. 87.

JURISPRUDENCE

Canada

Alberta Energy Co. v Goodwell Petroleum Corp. Ltd, 2003 ABCA 277 (CanLII).
Bank of Montreal v Dynex Petroleum Ltd, 2002 SCC 7, [2002] 1 SCR 146.
Berkheiser v Berkheiser, [1957] SCR 387, 7 DLR (2d) 721.
Kasten Energy, Inc. v Shamrock Oil and Gas Ltd, 2013 ABQB 63.
R v Industrial Coal and Minerals Ltd. (1977), 4 WWR 35 (available on CANLII) (Alta SC (TD)).
Saulnier v Royal Bank of Canada, 2008 SCC 58, [2008] 3 SCR 166.

Philippines

La Bugal B'laan Tribal Association, Inc. v Ramos (2004), G.R. No. 127882, 445 SCRA 1.

SECONDARY MATERIAL: MONOGRAPHS

Ballem, John Bishop. *The Oil and Gas Lease in Canada*, 4th ed (Toronto: University of Toronto Press, 2008).

The book has long been recognized as the standard legal reference on oil and gas lease in Canada. Like the book's earlier versions, the fourth edition aims to provide an overview of the historical, statutory and jurisprudential developments of oil and gas lease as an evolving contractual transaction in Canada.

As a recognized specialist in oil and gas, Ballem wrote the book as a form of enquiry into the present state of oil and gas lease in key provinces of Canada, with emphasis on the legal relationship between and among the parties to the agreement, including the importance, possible gaps in, and nuances of relevant provisions found in oil and gas lease agreements. Given Ballem's reader-friendly style of writing, the book is known to be widely used as an authoritative text by many law students, legal professionals, oil companies, and legal institutions. It is particularly helpful as a light reading reference for foreign-trained academic scholars.

Of particular significance is Ballem's discussion regarding the unique legal characterization of oil and gas lease as a *profit prendre*. He noted that the nature of oil and gas lease as a *profit a prendre*, which is an interest in land, is significant in determining the applicability of certain statutes and rules of the common law. This premise sets the tone for my research paper, which will explore if such common law concept is adaptable into the Philippine legal structure for oil and gas. As the book principally inquires into freehold oil and gas lease, however, it does not cover the legal dynamics affecting crown leases and licenses.

Barton, Barry J. *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993).

The book presents an elaborate and integrated overview of the legal framework for mining in Canada. As a research project that was conceived and pushed by the Canadian Institute of Resources Law, the book aims to provide a single reference source for all legal matters and issues pertaining to mining.

Recognizing a gap in the legal literature for mining, Barton undertakes to guide readers, lawyers and non-lawyers alike, through various legal concepts, statutes and jurisprudence on mining that have evolved in the different Canadian jurisdictions. The bibliography of cases alone provides a rich database of mining case law, which in itself can be a valuable research tool for legal scholars. The distinction made by Barton between private and Crown ownership of minerals is relevant to my research paper's objective of exploring the proper legal characterization of oil and gas property rights in the context Philippine oil and gas exploration service contracts.

De Castro, Juan Arturo Iluminado Cagampang. *Philippine Energy Law, The Philippine Electric Power Industry: Deciphering the Unique Dynamics of Energy Law, Policy and Development in a Developing Country*, 1st ed (Quezon City: Central Book Supply, 2012).

The book is one of very few Philippine materials that attempt to discuss and examine the country's energy legislation. De Castro principally based his book on his doctoral dissertation at the University of California, Berkeley, for which he was conferred the degree of Doctor of the Science of Law.

As the title of the work itself reveals, De Castro's focus is on the current legal and policy complications affecting the Philippine electric power industry. Pertinent to my research paper, however, is his Constitutional, statutory and case law analysis of the state's ownership of minerals and natural resources, including oil and gas. The discussion will be useful to put into perspective the legal feasibility of adopting the common law concept of *profit a prendre* in the light of the state's ownership of mineral resources.

Upton, Sinclair. *Oil! A Novel*, 3d ed (California: Sinclair Upton, 1927).

The novel dramatizes the development of the oil industry in Southern California. Set amidst the perceived oil scandals in the 1920s, it is a story about an independent oil baron and his attempt to educate his son about the oil business and thus, providing modern readers fascinating insights on the dynamics and politics of oil drilling in that era. The book loosely inspired the 2007 film *There Will Be Blood*.

Chapter II of the novel which is aptly entitled *The Lease* reveals an interesting discourse between the independent oilman and landowners as they negotiated an oil lease. In trying to convince the landowners to enter into an oil lease, the oilman underscored his independence and skills to do the oil drilling himself, as opposed to other oilmen who would hire out the job on contract. These contractors, as the oil baron stressed, were believed to rush the job through, so as to quickly obtain other job contracts. The arrangement essentially mirrors the economic risk that the Philippine government faces every time it enters into a service contract with an oil company, especially where contractual or property rights could be assigned to another contractor.

This literary reference can be incorporated into the abstract or introduction or the conclusion part of my research paper.

SECONDARY MATERIAL: ARTICLES

Bankes, Nigel. "Whoever heard of such a thing? A Crown oil and gas lease an intangible form of personal property?" (1 March 2013), online: ABlawg.ca: The University of Calgary Faculty of Law Blog on Developments in Alberta Law <http://ablawg.ca/wp-content/uploads/2013/03/Blog_NB_Kasten_Shamrock_March2013.pdf>.

This article is Professor Nigel Bankes's commentary on the decision of the Court of Queen's Branch of Alberta in *Kasten Energy, Inc. vs. Shamrock Oil and Gas Ltd*, 213 ABQB 63 (March 1, 2013) (*Shamrock*). Appearing on the University of Calgary Faculty of Law Blog on Developments in Alberta Law, the article explained how the *Shamrock* decision deviated from the legal concepts underlying *Berkheiser's* legal characterization of a freehold oil and gas lease (and a Crown oil and gas lease based on *R v Industrial Coal and Minerals*) as a *profit a prendre*. Specifically, Professor Bankes questioned Justice Lee's treatment of *Shamrock's* Crown oil and gas lease as an intangible form of personal property over which a receiver/manager can be appointed within the contemplation of Alberta's Personal Property Security Act.

With his vast professional experience in natural resources and energy law, Professor Bankes's article succeeded in guiding the readers to think through and integrate the legal concepts of *profit a prendre*, licenses, commercial leases, all in the context of applying and/or enforcing insolvency and receivership statutes over property rights in oil and gas lease.

Beck, Brian. "Interests in Land: Taking Stock After Dynex and Blue Range" in *Oil & Gas Law: Selected Topics* (Calgary: Legal Education Society of Alberta, 2000).

The article looks into the legal and practical ramifications of the Alberta Court of Appeals decisions in *Bank of Montreal v Dynex Petroleum Ltd.* and *Re: Blue Range Resources Corp.* to the common law understanding of an interest in oil and gas as an 'interest in land'. These cases, according to Beck, demonstrate the willingness of the Alberta courts to consider the intention of the parties as a key element in determining whether an oil-and-gas-interest is an "interest in land". This, despite arcane principles that hold contrary view in the light of the legal characterization of oil and gas lease as a *profit a prendre*.

As a practicing lawyer, Beck understands the significance of the cases to oil and gas lawyers – that the creation of land interests not previously recognized would have implications, among others, in the registration procedures of interests in lands under the Land Titles Act. An important insight from the article that I can elaborate on in my research paper is Beck's conclusion that derivative interests may also accrue from and run with a Crown oil and gas lease.

Cagampang-De Castro, Soledad M. "Acquiring Mineral Rights in the Philippines: Updates on Law and Mining Jurisprudence" (2009) 83 Philippine LJ 584.

Although the article principally talks about updates on mining law and jurisprudence in the Philippines, Cagampang-De Castro's work makes an informative exposition of the legal structure of mineral rights acquisition in the country. Pertinent to my research topic is the chapter where the author discussed the constitutional concept of financial or technical assistance agreements (FTAA) as the legal foundation for oil and gas service contracts. With her Masters of Law background from the Harvard Law School and doctorate from the University of Michigan, Cagampang-De Castro was able to convey to the readers a comprehensive legal impression of the FTAA's as a statutory mode of acquiring mineral rights in the Philippines.

The author's stint at the Minerals Development Council of the Philippines may explain her protectionist predisposition against entry of foreign investments. However, her recognition of the need for the investor to recover the share and fair return of investment in an FTAA arrangement is a logical starting point for my research paper's exploring whether property rights or interests indeed exist under oil and gas service contracts, consistent with the common law concept of *profit a prendre*.

Dimagiba, Victorio Mario A. "Service Contract Concepts in Energy" (1982) 53 Philippine LJ 307.

The article dissects the provisions of Presidential Decree No. 87 (or the Oil Exploration and Development Act of 1972), the law which first established the service contract concept for oil exploration in the Philippines. Given that my research paper will delve into this service contract concept, the article certainly provides a helpful reference regarding relevant details of the law. A key statement in the article that is worth noting for my research paper is the author's recognition of the importance of the service contract concept, as he noted that any discussion on contracts for energy-related activities in the Philippines gravitates around this concept. The bias in favor of the implementation of the concept is expected considering that the author wrote the article when he was the chief legal officer of a government agency that was supposed to enforce a law decreed by the Philippine President himself.

Kennett, Steven A, Arlene J. Kwasniak & Alastair R. Lucas. "Property Rights and the Legal Framework for Carbon Sequestration on Agricultural Land" (2006) 37 Ottawa L Rev 171.

The article examines the Canadian legal and institutional framework for carbon sequestration projects on agricultural land. Based on the authors' analysis, common law property rights and the statutory regime for easements have not provided an adequate legal structure for sequestration transactions.

In proposing that a custom-made property rights regime should be established for sequestration projects, the authors appropriately performs a doctrinal analysis of relevant property rights principles and common law mechanisms. Their keen resource law and research background is quite evident from their theoretical proposal to establish a set of criteria that would guide the design of the ideal property rights regime for carbon sequestration projects. Following this methodology, my research paper will also look into a doctrinal review of the underlying property rights in Philippine oil and gas service contracts vis-à-vis the adaptability of the concept of *profit a prendre* as a legal and proprietary interest. Consistent with the conclusion arrived at by the authors, my paper will confirm whether there is a need to clarify uncertainties in the law regarding the legal nature of property rights in oil and gas service contracts in the Philippines.

Remo, Amy R. "Otto Energy to Acquire BHP Billiton's Stake in SC 55", *Philippine Daily Inquirer* (29 November 2013) online: Inquirer.net <<http://business.inquirer.net/154415/otto-energy-to-acquire-bhp-billitons-stake-in-sc-55>>.

This news item reports on the impending acquisition by Otto Energy, an Australian oil company, of BHP Billiton's sixty percent (60%) interest in a service contract for oil and gas exploration in the Philippines. The report is useful insofar as it confirms that the assignment of oil and gas exploration rights can be a recurring business transaction in the context of Philippine oil and gas service contracts. Given this scenario, the parties' enhanced exposure to legal actions involving the resolution of issues affecting underlying property rights to these agreements can be reasonably anticipated. This news article will therefore give my research paper the relevant practical nuance, considering that the information will lay the preliminary groundwork why it has become imperative to clearly define property rights arising from Philippine oil and gas service contracts.

Tecson, Ma. Christina E. "Exploring Exploration: Fitting the Joint Marine Seismic Undertaking and Oil Exploration Laws into the Mold of Section 2, Article XII of the 1987 Constitution" (2010) 55 *Ateneo Law Journal* 149.

The article investigates the legal validity of a Joint Marine Seismic Undertaking in light of the requirements of Section 2, Article XII of the Philippine Constitution. Awarded as the Best Thesis in her *Juris Doctor* class, the paper not only provides a well-studied outline of the current statutory and jurisprudential framework of exploration contracts in the Philippines, it also proposes, consistent with my preliminary hypothesis, a set of working guidelines necessary in updating the country's outdated Oil Exploration and Development Act. The author's perspective regarding these proposed amendments to the law is therefore worth looking into, considering that her analysis is based on the criteria set by the Philippine Supreme Court in *La Bugal B'laan Tribal Association, Inc. v Ramos*. This landmark case upheld the constitutional validity of service contracts for the exploration, development, and utilization of minerals and petroleum, which an important legal assumption that has to be established before a discussion on underlying property interests could even be commenced.

Watson Hamilton, Jonnette & Nigel Bankes. "Different Views of the Cathedral: The Literature on Property Law Theory" in Aileen McHarg et al, eds, *Property and the Law in Energy and Natural Resources* (New York: Oxford University Press, 2010).

Intended as a theoretical overview for an edited collection of work, the article reviews the literature in property law theory and the relevant developments that are relevant to the current dynamics between property and energy and natural resources law. Given the diversity of issues presented in the edited collection, the article effectively provides the reader a glimpse of the varying property law perspectives that the author of each work is expected to hold. Watson Hamilton and Bankes identified the key themes of the edited collection as hinging on the distinctions between conceptual and instrumental 'views of the Cathedral'.

Watson Hamilton and Bankes's scholarly exposure to the subject matter of the article is clear from their well-outlined analysis of the various concepts of property law and the nuanced correlation of these theories to contemporary energy and natural resources topics. Having recognized a gap in the literature, Watson Hamilton and Bankes use legal materials that prove to be a fertile and coherent source of ideas for further intellectual pursuits. Their synthesis on the distinctions between conceptual and instrumental views of property law can be relevant insofar as contextualizing the Philippine view on property, given its civilian legal system.

UNIVERSITY OF CALGARY
FACULTY OF LAW

LAW 703: LEGAL RESEARCH & METHODOLOGY

REFORM OF MINING LAWS IN AFGHANISTAN AND THE
MODEL MINING DEVELOPMENT AGREEMENT: A
CASE STUDY
ANNOTATED BIBLIOGRAPHY

SCOTT MCLEOD
LL.M CANDIDATE

INTRODUCTION

This bibliography was prepared as an accompaniment to my Statement of Proposed Research Project, the final assignment in Law 703: Legal Research and Methodology, a course taken in the fall term of 2013. It lists some of the sources of information relevant to my LL.M major paper research. The topic of my research is the Model Mining Development Agreement and how its principles are reflected in the reform of Afghanistan's mining laws and regulations; more specifically those provisions that relate to promoting the sustainable development of mineral resources. This bibliography, as prepared specifically for this assignment and still at the beginning stages of my research project, is merely a representative sample and not meant to be exhaustive, and as it is a work in progress it will be modified as my research is continued.

MONOGRAPHS

Barton, Barry. *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993)

A professor at the University of Waikato, Professor Barton is a member of the University Council and a member of the Academic Board. He is also a Council Member of the Energy, Environment, Natural Resources and Infrastructure Law Section of the International Bar Association. This book is currently undergoing revision, yet is still considered the leading text on Canadian Mining Law. As such, it will provide me with an overview of mining law in a Canadian context and exposure to the most important mining law principles. It also, through its citations and questions raised, will provide me with further research ideas and will be a foundation upon which to base that further research.

Bastida, Elizabeth, Thomas Walde, and Janeth Warden-Fernandez, eds, *International Comparative Mineral Law and Policy: Trends and Prospects* (The Hague, Kluwer Law International, 2004).

Elizabeth Bastida is the Rio Tinto Research Fellow and the Director of the Mineral Law & Policy Programme at the Centre for Energy, Petroleum, Mineral Law & Policy at the University of Dundee (CEPMLP/Dundee). Thomas Wälde is the Professor of International Economic, Natural Resources and Energy Law. Janeth Warden-Fernández is a Research and Teaching Fellow and an advisor for the Mineral Law & Policy Programme at CEPMLP/Dundee. This book covers a variety of topics that together form the main governance practices in the mining industry. The book was written to aid in understanding developments in mining law and policy at the various levels. There are five main chapters: international

and comparative aspects of mining law; actors and policies in the mining industry; investment prospects, financial and fiscal issues; sustainable development and regional outlooks. The book will be useful to me in my research in giving me a broad understanding of the issues covered, in particular on mining as it relates to sustainable development.

Richer La Fleche, Erik. Ed, *The Mining Law Review, Second Edition* (London, Law Business Research Ltd, 2013)

Erik Richer La Flèche is a lawyer qualified to practice in Quebec and Ontario and he is a member of the Mining Law Group at his firm. This book gathers writings from leading mining practitioners from around the world, and is designed to be used as a reference for practitioners. The book is divided into 23 country chapters, each dealing with mining law in a particular jurisdiction, which will be particularly useful to me in my research in understanding which principles are most important to each jurisdiction in their regulation of mining, and will give me some specific examples of how different countries go about implementing those principles. It also includes 10 chapters on financing, which is of personal interest to me but may be less specifically useful for my research.

Richards, Jeremy, ed, *Mining, Society, and a Sustainable World* (Berlin, Springer-Verlag Heidelberg, 2009)

Southalan, John. *Mining Law and Policy: International Perspectives* (Australia, Federation Press, 2012)

The author is an Australian lawyer who works mainly on human rights and rule of law issues, and in his work with NGOs in the past has had significant input and involvement into industry and governmental reviews regarding mining and indigenous rights. This book explores some of the broad legal issues in the regulation of mining. In addition to a broad summary of how governments regulate mining, of particular relevance for my research are the chapters on government agreements and procedural matters.

ARTICLES AND PAPERS

Global Witness, “Copper Bottomed? Bolstering the Aynak Contract” (20 November 2012) online: Global Witness <www.globalwitness.org>

Global Witness is an organization formed to investigate and campaign to prevent natural resource related conflict and corruption, and associated environmental and human rights abuses. This particular report is an analysis of the strengths and weaknesses of an important mining contract between the Afghani government and a Chinese joint venture of the China Metallurgical Group Corporation and Jangxi Copper Corporation. Given that I wish to examine the principles used by the Afghan government when creating their Mining Law and entering into contracts under it, this is an especially useful article. This report also triggered a response from the Afghani government (noted below).

Global Witness, “Response to Ministry of Mines’ statement of December 2012 on “Copper Bottomed?” report” (20 December 2012) online: Global Witness <www.globalwitness.org>

Global Witness, “A Shaky Foundation? Analysing Afghanistan’s Draft Mining Law” (27 November 2013) online: Global Witness <www.globalwitness.org>

This is a report prepared by Global Witness that analyzes, at a broad level, Afghanistan’s draft Minerals Law. It identifies what Global Witness sees as general weaknesses in the draft law and makes recommendations. Comparing the recommendations in this report to the related articles of the MMDA show that the report recommends protections for the state and its citizens and recommends obligations for mining companies that go well beyond what the MMDA outlines. This, combined with the fact that Global Witness is an advocacy organization, suggests that I should analyze their recommendations with at least somewhat of a critical eye. This report will be useful in my research in providing examples of provisions that may help to promote sustainable development within the mining sector.

InterAction, “Summary Report: Roundtable Discussion on Governance to Empower Civil Society in Afghanistan’s Extractive Sector” (2012) online: <<https://www.interaction.org/>>

InterAction is an umbrella organization in Washington, D.C., made up of over 180 U.S. based international NGO’s. This report discusses the successes and challenges of governance in Afghanistan’s extractive sector and makes recommendations for helping ensure that extractive projects contribute to sustainable development. This report will be useful in my research as it compiles

the opinions of various experts on what they believe constitute good governance principles in the extractive sector.

International Advisory Council on Sustainable Resource Development for Afghanistan, “Fairness Opinion on the Aynak Mining Contract” (14 July 2009) accessed online: <www.globalwitness.org>

This is a report prepared by a specially formed Council as a condition of the Sustainable Development of Natural Resources Project (SDNRP). This Council is composed of three experts selected by the Afghani government to render an opinion on the Aynak contract. Although the Council found few issues with the “fairness” of the contract, they did make some recommendations to better ensure compliance with the contractual principles. As with some of the other reports in this bibliography, this report will give me further insight to the principles underlying the Afghani government’s mining regulation/contracts.

International Bar Association, *Model Mine Development Agreement* (MMDA 1.0) <http://www.ibanet.org/LPD/SEERIL/Mining_Law/Default.aspx>

Mining, Minerals, and Sustainable Development. *Breaking New Ground* (London: Earthscan Publications, 2002).

This report presents the principal conclusions of the International Institute for Environment and Development for the Mining, Minerals and Sustainable Development (MMSD) project, which is a comprehensive project/study on the role of minerals in sustainable development. This report describes the minerals sector as it relates to sustainable development, and makes recommendations based on its findings. This report will be especially useful in my research as its focus very closely parallels that of my proposed research, albeit with a broader focus.

Ministry of Mines and Petroleum (Islamic Republic of Afghanistan), “Response to Global Witness’ Recent Report on Aynak Copper Project” (December 2012) online: <<http://mom.gov.af>>

Naito, Koh, Felix Remy, and John Williams, eds, *Review of Legal and Fiscal Frameworks for*

Exploration and Mining (London: World Bank Group Mining Department, Mining Journal Books Ltd, 2001)

This is a World Bank-commissioned review of the legal and regulatory frameworks of selected countries. It is written to provide practical guidance to policy makers on the advantages and disadvantages of practices being implemented by various countries with significant mining industries. It will be useful in my research in providing examples of the principles embodied in individual countries' mining law regimes.

Oshinebo, Evaristus. "Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries" (2010) 10 *Asper Review of International Trade and Business Law* 1.

The author is a Professor at the University of Calgary, specializing in part in Mining Law. This article discusses in-depth one particular clause that commonly appears in contracts for the extraction of natural resources in developing countries. I believe this article will be useful in my examination of the MMDA and Afghanistan's mining laws as it analyzes, within the context of this particular contractual clause, many of the key issues that arise more generally.

Oshinebo, Evaristus. "The OECD Guidelines for Multinational Enterprises as Mechanisms for Sustainable Development of Natural Resources: Real Solutions or Window Dressing?" (2013) 17 *Lewis & Clark Law Review* 545.

McMahon, Gary, and Brandon Tracy, "The Afghanistan Mining Sector as a Driver of Sustainable Growth: Benefits and Opportunities for Large-Scale Mining" (2011) *Oil Gas and Mining (SEGOM) World Bank* <http://www.worldbank.org/>

This report, prepared by the World Bank, provides me with a comprehensive overview of the potential for development of the mining industry in Afghanistan. As such, it will be highly useful in assisting me in building a foundation upon which to build my research.

GOVERNMENT DOCUMENTS

The Minerals Law (Afghanistan) 2010 <<http://mom.gov.af/en>>

Mining Regulations (Afghanistan) 2010 <<http://mom.gov.af/en>>

National Mining Policy (Afghanistan) <<http://mom.gov.af/en>>

The Minerals Law (Draft) (Afghanistan) accessed online at Global Witness
<www.globalwitness.org>

UNIVERSITY OF CALGARY

FACULTY OF LAW

LAW 703

STATEMENT OF PROPOSED RESEARCH PROJECT

“ENVIRONMENTAL NEGLIGENCE AND THE
APPLICATION OF CROWN IMMUNITY”

BY
SIMONE FRASER
DECEMBER 17, 2013

Brief statement of my research question and problem

My research question is, whether the doctrine of Crown immunity should be applied in environmental negligence claims. The presumption of Crown immunity has been the subject of long debate. The Law Reform Commission of Saskatchewan called for papers in 2012 to consider whether Crown immunity should be reversed.¹ From this paper it was apparent that the presumption of immunity in British Columbia and Saskatchewan is intended to apply in the context of land use legislation.² A brief review of environmental cases confirmed that the Crown raises the shield of immunity when faced with a claim of breach of fiduciary duty. That duty would arise from negligence in tort or in carrying out a regulatory duty that raises fiduciary obligations. The aim of my paper is to investigate whether it is appropriate that the doctrine of immunity apply in cases where environmental adverse effects or harm is caused by negligence in the context of approvals for the development of natural resources such as oil and gas.

¹ Law Reform Commission of Saskatchewan, “Presumption of Crown Immunity: Consultation Paper” (10/2012) Law Reform Commission of Saskatchewan 26 at 3.

² *Ibid* at 22.

Annotated Bibliography

Legislation

- Oil and Gas Conservation Act Revised Statutes of Alberta 2000, Chapter 0-6

This Act is relevant as it is the primary piece of legislation that provides for the administrative powers and regulations for the management of oil and gas resources of Alberta. The Act includes the process of issuing licences and approvals to explore and extract the resource. The rights of appeal, regulations governing licences and approvals are set out in this Act. Conservation of the resource and production requirements are also provided for. Interestingly, the conservation is not used in the context of environmental protection, but rather efficient use of the resource. This provides insight into the driving purpose of the Act for further analysis.

- Oil Sands Conservation Act Revised Statutes of Alberta 2000 Chapter 0-7

The purpose of this Act is to ensure the efficient extraction of the oil sands resource. Of the seven listed purposes only one relates to pollution control. Similar to the Oil and Gas Conservation Act to identify how administrative bodies manage the environmental considerations requires further research. This Act sets out the powers and duties of the regulator to approve and manage oil sands exploration and extraction activities.

- Environmental Protection And Enhancement Act Revised Statutes of Alberta 2000 Chapter E-12

The EPAE is a provincial Act with the purpose to support and promote the protection, enhancement and wise use of the environment. However, that purpose is circumscribed by economic growth and prosperity considerations. The Act does adopt the principle of

sustainable development with the aim of ensuring the use of resources today does not impair the prospect of its use by future generations. The economic efficiency bias (if there is one) of the Oil and Gas and Oil Sands Conservation Acts may be offset by the purpose of this Act. However, further research is required into the extent to which the economic considerations of the EPAE dominate or are relied on by the regulator to justify how it carries out its duties (if any) to protect the public from environmental harm.

- Canadian Environmental Assessment Act S.C. 2012, c. 19, s.52

This is a federal Act that outlines the responsibilities of the federal government to protect those components of the environment that are within its jurisdiction. The threshold for protection is high, requiring control of only significant adverse environmental effects caused by a designated project. The federal regulator is mandated to co-ordinate with the provincial regulator. The federal duty is premised on sustainable development with the aim to achieve or maintain both a healthy environment and healthy economy. Further research is required into how the balance between the regulators duty to achieve both a healthy economy and environment is played out in its reasons for decisions. I suspect economic considerations will dominate justification for approvals. Interestingly, within the defined purposes of the Act a precautionary approach is only to be taken for projects on federal lands or those outside of Canada and supported by the federal government. Given that an additional purpose is to encourage the study of cumulative effects within a region is required, I would have thought a precautionary approach would be taken within any region within Canada. Further research is required into how the Canadian Courts understand and apply the precautionary approach. Does such a challenge ever make it to the Courts? There may be jurisdictional issues that would influence this higher threshold that the provinces wish to maintain control over. Further consideration of any fiduciary duties to protect the public from environmental harm

as between federal and provincial regulators is required. In addition, a definition of what I mean by environmental harm is required.

Secondary Materials: Monographs

- Braul, Wally. “The changing regulatory Scheme in Northeast British Columbia” (2011) 49 Alta L Rev 369.
This article looks at the issues arising from the Northeast BC oil patch boom in land tenure sales and exploration and production. There are public concerns over the use of hydraulic fracturing and unconventional technology that has led to the boom. The information here may provide insight into the regulatory changes that affect production and environmental management. Regulatory changes that address public concern provide valuable insight into potential litigation issues where Crown action or inaction might be brought to the Courts for further scrutiny.
- Carpenter, Sandy. “The Energy Project Approval Process in Canada: An early assessment of Bill C-38 and Other Thoughts” (2012) 50 Alta.L.Rev. 229.
Sandy Carpenter examines Bill C-38 and its potential impact on current energy project assessment process in Canada. The issue traversed in this article is whether Bill C-38 is a substitution for energy review processes in Canada. There is also useful discussion of aboriginal, stakeholder and political issues that may impact on my assessment of approval guidelines on consultation.

Government Documents

- Law Reform Commission of Saskatchewan, “Presumption of Crown Immunity: Consultation Paper” (10/2012) Law Reform Commission of Saskatchewan 26.
The Saskatchewan Governments call for submissions on whether the presumption of immunity should be reversed is set out in this article. The paper provides information on key issues in respect of the principles to be applied to the doctrine of immunity. The footnotes and references will lead me to useful scholarship and relevant case law to guide further research.

Secondary Materials: Articles

- Harvie, Alan. “Trade Secrets v public disclosure: Growth in hydraulic fracturing puts new pressures on oil industry” (July 26, 2013) 33:13 *The Lawyers Weekly* 1.
This article provides a useful outline of issues in respect of transparency of information during the approvals process. The issue of knowledge on behalf of the regulator is relevant to a negligence claim. How much can the regulator know or be expected to know when approving and monitoring projects. How can the Crown reasonably manage the issue of confidentiality and transparency when dealing both with stakeholders and industry developers?
- Kangles, Nick et al “Risk Allocation Provisions in Energy Industry: Are We Getting It Right?” (2011) 49 *Alta L Rev* 339.
Nick Kangles et al provide a useful review of Canadian legal principles relating to indemnities and risk allocation provisions used in the oil and gas industry. The article outlines the constraints on enforceability of indemnity provisions. Whether a duty of care arises or should arise is an issue of accountability. The risk of environmental harm and associated costs is a vexed problem for industry insurers. When considering Crown immunity the principles relating to indemnities and risk allocation may be analogous between the public and private sectors.
- Luft Keith, Thomas O’Leary and Ian Laing “Regulatory and Liability Issues Horizontal Multi-Stage Fracturing: (2012) 50 *Alta L Rev* 403.
This article provides an outline of legal and regulatory environments health and safety issues in Canada and the USA. This article provides useful references that identify approvals issues in oil and gas development. There is some cross over between health and safety and environmental regulation and controls. Generally health and safety regulation is closely adhered to in the oil and gas industry. It is a dangerous industry and the safety of employees and visitors on site is of paramount concern. The powers of the Crown regulatory health and safety officers seem to have more teeth as compared to environmental monitoring officers. It is interesting to consider whether a comparison will provide insight to whether the Crown has failed in its duty of care in respect of environmental monitoring in light of its powers. The industry response to environmental regulation and its off site effects is relevant to this

analysis. The article also provides a history of litigation and associated risks in the context of hydraulic fracturing which may provide some cases on the application of the doctrine of Crown immunity.

- Randolph J. Justus, “A Guide to Writing the Dissertation Literature Review” (2009) 14:13 Practical Assessment, Research & Evaluation 1.
The material provides information on how to write a high-quality dissertation literature review and a framework for outlining research methodology.
- Samuelson Pamela, “Good Legal Writing: Of Orwell and Window Panes”(1984-85) 46 U Pitt L Rev 149.
The material provides information on the six paramount rules of good legal writing that the author has derived from years of legal scholarship experience.

UNIVERSITY OF CALGARY
FACULTY OF LAW

LAW 703: LEGAL RESEARCH AND METHODOLOGY

LIABILITY OF THE CORPORATE DIRECTOR:

WHAT IS REASONABLE?

ANNOTATED BIBLIOGRAPHY

BY:

Sharilyn C. Nagina
December 18, 2013

Directors in Alberta are subject to a significant number of environmental obligations through the statutory and common law. The penalties for breach of these obligations range from fines to criminal sanctions. Given the increasing obligations imposed on corporate directors, it is becoming very difficult for an individual director to be aware of every head of environmental liability to which he or she is subject. The result of this is that even the most diligent and well-intentioned director may unwittingly contravene a legal obligation and be subject to sanctions. This is compounded by the fact that a director often has little control over the day to day actions of a company that may trigger liability, yet the director may still be subject to significant liability for actions over which he or she had no reasonable ability to influence or participate in, yet alone condone.

This unnaturally broad scope of liability for a corporate director also creates problems for courts and administrative tribunals. This is because, in determining whether a director has breached his or her duty, the decision maker is often faced with two starkly different options. The first is to impose severe penalties on directors for actions far outside of their moral culpability that the director had no reasonable opportunity to curtail. The second is to absolve directors of all liability. In my view, neither of these two extremes are ideal. There should be a hybrid or middle ground that fosters the goal of deterrence of unlawful behaviour and prescribes consequences for breach all within a regime in which a director has a reasonable chance to understand and meet his or her obligations through the exercise of prudent and diligent behaviour.

LEGISLATION AND REGULATIONS

Business Corporations Act, RSA 2000, c B-9.

Canada Business Corporations Act, RSC 1985 c 44.

Environmental Protection and Enhancement Act, RSA 2000, c E-12.

Mines and Minerals Act, RSA 2000, c M-17.

Oil and Gas Conservation Act, RSA 2000, c O-6.

Pipeline Act, RSA 2000, c P-15.

Water Act, RSA 2000, c W-3.

JURISPRUDENCE

BCE v. 1976 Debentureholders, 2008 SCC 69.

Blacklaws v. Morrow, 2000 ABCA 175.

Petrobank Energy and Resources Ltd. v. Safety Boss Ltd., 2012 ABQB 161.

Re Baker et al. (14 November 2012) Director's Order No. 5866-8WKU92, Environmental Review Tribunal (Ontario).

SECONDARY MATERIALS: MONOGRAPH

Brenda Jean-Currie, ed, *The Annotated Business Corporations Act of Alberta*, 3d ed, loose-leaf (consulted on 17 December 2013), (Toronto, ON: Carswell, 1988).

The annotations in this loose-leaf text will be a good starting point for my legislation and case law review.

Joseph Groia & Pamela Hardie *Securities Litigation and Enforcement* (Toronto: Thomson Canada Ltd., 2007).

Groia is practitioner who has acted as Associate General Counsel and as Director of Enforcement for the Ontario Securities Commission. He has also led the team that successfully defended Mr. John Felderhof in the 10 year OSC prosecution of charges arising out of the collapse of Bre-X Minerals Ltd. Hardie has been Counsel at the OSC in both the Corporate Finance and Enforcement Branches. In addition to this book, she has co-authored a twenty four volume legislative history of the Ontario Securities Act, a text

on shareholders rights in Canada and a chapter on insider trading for a securities law reporter. This book provides an overview of the securities industry, the various causes of action, and defences that can be brought. Although it provides a general overview, the commentary on defences, including the due diligence defence, will be of assistance in reviewing the current defences, and considering whether there is an alternative to the current regime. The intended audience appears to be law students and lawyers.

Poonam Puri & Jeffrey Larsen, *Corporate Governance and Securities Regulation in the 21st Century* (Markham: LexisNexis Canada Inc., 2004).

Puri is the Associate Dean and a Professor of Law at Osgoode Hall Law School, York University. Larsen is a practitioner who obtained his Juris Doctor from the University of Toronto and his Master of Laws from Osgoode Hall Law School, York University. This book provides an overview of Corporate Governance and Securities Regulation. It also provides a general discussion of the liability of the corporate director. In chapter four the authors discuss what they view as the, “liability crisis” that has been faced by directors, officers, and other gatekeepers. This book will provide a good source of background information, and the commentary on the, “liability crisis” is very relevant to my topic. The authors’ intended audience appears to be law students and lawyers.

Wayne Gray, ed, *The Annotated Canada Business Corporations Act*, 2d ed, loose-leaf (consulted on 17 December 2013), (Toronto, ON: Carswell, 2013).

Although this book goes beyond the jurisdiction of Alberta, the annotations in this loose-leaf text will be a good starting point for my legislation and case law review.

SECONDARY MATERIALS: ARTICLES

Bernard Black, Brian Cheffins & Michael Klausner, “Outside Director Liability” (2006) 58:4 *Stan L Rev* 1055.

At the time of writing this article, Black was a Professor of Law at the University of Texas Law School and a Professor of Finance at the McCombs School of Business, University of Texas, Austin; Cheffins was a Professor of Corporate Law at Cambridge University; and Klausner was a Professor of Business and a Professor of Law at Stanford Law School. This article examines the public perception of the liability of outside directors of public companies for personal liability as compared to the reported cases in which liability was found. This article is pertinent to my research because unlike my research questions that consider whether the paradigm in which corporate directors may be found liable is in need of review, the authors opine on whether the threat of personal liability to outside directors can be ameliorated by an appropriate Directors and Officers insurance policy. This will provide an interesting alternative to consider as my research progresses. The intended audience for this article appears to be law students, lawyers, business students, and business executives.

Bill McNally and Barb Cotton, “A Thesis Regarding the Civil Liability of Directors For Criminally or Near Criminally Culpable Acts” (date unknown) [unpublished, online at http://www.bottomlineresearch.ca/articles/articles/pdf/directors_liability.pdf].

McNally is a senior practitioner. Cotton is the principal of Bottom Line Research & Communications in Calgary and has taught legal research and writing at the University of Calgary Law School. This article discusses the potential civil liability of directors for criminal or near criminal acts. It is interesting because in the authors’ review of relevant case law they identify the different standards for a finding of civil liability where the acts complained of are tortious or near criminal behaviour. The intended audience for this article appears to be lawyers.

David Debenham, “Return to the Beaten Path?: Directors’ and Employees’ Liability for Intellectual Property Torts after *Mentmore*” (2003) 16 IPJ 527 (WL Can).

Debenham is a lawyer at the Ottawa office of McMillan. His article addresses liability of Canadian directors and employees for strict liability torts following the Federal Court of Appeal’s decision in *Mentmore Manufacturing Co. Ltd. v. National Merchandising Manufacturing Co. Inc.* (1978) 40 C.P.R (2d) 164. Debenham’s article starts with an acknowledgement that a director may be found personally liable for a strict liability tort without fault or negligence on their part. He then states that the purpose of the article is to provide guidance for development in the law in this area. Debenham’s suggestions for development will provide a useful alternative to consider in my analysis of whether there is a better alternative to the current paradigm. The intended audience for this article appears to be law students, lawyers, legislators, the judiciary, and any other person who may be involved in the development of the law in this area.

Dianne Saxe, “Environmental Liabilities of Officers and Directors” (1990) 46 BLR 262 (WL Can).

Saxe is an Ontario environmental lawyer. This article addresses the liability of officers and directors for breaches of environmental legislation. One of the main points in her article is a discussion of the evolving and increasing standard of care of officers and directors in environmental matters. In doing so, Saxe summarizes the ways in which a director may be found guilty of an environmental offence and examines the due diligence defence. Saxe then takes the view that absent knowledge or a reasonable opportunity to obtain the relevant knowledge, liability should not be imposed on a director. The intended audience appears to be law students and lawyers.

Nancy Shapiro “Absentee Directors: Is There Liability?” (2001) 8 CLR (3d) 187 (WL Can).

Shapiro is a partner at Koskie Minsky LLP in Ontario. This article provides commentary on absentee director liability following a series of Ontario decisions on the issue of the imposition of liability on a director who lacks knowledge of the corporation’s actions or intentions. Although this article focuses on the construction lien legislation, the analysis of whether liability should be imposed in the absence of a requisite level of knowledge is applicable. The intended audience appears to be law students and lawyers.

OTHER MATERIAL

Charlotte Santry, "Focus: Will Director Liability Weaken Environmental Protection?" online: Law Times <http://www.lawtimesnews.com/201311183601/focus-on/focus-will-director-liability-weaken-environmental-protection>.

In this article, Santry raises the issue of whether the current liability regime will deter qualified individuals with particular expertise in environmental issues from agreeing to act as a director. Although this article is in Law Times online magazine, the article appears to be aimed at lawyers, professional directors, and those with expertise in specialty areas like environmental remediation.

UNIVERSITY OF CALGARY
FACULTY OF LAW

LAW 703: LEGAL RESEARCH AND METHODOLOGY

Proportionality: An Appropriate Element for Fair and Equitable
Treatment?

Annotated Bibliography

BY
Stephanie Leitch
December 18, 2013

Description: I am researching whether proportionality is an appropriate element for the fair and equitable treatment principle within international investment arbitrations that arise under bilateral investment treaties. Currently, proportionality is used as an element; however, it is not within the language of the treaties, and it is not quite clear where the element came from, and why arbitrators are following a type of precedent within international investment disputes.

Choudhury, Barnali, “Evolution or Devolution? – Defining Fair and Equitable Treatment in International Investment Law” (2005) 6 J World Inv & Trade 297.

The author has an LLM from Columbia, and the article is published in reputable journal. As such, I believe the author to be credible. This article begins with an explanation of the history of fair and equitable treatment in international law. Then it breaks down the emergence of elements in Fair and Equitable Treatment. The article does argue for an evolving definition, but it does not include proportionality, providing a workable alternate definition of fair and equitable. This alternative will be useful in proving proportionality is not necessary.

Christie, George C., “What Constitutes a Taking of Property Under International Law?” (1962) 38 Brit YB Int’l L 307, online: Duke Law Scholarship Repository
<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2416&content=faculty_scholarshop>.

The author is a Professor at Duke University. From a cursory look at a list of the author’s publications, this is the first one the author wrote; however, because I obtained the citation from the seminal article, I believe the piece to be reliable. As an older article, I believe this would be a useful survey of the history of expropriations. It provides a basis on how to decide whether an administrative activity should be considered a takings, which is still debated today. The usefulness of this article will depend on whether I decide to include expropriations in the analysis.

Commission, Jeffrey P, “Precedent in Investment Treaty Arbitration – A Citation Analysis of a Developing Jurisprudence” (2007) 24 J Int’l Arb 129.

The author of this article has an LLB from McGill University, and an LLM from the University College of London. The author is an Associate at Freshfields Bruckhaus Deringer in Washington, DC. The author has acted as counsel for ICSID arbitrations. This article is a discussion of whether precedent in investment treaty arbitration actually exists and the reasons behind this increasingly common phenomena. I believe it will be beneficial to see where

proportionality came from, by tracing its routes through published decisions. This article will help me understand how a principle could gain traction within arbitration, i.e. see where it was first used, how it was then followed and how it has snowballed. And it gives reasons why precedents has developed in this type of arbitration; for example there's a small set of arbitrators who hear the cases, which is similar to a panel of judges, published awards, giving reasons. The article also quantifies its reasons for saying it is a similar phenomenon to a panel of judges.

Desmedt, Axel, "Proportionality in WTO Law" (2001) 4 J Int'l Econ L 441.

The author is a Member in Council at the Belgian Institute for Postal services and Telecommunications. The author holds an LLB from the University of Brussels, and an LLM from the University of Michigan. This is an interesting article to read; the claim is that proportionality should not become overarching principle to be applied to all WTO law. This is because it is important to find such a principle within the language of the text being analysed. This could be an appropriate analogy for what should happen within BITs. If nation states want proportionality to be included in fair and equitable treatment, then the treaty should state it outright.

Dolzer, Rudolf, "Fair and Equitable Treatment: A Key Standard in Investment Treaties" (2005) 39 Int'l Law 87.

The author is a Professor and Director Institute of International Law in Bon, Germany. The Kingsbury & Schill article had several references to works by Dolzer, as do several of the other articles and papers I have read for this bibliography, so I believe the author to be credible. I also believe I should seek out other articles written by this author. The article presents a development of Fair and Equitable standard through BIT cases. The article hints at the development of precedent in international investment disputes, but does not state it. It then focuses its analysis on legitimate expectations and reliance on contractual assurances. This gives another example of how the literature is conflicting with regards to the elements of fair and equitable treatment.

Gunn, T. Jeremy, "Deconstructing Proportionality in Limitations Analysis" (2005) 19 Emory Int'l L Rev 465.

The author is Director of ALCU, and professor at Emory Law School, which is a Tier 1 school. I'm still unsure about the usefulness of this article; it focuses on limitations clauses as it sets forth issues within proportionality. However, I believe there is room for some of the issues seen in limitations clauses to be applicable to administrative disputes, such as evidentiary issues, institutional competency and evaluating the administrative actions taken by the state.

JANS, Jan H., "Proportionality Revisited" (2000) 27:3 Legal Issues of Econ. Integration 239.

The author is a Professor at the University of Amsterdam. Although I do not know much about the university, the author seems to have written extensively on the subject of proportionality, as he references his previous works frequently, giving me confidence in his knowledge of the subject. The article sets out the three main elements of proportionality: suitable to obtain its goals, necessary or the least restrictive means, and proportionality *sensu stricto* (in its strictest sense). As argued by the author, a main problem is that the elements are not used, or only partially used. The article discusses the European Community, but the concept was taken from the EC, so it should be useful in the analysis of how each element should be applied.

Kingsbury, Benedict & Stephan Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law" (2009)
Online: NYU School of Law, Public Law Research Paper No. 09-46
<<http://ssrn.com/abstract=1466980>>.

This was the paper given to me by Professor Whitsitt. Kingsbury is Director of the Institute for International Law and Justice at NYU School of Law, and Schill is a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law. As such, I believe the authors to be credible. The paper sets out the elements that have become common for fair and equitable treatment interpretations within international investment arbitrations. Other than providing me with many sources, this paper provides a starting point for my research. It gives a history on the development of proportionality (that I would like to expand on). It also begins to consider whether there is a global administrative law. I hope to expand on this paper.

Nolte, Georg, "General Principles of German and European Administrative Law – A Comparison in Historic Perspective" (1994) 191 Mod L Rev 191.

This author is a professor at the University of Berlin, and is a member of the United Nation's International Law Commission. With such credentials, I believe the author to be credible. The article provides a background of proportionality in German law and its European Community counterpart, written from the perspective of a common law lawyer. In connection with the other articles I have on the subject, I think I will gain a strong understanding of the history of proportionality.

Schill, Stephan, "Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law" (2006) Online: IILJ Working Paper 2006/6 Global Administrative Law Series <www.iilj.org/publications/2006-6Schill.asp>.

The author is a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, and he co-authored the seminal paper on the use of proportionality in fair and equitable treatment clauses. This article attempts to tie fair and equitable treatment to rule of law in a conceptual manner. The elements used in this paper are more extensive than the others I have read. The author advocates that proportionality (in particular) allows for a flexible system. I question the author's openness to the concept as a potential bias; the author is German, as is the principle. It seems to me that the authors from a civil law background are much more favourable to proportionality than those from a common law background.

Schreuer, Christoph, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6 J World Inv & Trade 357.

This author is a Professor of International Law at the University of Vienna, Austria. This article may change my discussion of fair and equitable treatment in international investment treaties as being something that does not necessarily come from customary international law; it surmises that if fair and equitable treatment equated to the international minimum standard, the treaties could have stated such. This article, like the Choudhury article sets out the elements of fair and equitable treatment. Proportionality is mentioned in passing in the conclusion as a potential element of fair and equitable treatment, but it is not expounded.

Yannaca-Small, Catherine, "'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law" (2004) Online: OECD Working Paper on International Investment, No. 2004/4
<<http://www.oecd.org/investment/internationalinvestmentagreements/33776546.pdf>>.

The author of this paper is a legal advisor to the Investment Division of the Directorate for Financial and Enterprise Affairs of the Organisation for Economic Cooperation and Development. If I do include a discussion on indirect expropriation, this paper provides a fairly comprehensive background into the principle, including the criteria use to decide whether an expropriation has occurred. This paper will increase my understanding of indirect expropriations, including how to decide if an administrative activity is justified, or if it requires compensation.