

UNIVERSITY OF CALGARY

FACULTY OF LAW

LAW 703

GRADUATE SEMINAR IN LEGAL RESEARCH & METHODOLOGY

DIEGO ALMEIDA

ANNOTATED BIBLIOGRAPHY

WORD COUNT: 2161

**MINING PROJECTS AND ABORIGINAL PEOPLES: IS IT SUFFICIENT TO
COMPLY WITH THE LAW?**

DECEMBER 2017

1. Description of the research project

The thesis aims to demonstrate that mining project's proponents that comply with the processes of prior consultation and public participation provided by the law, are not entirely safe of social grievances and/or conflicts. There are additional elements and actions to be taken, to avoid social disputes caused by this type of projects.

For reaching such conclusion, the thesis will describe the legal framework of the duty to consult and the environmental assessment process in Canada and Ecuador. It will also analyse four mining projects that have avoided/overcame social disputes, and will identify the practices of those project proponents that have been successful in avoiding conflicts.

The comparison between Canada and Ecuador is justified by the fact that they have produced regulations that set requirements for performing prior consultation and considering public participation before the approval of mining projects. In Canada such regulations are enforced, while in Ecuador they are not, and, despite this, mining activities are being carried on in both countries, with positive and negative social outcomes in both jurisdictions.

2. Annotated bibliography

SECONDARY SOURCES: BOOKS

- Andrade Cadena, Xavier *et al*, *Doing Mining in Ecuador*, 1st ed (Quito: Andrade Veloz & Asociados, 2016).

This book describes the most relevant provisions of Ecuadorian law related to mining activities. The topics included in the review are prior consultation, public participation in the Environmental Assessment process and other social requirements, all related to mining activities in Ecuador. The methodology used in the book is a legislation review. It recounts

all relevant provisions and processes that mining companies must follow to operate in Ecuador.

It is useful for the research because it provides all relevant legal provisions in Ecuadorian law regarding duty to consult and public participation processes. It will help in locating the applicable Acts and provisions of Ecuadorian law for the description of the legal framework in Part One of the thesis.

- Becklumb, Penny & Tim Williams, *Canada's Changing Federal EA Process*, 2012-36-E (Ottawa: Library of Parliament, 2012).

This book summarizes the provisions of the *Canadian Environmental Assessment Act 2012*¹, a statute that regulates the process of environmental assessment that has to be undertaken prior to the development of a mining project in Canada. It describes, for instance, the types of processes and the public participation expected in each one, as well as particularities of each process. It is made in the form of a legislation review.

This information will be useful for describing the legal framework of the federal environmental assessment process in Part One of the thesis.

- Doelle, Meinhard & Chris Tollefson, *Environmental Law Cases and Materials*, 2nd ed (Toronto: Carswell, 2013).

A casebook that explains environmental law in Canada. This book describes, through articles and cases, many aspects of environmental law, such as the common law, jurisdiction between federal and provincial governments, the legal regime of parks and natural areas, etc.

It is useful for the research because it includes a complete review and critic of the federal environmental assessment process and the challenges that it faces when integrating the duty

¹ *Canadian Environmental Assessment Act*, SC 2012 c 19 s 52.

to consult in this process. This information will be useful for describing the legal framework of these two processes in Part One of the project.

- Lambrecht, Kirk M. Q.C., *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: U of R Press, 2013).

Lambrecht describes in his book the benefits of integrating the environmental assessment process with the duty to consult. He considers that integrating those processes will result in benefits for project proponent, by saving in the decision-making process of the government, and building good relationships with Aboriginal communities affected by the project.

The information of this book will be used to describe the legal framework of the duty to consult and the environmental assessment process, and to describe the integrated processes performed in the mining projects described for Canada.

- Newman, Dwight, *Revisiting the Duty to Consult Aboriginal Peoples*, rev. ed (Saskatoon: Purich Publishing Ltd, 2014)

Newman explores the duty to consult beyond the legal framework set by the Supreme Court in *Haida*, *Taku River* and *Mikisew Cree*.² He deepens in the characteristics of the duty to consult by rising some of the questions that have not yet been answered by the Court, like the duty to consult in legislative action, which is a right granted by the *United Nations Declaration on the Rights of Indigenous Peoples*.³ He criticizes the some of the approaches given by the Supreme Court, and deepens in the explanation of others.

² *Haida Nation v. British Columbia*, [2004] 3 SCR 511 [*Haida*], *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 SCR 550 [*Taku River*], and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 [*Mikisew Cree*].

³ *Declaration on the Rights of Indigenous Peoples*, 13 September 2007, UNTS 61/295 at A 19.

It is useful because of the description of relevant aspects of the duty to consult, such as the scope, which is an essential part in the description that will be made in Part One of the thesis.

- Noble, Bram, *Learning to Listen: Snapshots of Aboriginal Participation in Environmental Assessment*, 1st ed (Ottawa: MacDonald-Laurier Institute, 2016)

Noble describes eight examples of environmental assessment processes that incorporated elements of the duty to consult, before seeking approval for the development of the proposed projects. He encourages to the project proponents to engage as early as possible with local communities and Aboriginal peoples, because they will most likely build good relationships with Aboriginal peoples.

This book will be one of the most relevant guides for describing the mining projects in Part two of the research. It contains information of the projects, names of the proponents, actions taken and outcomes.

- Saleem, Ali, *Mining, the environment and indigenous development conflicts*, 1st ed (Reno: University of Nevada Press, 2003).

This study made in the early 2000's describes four mining projects in North America, and exposes the way how Impact and Benefit Agreements [IBAs] were negotiated between the proponents and Aboriginal peoples in those projects. One of the main conclusions is that negotiating this type of agreements could help to overcome social disputes.

This book is the starting point for describing the actions that project proponents can take beyond the law. The examples given by Saleem will help to explain how some of the described projects in Canada and Ecuador have negotiated similar agreements with Aboriginal peoples.

SECONDARY SOURCES: ARTICLES

- Findlay, Caroline, “Canadian Aboriginal Rights and Mineral and Energy Development: Risks and Related Strategies” (2010) 56:5B Rocky Mt. Min. L. Inst.

This article is divided in two parts. The first one is a description of the principles of the duty to consult outlined in *Haida*, *Taku River* and *Mikisew Cree*. The second part relates to the legitimation of Aboriginal peoples to sign IBAs and the nature of such agreements, which are to be considered of private nature, and report mutual benefits to the parties. These contracts are used to obtain a social license.

The content of this article is useful for describing the elements engaged by project proponents beyond the law, as they are not prescribed by any regulation. This will support the ideas to be explained in Part Three of the thesis.

- Knox, D. Anthony & Thomas Isaac, “The Crown’s duty to consult and accommodate Aboriginal people: The Supreme Court of Canada’s decisions in *Haida Nation v. B.C.* and *Weyerhaeuser and Taku River Tlingit First Nation v. B.C.* (2005) 10A International Mining Law and Investment in Latin America and the Caribbean.

Knox & Isaac describe the duty to consult principles outlined in *Haida* and *Taku River*. They use a doctrinal review methodology for explaining some of the most relevant features of the principles outlined by the Supreme Court in these cases. They deepen in the description of the principle set in *Taku River* about the possibility to undertake consultation in the environmental assessment process.

This article will help in describing the legal framework of the duty to consult in Canada, in Part One of the thesis.

- Paz Durini, Jorge, “Social License in Developing Countries” (2008) 54:25 Rocky Mt. Min. L. Inst. 25-2.

This is one of the few articles written in Ecuador about mining law. This article addresses the concept of “*social license to operate*” this is, a consent of Indigenous peoples to allow mining activities in their traditional lands. He describes the involvement that communities normally have in mining projects in South America and explores the outcomes of prior consultation in countries like Peru and Chile.

This book will be useful for describing the background and idiosyncrasy of some Indigenous peoples in South America. This information will be considered in the description of the mining projects in Ecuador, in Part Two of the research.

- Prno, Jason & Scott Slocombe, “Exploring the origins of ‘social license to operate’ in the mining sector: Perspectives from governance and sustainability theories” (2012) 37:3 Resources Policy 346.

The authors explain the meaning of the social license to operate, describing it as an implicit approval of the communities affected by a mining project, without grievances or disputes. One of the conclusions that the authors reach is that such license is obtained normally after the community and the project proponent agree on economic benefits and share of profits from the mining activities.

These ideas will be used and described in Part Two of the research, when describing the mining projects in Canada, as well as in Part Three, to identify the elements to be considered beyond the law.

- Prno, Jason, “An analysis of factors leading to the establishment of a social licence to operate in the mining industry” (2013) 38:4 Resources Policy 577.

Continuing with the study of the concept “social license to operate”, in this article the author explores the five main factors that lead to the granting, or not, of social license. These five factors are inferred after analyzing the social relationships of four mining

projects around the world (Alaska, Canada, Peru and Papua New Guinea). The most relevant conclusion is that economic benefits to local communities is perhaps the most relevant factor that leads to the granting of the social license to operate.

The information in this article will be useful to explain the concept of the social license to operate in Part Three of the thesis, while describing the most relevant elements to be considered by mining companies beyond the law.

- Tsuji, Leonard & Elise Ho, “Traditional environmental knowledge and western science: in search of common ground” (2002) 22:2 The Canadian Journal of Native Studies 327.

This article describes the importance of integrating “*traditional knowledge*” in the early planning stages of projects. The authors encourage project proponents to develop their projects in a joint effort with Aboriginal communities because the knowledge they have about their lands and ecosystems could potentially benefit the final design and operation of the project, and could minimize environmental and social impacts.

The concept of traditional knowledge will be analyzed and incorporated in Part One of the thesis, when describing the environmental assessment process, and will be referred to in Part two, when describing the mining projects for Canada.

SECONDARY SOURCES: REPORTS

- Centre for Indigenous Environmental Resources, *Meaningful Involvement of Aboriginal peoples in Environmental Assessment – Final Report* (Winnipeg: CIER, 2009).

This is a report that analyzes three major projects: one non-metallic mining project, one metallic mining project and one pipeline project across Canada. The analysis leads to the conclusion that early engagement with Aboriginal communities is essential in building a

good relationship between project proponents and Aboriginal peoples. This early engagement could be beneficial if it considers the concerns of the community and addresses them properly.

This information will reinforce the legal framework description of the duty to consult and the environmental assessment for Canada, which will be described in Part One of the thesis.

- Lundin Gold Inc., *2015-2016 Sustainability Report. Building the future through responsible mining*, online
<http://www.lundin角度.com/i/pdf/governance/mds_lundin角度_2015-2016_spread.pdf>

This document describes the overall status and achievements accomplished by Canadian *Lundin Gold Inc.*, owner and operator of the most relevant mining project in Ecuador at the moment (Fruta del Norte) in 2015-2016. This report includes sustainability practices, engagement with the community and milestones reached in the project on those years. There is a section of the report which describes some of the agreements made with the community affected by the project, and additional projects executed with local communities, such as the construction of infrastructure, etc.

This is a very relevant document for the research, as it provides information about the project and actions taken that have put this project under way without any grievance from the Indigenous communities. This information will be useful for the description to be made in Part Two of the thesis.

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*Domestic Violence and Access to Justice Project: The Unique and Troublesome Space of
Indigenous Women in the Law of Domestic Violence*

ANNOTATED BIBLIOGRAPHY

ELYSA DARLING

December 8, 2017

My LLM research focuses on the access to justice issues faced by Indigenous women experiencing domestic violence. My research supports the Social Sciences Humanities and Research Council funded Domestic Violence and Access to Justice Within and Across Multiple Legal Systems Project. The Project aims to address four questions: what are the access to justice problems that arise in domestic violence cases within and/or across the civil, family, child protection, immigration and social welfare systems?; how do these problems differ depending on the substantive laws, policies, justice system services, legal processes and practices across different jurisdictions?; how do these problems differ according to the social location of the victims, perpetrators and other family members?; and what insights do the findings provide for systemic reform? More specifically, my research will address these questions in the context of Indigenous communities by examining the unique legal and socio-economic issues Indigenous women face and how these issues shape their experiences with domestic violence and the justice system.

These questions will be answered by combining doctrinal legal research methods with qualitative interviews in four jurisdictions across Canada: Prince George, Lethbridge, Saskatoon, and Toronto. My qualitative research will be focused in Lethbridge, due to its rural location and substantial Indigenous population.

LEGISLATION

Child, Youth and Family Enhancement Act, RSA 2000, c C-12.

Constitution Act, 1867, 30 & 31 Vict, c 3.

Criminal Code, RSV 1985, c C-46.

Family Homes on Reserves and Matrimonial Interests or Rights Act, SC 2013, c 20.

Family Law Act, SA 2003, c F-4.5.

Indian Act, RSC 1985, c I-5.

Protection Against Family Violence Act, RSA 2000, c P-27.

Protection Against Family Violence Regulation, Alta Reg 80/1999.

JURISPRUDENCE

Bradfield v Brydges, 2016 BCSC 189 (CanLII).

Derrickson v Derrickson, [1986] 1 SCR 285, 1986 CanLII 56.

Droit de la famille-162829, 2016 QCCS 5685 (CanLII).

McMurter v Mcmurter, 2016 ONSC 1225 (CanLII).

Paul v Paul, [1986] 1 SCR 306, 1986 CanLII 57.

Poitras v Khan, 2016 SKQB 346 (CanLII).

SECONDARY MATERIALS: MONOGRAPHS

Bopp, Michael; Judie Bopp & Phil Lane jr. *Aboriginal Domestic Violence in Canada* (Ottawa: Aboriginal Healing Foundation, 2003).

This cross-Canada study reviewed the existing research and program literature on Indigenous domestic violence and abuse more generally. It also includes a comprehensive review of Indigenous approaches to healing from the impacts of trauma and abuse, and an in-depth consultation and analysis process with selected practitioners and experts. It provides a substantive overview of domestic violence in aboriginal communities by assessing the root causes of domestic violence, the determinants of it occurring, the responses to date, and a framework that addresses the complexity of family violence in aboriginal communities. This study and its recommendations will allow me to understand how prevalent domestic violence is and how the experiences of indigenous peoples vary from non-indigenous peoples. The review of current responses and programs will be helpful in determining if non-legal solutions are more effective in

detering intimate partner violence. Though the Aboriginal Healing Foundation, the commissioner of the report, is no longer in existence, the Foundation's approach to holistic-problem solving will be helpful in determining the non-legal methods that can contribute to a solution.

Brownridge, Douglas A. & Shiva S. Hall. *Explaining Violence against Women in Canada* (Maryland: Lexington Books, 2001).

Dodge, Amanda. "Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations" (Toronto: Canadian Bar Association's Access to Justice Committee, 2013).

This Report, prepared for the Canadian Bar Association's Access to Justice Committee, developed a community-consultation framework that allowed the Committee to proceed with interviews in an ethical and respectful manner by being inclusive and culturally respectful. The Committee partnered with community based organizations and legal aid offices to conduct thirteen community consultations in Calgary, Saskatoon, Toronto, Montreal and the Maritimes. The interviewees were low-income adults and youth, racialized groups, single mothers and people with disabilities. The excerpts from the interviews will be used to illustrate how domestic violence victims and Indigenous women struggle to obtain justice, and how their notions of justice are not always aligned with the legal system's notion of justice. The Committee's aim is to identify a conceptual framework of access to justice that places litigants and their experiences at the centre, which aligns with my approach in determining the best resolutions for Indigenous women experiencing domestic violence.

Dready, Kimberly. "Moving Toward Safety: Responding to Family Violence In Aboriginal and Northern Communities of Labrador" (Provincial Association Against Family Violence, 2002).

Green, Joyce, ed. *Making Space for Indigenous Feminism* (Nova Scotia: Fernwood Publishing, 2007).

Hargreaves, Allison. *Violence Against Indigenous Women* (Waterloo: Wilfred Laurier University Press, 2017).

Ladner, Keira L. & Myra J. Tait, eds. *Surviving Canada: indigenous peoples celebrate 150 years of betrayal* (Winnipeg: ARP Books, 2017).

Linklater, Renee. *Decolonizing Trauma Work* (Nova Scotia: Fernwood Publishing, 2014).

Linklater works with Indigenous healthcare practitioners to provide an overview of Indigenous notions of wellness and wholistic health, critiques of psychiatry and psychiatric diagnoses, and Indigenous approaches to helping people through trauma, depression and experiences of parallel and multiple realities. In comparing Western and Indigenous approaches to trauma, Linklater provides practical methods for those working with traumatized people to identify and address their colonial roots by adopting tools to work with Indigenous peoples in a culturally sensitive way. This method will assist us in developing our research questions in an ethical and sensitive matter, considering the trauma experienced by some of our subjects.

Macklem, Patrick. *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto press, 2001).

McGillivray, Anne & Brenda Comaskey. *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999).

The interviews in this book were originally done in support of the *Report of the Aboriginal Justice Inquiry of Manitoba*, vol I, *The Justice System and Aboriginal People*. This book provides the stories of the twenty-six women included in the original report and expands upon the criminal justice context, considering how the Canadian justice system and indigenous traditions may contribute to a solution to the pervasive violence. The interviews were structured in an open-ended format that aimed to heal and empower the victims of domestic violence. The data itself is

outdated and likely unsuitable given that new legislation has been passed in Manitoba dealing with domestic violence. However, the interviews are useful in assessing the effectiveness of the questions asked and the data obtained from the open-ended interview format. This will provide us with a helpful starting point when constructing our own questions. Further, the grievances of the women interviewed may still be relevant due to the inapplicability of provincial legislation and domestic violence provisions of *FHRMIRA* on reserve. This approach is a useful contrast to the study on socio-economic ‘risk markers’ by Brownridge in his article “Male Partner Violence Against Aboriginal Women in Canada: An Empirical Analysis”, as it considers the individual experience of each woman.

Reinharz, Shulamit. *Feminist Methods in Social Research* (New York: Oxford University Press, 1992).

Suzack, Cheryl et al, eds, *Indigenous Women and Feminism* (Vancouver: UBC Press, 2010).

Ursel, Jane; Leslie M. Tutty & Janice Lemaistre, eds, *What’s Law Got To Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (Toronto: Cormorant Books Inc, 2008).

This collection of essays provides a full account of Canada’s approach to domestic violence in both the civil and criminal systems, with detailed summaries and critiques of the different court structures implemented across the country. Though the data relied upon is dated (published in 2008), the review of the specialized courts provides an in-depth overview as to how these court structures operated and the purpose of their varying structures. Specifically, the chapter focusing on Alberta will be particularly useful given the scope of our jurisdictional focus in Lethbridge. This chapter discusses some of the Alberta-specific challenges that the HomeFront and specialized domestic violence courts are dealing with. This information is helpful in determining whether or not the existing provincial structures are operating successfully, and what, if anything could be done to assist indigenous women in this context.

Ursel, Jane. "Over policed and under protected: A question of justice for aboriginal women" in Mary Ruclos Hampton and Nikki Gerrard, eds, *Intimate Partner Violence: Reflections on experience, theory and policy* (Toronto: Cormorant Books, 2006) 80.

SECONDARY MATERIALS: ARTICLES

Brownridge, Douglas A. "Male Partner Violence Against Aboriginal Women in Canada: An Empirical Analysis" (2003) 18:1 *Journal of Interpersonal Violence* 65.

The author sets out to determine, through an empirical analysis of several 'risk markers' (substance abuse, common-law living, et cetera) why indigenous women are more likely than non-indigenous women in Canada to experience intimate partner violence. The study concludes that the risk markers are not only accurate, but that indigenous women possess a greater representation of these risk markers which means they have a higher likelihood of experiencing violence. Though this article is dated (published in 2003), these risk markers are representative of the difficult socioeconomic challenges of indigenous communities. Thus, these markers are likely still relevant and will contribute to a better understanding of the root causes of domestic violence for my thesis. The methodological approach taken can be critiqued for its failure to account for the individual experience of these women, and how their experiences have been shaped by colonial and patriarchal power imbalances.

Busby, Karen; Jennifer Koshan & Wanda Weigers. "Civil Domestic Violence Legislation in the Prairie Provinces: A Comparative Legal Analysis" in Jane Ursel, Leslie M. Tutty & Janice leMaistre, eds, *What's Law Got To Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (Toronto: Cormorant Books Inc, 2008) 197.

This chapter reviews the civil legislation enacted by Alberta, Saskatchewan and Winnipeg aimed at increasing access to civil remedies for domestic violence victims. It discusses the legislation dealing with protection orders, the usage rates of these remedies, and how these varying systems may help explain the divergence in usage that have been observed across the

Prairie provinces. The authors are academics that specialize in domestic violence. Though their review does not specialize in Indigenous communities, it does provide an opinion that emergency protection orders apply on reserve. This chapter provides me with an overview of how the legislation in Alberta functions, and a counter-argument to my constitutional analysis.

Dickson-Gilmore, Jane. "Whither restorativeness? Restorative justice and the challenge of intimate violence in aboriginal communities" (2014) 56:4 Can J Corr 417.

Donnelly, Denise A. et al. "White Privilege, Color Blindness, and Services to Battered Women" (2005) 11:1 Violence Against Women 6.

Farrow, Trevor. "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957.

Farrow is a legal academic focusing on legal process and dispute resolution. This article summarizes the findings of a major study he led over an eight-month period in which ninety-nine people were interviewed in public locations in Toronto, Brampton and Mississauga to determine their views on the legal system. Farrow's article touches on the traditional access to justice conceptual framework that primarily focuses on access to courts and tribunals. He argues that attempts to fix the access to justice problem have been unsuccessful because they have failed to address the issue from the perspective of those facing it. Farrow's position on this aligns with my research's focus on the ways in which government tries to increase Indigenous communities' access to justice, while failing to realize that this may not be what the community desires.

Gillis, Joseph Roy, et al. "Systemic Obstacles of Battered Women's Participation in the Judicial System: When Will the Status Quo Change?" (2006) 12:12 Violence Against Women 1150.

MacTaggart, Stacey L. “Lessons from History: The Recent Applicability of Matrimonial Property and Human Rights Legislation on Reserve Lands in Canada” (2016) 6:2 UWOJ Leg Stud 3 online:< <http://ir.lib.uwo.ca/uwojls/vol6/iss2/3>>.

This article reviews the *FHRMIRA* legislation and provides possible post-separation outcomes that may arise due to this legislation, arguing that these outcomes are no different than the historical challenges Indigenous women have faced in seeking protection. The author uses the ruling in *Tsilqot'in* to argue that the interjurisdictional immunity doctrine is no longer available as a method of thwarting provincial law on reserve. Written in 2016, this argument is now out of date as recent case law in British Columbia has held that *Tsilqot'in*'s limiting of the IJI doctrine is only applicable in cases of aboriginal title. MacTaggart's article will be used to address this counter-argument in my IJI analysis. This article has been used to source many of the reports and articles I have relied on in discussing matrimonial real property and the federal legislation.

Mosher, Janet, “Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by their Intimate Partners” (2015) 32:2 Windsor Y B Access to Justice 149.

Mosher's article analyzes how access to justice must speak meaningfully to the circumstances of women experiencing domestic violence because of the heightened barriers they experience in accessing the justice system. Mosher identifies three inter-related phenomena that contribute to these difficulties: understanding of domestic violence as incident-based; failure to restrict men's strategic use of legal systems to further their power; and the complexity and confusion that arises when women are required to navigate multiple and opposing legal systems. Mosher argues that to deal with these phenomena we need to conceptualize access to justice as placing women's safety and well being at the centre. Mosher is one of the co-investigators of the Project my LLM is apart of. Her work in this area is distinct from the academic discourse that

conceptualizes access to justice from the viewpoint of vulnerable or marginalized peoples because of its focus on how the justice system perpetuates the violence women experience at the hands of their partners.

Poon, J; M. Dawson & M Morton, “Factors increasing the likelihood of dual and sole charging of women for intimate partner violence” (2012) 20:12 *Violence Against Women* 1447.

Turpel, Mary Ellen. “Home/Land” (1991) 10:1 *Cdn J of Family L* 17.

Turpel examines the colonial legal structure imposed upon Indigenous peoples in Canada through two Supreme Court of Canada cases: *Derrickson v Derrickson* and *Paul v Paul*. Both cases are examined in my thesis chapter dealing with matrimonial real property on reserve. Turpel’s analysis of the case not only argues the legal ramifications of the decisions for Indigenous people on reserve, but she also situates these legal ramifications within the broader, colonial and patriarchal context that Indigenous women exist in. In doing so, she demonstrates that the violence experienced by Indigenous women, their vulnerable socio-economic standing and their inability to access meaningful forms of justice are inter-connected. This article lays the foundation for my analysis of the law on matrimonial real property on reserve and its effects on domestic violence victims.

Tutty, Leslie M. & Jennifer Koshan, “Calgary’s Specialized Domestic Violence Court: An Evaluation of a Unique Model” (2013) 50:4 *Alberta L Rev* 731.

OTHER MATERIALS

Darling, Elysa. “Landlords, Tenants, and Domestic Violence: The *Family Homes on Reserves*

and Matrimonial Interests or Rights Act” (30 October 2017, Ablawg (blog), online:<
<https://ablawg.ca/2017/10/30/landlords-tenants-and-domestic-violence-the-family-homes-on-reserves-and-matrimonial-interests-or-rights-act/>>).

This post reviews the *Family Homes on Reserves and Matrimonial Rights or Interests Act* and its implications for protection orders. The post is part of a larger series dealing with landlords, tenants and domestic violence written by Jennifer Koshan and Jonnette Watson-Hamilton that now make up an ebook resource. As the chapter in my thesis deals directly with these issues, much of the research and conclusions that I rely on originate in this post. I will refer to it to ensure that I give credit to the original analysis.

Assembly of First Nations, “Matrimonial Real Property on Reserves: *Our Lands, Our Families, Our Solutions*” (2006) online< <http://www.afn.ca/uploads/files/mrp/mrp-handbook.pdf>>.

Cornet, Wendy & Allison Lendor. “Discussion Paper: Matrimonial Real Property on Reserve” (Ottawa: Women’s Issues and Gender Equality Directorate of the Department of Indian Affairs and Northern Development, 2002).

The Women’s Issues and Gender Equality Directorate of the Department of Indian Affairs and Northern Development (INAC) commissioned this report in 2002, prior to the enactment of the federal on reserve matrimonial property legislation. The report provides an overview of the issues and challenges in dealings with matrimonial real property on reserve. This report will help me better understand what the government considered the central issues that the legislation needed to address. Further, it may prove useful in ascertaining the intent behind the domestic violence provisions, and how the government envisioned these provisions applying. This source will be a useful contribution to my review of Hansard evidence, parliamentary transcripts and consultative reports leading up to the enactment of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* legislation.

Fagan, Catherine. *Report: First Nations Law-Making & Implementation Experience when*

enacting Matrimonial Real Property Laws under the Family Homes on Reserves and Matrimonial Interests or Rights Act (Curve Lake, Centre of Excellence for Matrimonial Real Property, 2017).

This report was commissioned by the Centre of Excellence for Matrimonial Real Property (COEMRP), the national NGO tasked with assisting First Nations communities in implementing matrimonial real property laws under the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. The COEMRP requested that the report review the law-making and implementation experiences of those First Nations who have enacted matrimonial real property laws and to meet with their community members involved in the drafting, ratification and implementation of those laws. The report summarizes each area with a ‘lessons learned’ and ‘best practices’ assessment. The Report is useful because it is the most thorough review of First Nations’ first-hand accounts to how they’ve engaged with the legislation. It indicates that the Nations who have chosen to enact laws under the *FHRMIRA* are struggling, and that this is likely indicative of a broader problem. Most importantly, it identifies the frustrations of several communities that are unable to access emergency protection orders due to the provincial and territorial government’s failure to designate judges. It notes that emergency protection orders and exclusive occupation orders under *FHRMIRA* have not been used on any reserve. This is the most up to date and relevant information on the *FHRMIRA* legislation and is the only source of first-hand feedback on the legislation following its enactment that I have been able to locate.

Federal-Provincial-Territorial Ad Hoc Working Group on Family Violence, *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems* (Ottawa: Department of Justice Canada, 2013).

Government of Canada. “Action Plan to Address Family Violence and Violent Crimes Against Aboriginal Women and Girls” (Ottawa: Government of Canada, 2014).

HomeFront Society for the Prevention of Domestic Violence, *Building a Comprehensive*

Response to Family Violence in Aboriginal Communities (Ottawa: National Crime Prevention Centre, 2014).

Lamontagne, Manon. “Violence Against Aboriginal Women: Scan and Report” (Toronto: Canadian Women’s Foundation, 2011).

National Aboriginal Circle Against Family Violence, Assembly of First Nations: Action Plan to Address Violence and Violent Crimes Against Women and Girls (Ottawa: Government of Canada, 2014).

National Aboriginal Initiative. “Honouring the Strength of Our Sisters: Increasing Access to Human Rights Justice For Indigenous Women and Girls” Summary Report of the 2013 and 2014 Aboriginal Women’s Roundtable Process (Canadian Human Rights Commission) online: < https://www.chrc-ccdp.gc.ca/sites/default/files/roundtable_summary_report_eng_0.pdf >

Native Women’s Association of Canada (NWAC) project “You Are Not Alone” online: <<https://www.nwac.ca/policy-areas/violence-prevention-and-safety/you-are-not-alone/>>.

Neilson, Linda. “Enhancing Civil Protection in Domestic Violence Cases: Cross-Canada Checkup (Fredericton: Muriel McQueen Ferguson Centre for Family Violence Research, 2015).

Neilson reviews the civil remedies available in cases of domestic violence across Canada and connects conclusions drawn from her research on domestic violence to case law and statutes. Neilson reviews the principles behind civil protection remedies. The considerations in granting emergency protection orders, restraining orders and exclusive occupation orders are reviewed. Despite the thoroughness of Neilson’s approach, there is almost nothing on the enforceability of civil legislation on reserve, except for brief mentions of the *Family Homes on Reserves or Matrimonial Rights or Interests Act*. The Report also acknowledges that First Nations have continuing problems with authority to offer and enforce some types of remedies on First Nations reserves. This source provides significant insight into provincial legislation and the processes that it creates. It provides further proof that Indigenous women’s experience on reserve are different than women who live off reserve, and has not yet been sufficiently analyzed.

Stratton, Mary. "Alberta Legal Services Mapping Project: An Overview of Findings from the Eleven Judicial Districts" (Canadian Forum to Civil Justice, 2011).

Truth and Reconciliation Commission of Canada. "Calls to Action" 4, online:<
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UNIVERSITY OF CALGARY

FACULTY OF LAW

LAW 703 GRADUATE SEMINAR IN LEGAL RESEARCH AND METHODOLOGY

BIBLIOGRAPHY: SECONDARY SOURCES AND ANNOTATIONS

MAJOR RESEARCH PROJECT

CETA to the rescue:

As the fate of NAFTA is up in the air, could a national cap-and-trade system benefit Canada in light of the coming into force of CETA and its investment provisions?

BY

ADRIANA DA SILVA BELLINI

DECEMBER 8, 2017

BIBLIOGRAPHY: SECONDARY SOURCES AND ANNOTATIONS*

**Note: All primary sources are attached to the Restated Research Proposal. Furthermore, the mention “repeated” next to a source below indicates that it is the second time it appears in this bibliography, as it is relevant under more than one subject heading.*

Summary of Research Project

Examining the legal and policy components of the fight against climate change implicates economic, social, political, technological, and environmental considerations. International trade and investment agreements affect the ability to carry out climate policies locally, and they amplify the influence that a country’s climate policies may have on one another. Recent international trade news such as the intended renegotiation, termination or abandonment by the United States of trade agreements, such as the North American Free Trade Agreement (NAFTA) and the Trans-Pacific Partnership Agreement (TPP), and the recent coming into force of the Comprehensive Economic and Trade Agreement (CETA) between Canada and European Union, will have an unprecedented impact on Canada. These trade agreements all include investment protection provisions and Investor-State Dispute Settlement mechanisms. These mechanisms permit investors and private companies to sue host governments for violation of these investor protection standards. Indeed, domestic regulatory autonomy may be threatened by these provisions, and as such, they may affect a country’s ability to implement climate friendly policies and emission reduction measures.

The potential for harmonizing and linking climate policies both within Canada and abroad has become increasingly important recently for two reasons. First, the Paris Agreement came into force in November 2016, and a substantial number of countries have included market mechanisms in their domestic plans to contribute to climate change mitigation efforts.¹ Second, the federal government’s *Pan-Canadian Framework on Clean Growth and Climate*² requires all jurisdictions to set a price on carbon by 2018. Existing provincial climate policies include carbon taxes, levies, and emissions trading through cap-and-trade schemes. Such decentralized policies lead to uneven carbon prices across the country, and emissions reductions are not occurring where they would be achieved most efficiently and at the lowest possible cost.

As such, this research proposes to examine the intersection of the Investment provisions in CETA, and the potential for a Canadian carbon market, as a way to address the increasingly urgent problem of global warming caused by anthropogenic emissions of greenhouse gases.

¹ “IETA INDC Tracker”, International Emissions Trading Association, Last visited 2017-11-02, online: <<https://t.co/NZF56HdeRB>>.

² Canada: *Pan-Canadian Framework on Clean Growth and Climate Change: Canada's Plan to Address Climate Change and Grow the Economy* (2016).

Climate Change Law and Policy

Monographs

Bodansky, Daniel M., Jutta Brunnée & Lavanya Rajamani. *International Climate Change Law* (Oxford: Oxford University Press, 2017).

This is the most recently published book that includes a thorough presentation of the Paris Agreement, and also the first to refer to the impact of the recent American election, both of which are relevant to my research. The authors Daniel Bodansky and Jutta Brunnée are very well known and respected in academia and have abundant literature in international climate change law. Their tone is neutral and explanatory. As such, their writing was often included in mandatory class readings by several professors I have had both at the University of Calgary and Dalhousie University. This book includes a general overview of the international climate change regime, namely the UNFCCC, the Kyoto Protocol, the Paris Agreement, as well as a section discussing the relationship between climate change and trade through the WTO. Research on these topics is necessary for me to gain sufficient general knowledge and background information to serve as the basis of my paper. The currency and reliability of this secondary source make it particularly useful. Lastly, the book addresses the conflict between unilateral and multilateral measures in matters of international climate change law, which is an issue I will need to address and keep in perspective throughout my paper.

Changing Climates in North American Politics: Institutions, Policymaking, and Multilevel Governance, Henrik Selin & Stacy D. VanDeveer, eds, (Cambridge, MA: The MIT Press, 2009).

Climate Change and the Law, IUS Gentium: Comparative Perspectives on Law and Justice, Erkki J. Hollo, Kati Kulovesi & Michael Mehling, eds, vol 21 (New York: Springer Dordrecht Heidelberg, 2013) 419. (repeated)

Climate Change: International Law and Global Governance, Oliver C. Ruppel, Christian Roschmann & Katharina Ruppel-Schlichting, eds, *Legal Responses and Global Responsibility*, vol I (Baden-Baden, DE: Nomos Verlagsgesellschaft, 2013).

Climate Change Policy in North America: Designing Integration in a Regional System, Neil Craik, Isabel Studer & Debora VanNijnatten, eds, (Toronto: University of Toronto Press, 2013).

Condon, Bradley J. & Tapen Sinha. *The Role of Climate Change in Global Economic Governance* (Oxford: Oxford University Press, 2013).

Doelle, Meinhard. *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law*, (Toronto: Thomson Carswell, 2005).

This book presents good general overview of the international environmental law regime as it applies to climate change. It is however somewhat out-dated as it was published prior to start of the Kyoto compliance periods, and prior to the drafting of the Paris Agreement. Chapter 5 is particularly relevant to my research paper as it addresses the role of international trade and its impact on the climate change regime, along with its potential to motivate action on climate change, through an analysis of the developments within the

WTO. While the book does not focus the discussion directly on investment law itself, understanding the relationship between trade and the climate change regime generally, from the perspective of a specialist in international climate change law, is important to allow me to build the necessary foundation of knowledge required to effectively carry out my research. The author is a Canadian law professor at Dalhousie University. He was my professor for the international climate change law class I took, and as a professor he always used a neutral approach and tone, and exposed multiple sides of an issue. However, as a climate change law professor, his ultimate goal of mitigating climate change and reducing emissions of GHG, rather than benefit trade, must not be overlooked.

Durrant, Nicola. *Legal Responses to Climate Change* (Sydney: Federation Press, 2010).

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Mahony, Dennis *et al.* *The Law of Climate Change in Canada* (Toronto: Canada Law Book, 2014) (loose-leaf supplement 9).

Turmel, André. *Annotated Climate Change Statutes and Regulations in Canada*, loose-leaf 2013 release 4 (Toronto: Carswell, 2010).

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Metcalf, Cherie. “Climate Law in Canada: International Law's Role Under Environmental Federalism” in *Forum Topic: The Impact of International Law on Canadian Law*, (2014) 65 UNBLJ (University of New Brunswick Law Journal) 86.

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Marcu, Andrei. “Carbon Market Provisions in the Paris Agreement (Article 6)” January 2016, Policy Report no 128 Centre for European Policy Studies, (CEPS) Brussels. Online: <<https://www.ceps.eu/publications/carbon-market-provisions-paris-agreement-article-6>>.

Bodansky, Daniel M. *et al.* “Facilitating linkage of heterogeneous regional, national, and sub-national climate policies through a future international agreement,” Harvard Project on International Climate Agreements, Faculty Research Working Paper Series (Cambridge, Mass.: Harvard Project on Climate Agreements, November 2014).

Cameron, Anna & Trevor McLeod. “Patchwork Pollution Solution: Stitching Together a Canadian Climate Plan” (July 2015) Calgary: Canada West Foundation, Centre for Natural Resources Policy. (repeated)

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Lambert Schneider, Anja Kollmuss & Stephanie La Hoz Theuer, “Ensuring the environmental integrity of market mechanisms under the Paris Agreement” (2016) Policy Brief, Stockholm Environment Institute. Online: <http://sei-us.org/Publications_PDF/SEI-PB-2016-Market-mechanisms-Paris-Agreement.pdf>.

“The Paris Agreement”, United Nations Framework Convention on Climate Change, Last visited: 2017-11-02, online: <http://unfccc.int/paris_agreement/items/9485.php>.

“United Nations Framework Convention on Climate Change”, UNFCCC, Last visited: 2017-11-02, online: <<https://cop23.unfccc.int/>>.

“Climate Change”, Government of Canada, (date modified: 2017-10-12), Last visited: 2017-11-02, online: <<https://www.canada.ca/en/services/environment/weather/climatechange.html>>.

Constitutional Authority over GHG emissions

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Bélanger, Alexis. “Canadian Federalism in the Context of Combating Climate Change” (2011) 20:1 Constitutional Forum 21.

Chalifour, Nathalie J. “Making Federalism Work for Climate Change: Canada’s Division of Powers over Carbon Taxes” (2008) 22 Nat’l J. Const. L. (NJCL) 119.

Chalifour, Nathalie J. “Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax” (2016) 36 NJCL 331.

This is the most recent article on the topic of constitutional authority over GHG emissions that I have come across in my research so far. It is very detailed and very comprehensive. In my view, it carries substantial authority as the author’s previous writing on this topic was often referenced, and the article credits several known professors with review and comments. Due to its recency, it is the only scholarly article on this topic that addresses the federal government’s intention to put in place a *PanCanadian* price on carbon, as well as the post-Paris Agreement context, which considers Canada’s emission reduction targets under this Agreement (Canada’s NDC). The article is quite lengthy, and as such it presents an overview of the applicable science, Canada’s place within the international climate change regime (namely, the UNFCCC, Kyoto, and Paris) as well as a brief summary of each provinces climate policies. It considers the different policy options

available to the federal government regarding GHG emissions, and provides a comprehensive analysis of the legal and constitutional authority to carry out these options through five federal powers: spending power, POGG (emergency and national concern branches), declaratory power, criminal law power, taxation power, and trade and commerce. The analysis of the last federal power is particularly relevant to my research topic. The author makes clear that this article is presented as a legal analysis, and is based on applicable case law, rather than a political or a policy discussion. This is particularly interesting, as I must remain conscious of the risks that have been brought to my attention about steering my research into an overwhelmingly policy-oriented discussion. The article is also not intended to state a preference or make a recommendation as to whether provincial policies or federal policies are better or more efficient, just that there is ample constitutional authority for the federal legislature to enact the necessary laws to address GHG emissions. Lastly, the author does not argue against provincial authority, strictly that Parliament does have sufficient authority. As such, the tone is quite neutral.

Hogg, Peter W. “Constitutional Authority over Greenhouse Gas Emissions” (2009), 46:2 *Alta L. Rev.* 507.

Hsu, Shi-Ling & Robin Elliot. “Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions” (2009), 54 *McGill L.J.* 463.

Lucas, Alistair R. & Jenette Yearsley. “The Constitutionality of Federal Climate Change Legislation” (2012), 23 *JELP* 205.

Sheffield, Kai D. “The Constitutionality of a Federal Emissions Trading Regime” (2014), 4:1 *W. J. of Legal Stud.* 1.

Emissions Trading and Carbon Pricing

Monographs

Bogojević, Sanja. *Emissions Trading Schemes: Markets, States and Law* (Oxford: Hart Publishing, 2013).

This book provides an in-depth discussion of emissions trading schemes, the different models and the applicable legal framework. It also includes several chapters discussing the European Union’s Emissions Trading Scheme and the underlying legal regime.

Climate Change: A Guide to Carbon Law and Practice, Paul Q Watchman, consulting ed, (London: Globe Business Publishing Ltd, 2008).

Deatherage, Scott D. *Carbon Trading Law and Practice* (Oxford: Oxford University Press, 2011).

Emissions Trading for Climate Policy: US and European Perspectives, Bernd Hansjürgens, ed, (Cambridge: Cambridge University Press, 2005).

Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and beyond, David Freestone & Charlotte Streck, eds, (Oxford: Oxford University Press, 2009).

This book contains several chapters by different authors that are of use to my research as a detailed breakdown of carbon trading within the international climate change regime. Indeed, there are numerous chapters discussing the International market-based mechanisms developed through the Kyoto Protocol to address climate change, the nature of the legal ownership of carbon units, as well as case studies of specific domestic policies, such as the European Emissions Trading System. Chapter 4 specifically evaluates the implications of trade and investment on carbon trading for sustainable development. This chapter also looks at the relationship between international economic regimes and emission reductions. As the authors differ for each chapter, the legal frameworks and perspectives used to present the issues are quite varied and include regulatory, judicial, as well as economic and market design. Lastly, the texts are very detailed and the language used is quite technical and complex, as such, I may require more basic reading on certain topics before being able to fully utilize this source.

Massai, Leonardo. *European Climate and Clean Energy Law and Policy* (London: Earthscan, 2012).

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

Weishaar, Stefan. *Towards Auctioning: The Transformation of the European Greenhouse Gas Emissions Trading System: Present and Future Challenges to Competition Law*, in *Climate Change Law, Policy and Practice Series*, vol 2, Kurt Deketelaere, series ed, (Alphen aan den Rijn, NL: Kluwer Law International, 2009).

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Ahonen, Hanna-Mari, Aili Judström & Karl Upston-Hooper. “Carbon Markets and Flexible Mechanisms: The Battle to Reform Carbon Pricing Policies” (2017) 11:2 *Current Developments in Carbon Climate Law*, *Carbon & Climate Law Review* 150.

Alexeeva, Victoria & Niels Anger. “The globalization of the carbon market: Welfare and competitiveness effects of linking emissions trading schemes” (2016) 21 *Mitig Adapt Strateg Glob Change* 905.

Andresen, Steinar *et al.* “The Paris Agreement: Consequences for the EU and Carbon Markets?” (2016) 4:3 *Politics and Governance* 188.

Bodansky, Daniel M. *et al.* “Facilitating Linkage of Heterogeneous Regional, National, and Sub-National Climate Policies Through a Future International Agreement” (November 2014) *Faculty Research Working Paper Series*, Harvard Project On Climate Agreements, Harvard Kennedy School.

Fluker, Shaun. "A Comparison of Carbon Emission Trading Systems in New Zealand and Canada: Diversity is Not a Virtue in Carbon Law and Policy" (2015) 11:2 McGill JSDLP 219.

This article presents a comparison of trading systems in Alberta, Québec and New Zealand, their operation, effectiveness and linkage potential. Through such a comparative analysis, the particularities of each system are exposed and their impact demonstrated in a more practical and applicable manner. As a law professor, the author's discussion focuses on the legislative and regulatory framework, and the effect of such design features on actual emission reductions. Furthermore, the author concludes with an indication of which framework and features are superior in his view. This source will be useful to my research paper in many regards, namely in understanding the elements of carbon trading law and policy as well as the specific considerations relating to Canada necessary for the first part of my discussion. The detailed references will also be of great value.

Fluker, Shaun & Salimah Janmohamed. "Who Regulates Trading in the Carbon Market?" (2014) 26:2 JELP 83.

Kneteman, Christie J. "Building an Effective North American Emissions Trading System: Key Considerations and Canada's Role" (2010), 20 JELP 127.

Snoddon, Tracy. "Carbon Copies: The Prospects for an Economy-wide Carbon Price in Canada" (September 15, 2016) E-Brief, Energy and Natural Resources Policy C.D. Howe Institute, online: <https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/e-brief_247.pdf>.

This source presents a brief practical overview of the benefits and limitations to having a national carbon price in Canada, whether through federal policy, linkage or informal coordination of provincial policies. It addresses the relevant considerations and the pros and cons of each policy option: centralized federal policy, and decentralized interprovincial approach. The author discusses the importance of harmonization, and whether similar emission reduction targets between provinces is a necessary prerequisite for cooperation to be effective. The author also raises several interesting points that I had not considered on the effects of linking the carbon policies of a province like Alberta with Québec and California's cap-and-trade systems, or linking carbon tax policies with cap-and-trade regime. While it is somewhat out-dated because the federal government has just recently imposed a carbon price requirement that will take effect in 2018, the benefits of the policy and the considerations and implications of it remain relevant. It is important to keep in mind that this source presents a policy analysis, and not at all a legal one. However, the ideas are relevant and the political context must inevitably be kept in mind with issues such as climate change. The bibliography contained a lot of overlap with the sources I had already gathered, therefore the few I had not yet come across were valuable additions to ensure I am appropriately covering my bases.

Zaman, Peter. "Learning from the Lessons of Others: A Guide for Emerging Emissions Trading Markets" (2016) 3 CCLR 227.

This article present a brief overview of considerations and recommendations for emerging carbon markets based on an evaluation of the European Union Emissions Trading

Scheme. The relevance of this article is due to the fact that the evaluation is more recent and is therefore conducted within the setting of the Paris Agreement. However, the tone and the depth of the content make this article seem like it is not intended to address a more technical or academic legal audience. Nonetheless, it will still be useful in the first steps of my research when determining the basic considerations that will be relevant throughout my paper.

Courchene, Thomas J. & John R. Allan. “The Provinces and Carbon Pricing: Three Inconvenient Truths” (Dec 2008 - Jan 2009) *Policy Options*, Institute for Research on Public Policy 60. Available online: <<http://archive.irpp.org/po/archive/dec08/courchene.pdf>>.

Aldy, Joseph E., William A. Pizer & Keigo Akimoto. “Comparing Emission Mitigation Efforts across Countries” (2017) 17:4 *Climate Policy* 501.

Haites, Erik. “Experience with linking greenhouse gas emissions trading systems” (2016) 5 *WIREs Energy Environ* 246.

Haites, Erik & Michael Mehling. “Linking Existing and Proposed GHG Emissions Schemes in North America” (2009) 9:4 *Climate Policy* 373.

Keohane N., A. Petsonk & A. Hana. “Toward a club of carbon markets” in *Special Issue Alternate Structures for Global Climate Action: Building Blocks Revisited*, Richard B. Stewart & Bryce Rudyk, eds, (2015) 144 *Climatic Change* 81.

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Ranson, Matthew & Robert N. Stavins. “Linkage of Greenhouse Gas Emissions Trading Systems: Learning from Experience” (2015) 16:3 *Climate Policy* 284.

Shurtz, Nancy. “Carbon Pricing Initiatives in Western North America: Blueprint for Global Climate Change Policy” (2015–17) 7 *San Diego J. Climate & Energy Law* 61.

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Yam, Josephine Victoria. *Commodity or Currency: How Carbon Credits Should be Traded To Achieve Environmental Integrity in Linked Cap-and-Trade Schemes* (LLM Thesis, University of Calgary Faculty of Law and Faculty of Graduate Studies, 2016).

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Beugin, Dale *et al.* “Comparing Stringency of Carbon Pricing Policies” (July 2016, Updated Jan 2017) Montreal: Canada’s Ecofiscal Commission. Available online at: <http://ecofiscal.ca/reports/comparing-stringency-carbon-pricing/>.

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Cameron, Anna & Trevor McLeod. “Patchwork Pollution Solution: Stitching Together a Canadian Climate Plan” (July 2015) Calgary: Canada West Foundation, Centre for Natural Resources Policy.

European Commission, “The EU Emissions Trading System (EU ETS)”, online: https://ec.europa.eu/clima/policies/ets_en.

“IETA INDC Tracker”, International Emissions Trading Association, Last visited 2017-11-02, online: <https://t.co/NZF56HdeRB>.

Stavins, Robert N. & Robert C. Stowe, eds. “Market Mechanisms and the Paris Agreement” (Cambridge, Mass: Harvard Project on Climate Agreements, October 2017).

Western Climate Initiative, Inc., Last visited: 2017-11-02, online: <http://www.wci-inc.org/>.

World Bank, Ecofys & Vivid Economics. “State and Trends of Carbon Pricing 2017” (Washington, DC: World Bank, November 2017), available online: <https://openknowledge.worldbank.org/handle/10986/28510>.

World Bank Group. “Lessons Learned from Linking Emissions Trading Systems: General Principles and Applications” (2014) Technical Note 7, Partnership for Market Readiness.

Climate Change and International Trade

Monographs

Climate Change Policy in North America: Designing Integration in a Regional System, Neil Craik, Isabel Studer & Debora VanNijnatten, eds, (Toronto: University of Toronto Press, 2013). (repeated)

Particularly of interest: chapter 11 by Andrew Green “Trade Rules, Dispute Settlement, and Barriers to Regional Climate Cooperation.”

Epps, Tracey & Andrew Green. *Reconciling Trade and Climate: How the WTO Can Help Address Climate Change* (Cheltenham, UK: Edward Elgar Publishing, 2010).

This book looks to counter the idea that trade laws are detrimental to climate change mitigation policies, and even argues that they can reinforce each other. This book, along with the article by Anatole Boute, holds an opinion opposite to most other sources. This is essential for my research paper, as I must understand the different sides of each argument. One of the authors, Andrew Green, is a law professor at the University of Toronto and has several publications discussing the intersection between trade law and climate change. The book includes a presentation of several topics that remain foreign to me for now, but that I will need to understand in order have a complete picture of the discipline of international trade. These topics include Environmental Goods and Services and increasing their trade (Doha Agreement), the role of the Council for Trade in Services in Special Session, and the Committee on Trade and Environment in Special Session. This book also includes an extensive discussion of unilateral actions and multilateral solutions relating to climate change and trade. This is an interesting addition to the sources I have gathered on this topic as it analyses the impact of unilateral and multilateral action from the trade perspective rather than simply the environmental perspective as most of my other sources do.

Fickling, Meera & Jeffrey J. Schott. *NAFTA and Climate Change* (Washington: Peterson Institute for International Economics, 2011).

Inter-linkages: The Kyoto Protocol and the International Trade and Investment Regimes, W. Bradnee Chambers, ed, UNU Policy Perspectives vol 5 (New York: United Nations University Press, 2001).

While this book contains numerous discussions of topics that are relevant to my research, the range of topics is more impressive than the depth and extent of the analysis of each topic. The fact that the chapters in this book are written by different authors that also appear in other scholarly works in my bibliography reinforces the reliability of this source. Of these topics, one that is particularly interesting for my research is Jacob Werksman's analysis of the interaction between the WTO rules and the rules that govern emissions trading systems (chapter 7). The author is an international lawyer who is now principal advisor to the Directorate General for Climate Action of the European Commission. He has also contributed to articles in my bibliography regarding climate change and international investment rules. It would seem therefore that his contribution and insight would be quite valuable.

Other chapters (namely 5 and 8) discuss the relationship between the Kyoto Protocol and international trade and investment law. These chapters present the issues in the Kyoto Protocol that affect trade and that may be incompatible with the WTO and other trade agreements such as NAFTA and the European Union, as well as market regulations and the interaction between Kyoto's Clean Development Mechanism and the Multilateral Agreement on Investment, namely with regards to the investors and recipients of CDM projects.

As the book was published in 2001, though the Kyoto rules regarding the functioning of the Protocol and its market mechanisms for addressing climate change had mostly been established, the first compliance period only started in 2008. Therefore, the discussion is somewhat hypothetical rather than based on actual practical outcome. This was also published before EU ETS, which was put in place in order to comply with Kyoto commitments beginning in 2008. It remains a good start to my research as it addresses international investment regimes rather than simply trade rules like several of my other sources.

Kulovesi, Kati. “Climate Change and Trade: At the Intersection of Two International Legal Regimes” in Erkki J. Hollo, Kati Kulovesi & Michael Mehling, eds, *Climate Change and the Law*, IUS Gentium: Comparative Perspectives on Law and Justice, vol 21 (New York: Springer Dordrecht Heidelberg, 2013) 419.

This chapter discusses the “linkages between the United Nations Framework Convention on Climate Change and the World Trade Organization”, issues such as carbon leakage and competitiveness as well as potential ways the two organizations can cooperate and benefit from one another. This chapter may turn out to be slightly out-dated in certain regards considering, namely, that the Kyoto Protocol is no longer in effect. However, both the UNFCCC and the WTO remain important institutional players today and are both directly relevant to my major research paper. The chapter sets a good foundation for understanding the relation between the two institutions as well as between trade and climate change more generally.

Leal-Arcas, Rafael. *Climate Change and International Trade* (Cheltenham, UK: Edward Elgar Publishing, 2013).

This book begins with an overview of international legal instruments governing international environmental law generally, (such as CITES, the Basel Convention and the Montreal Protocol) which is important to understand as it provides insight into the development of the current legal regime for addressing climate change. One particularity of this book is that it discusses the implications of the top-down and bottom-up approaches to climate change and trade (part 3, chapter 6). This presents a very interesting perspective due to the fact that the difference between the two relevant international climate change agreements that has caused so much debate, and the reason the Paris Agreement was so ground breaking, is indeed that Kyoto was a top-down regime and Paris is a bottom up regime. As this new approach in Paris had a huge impact on the reach and universality of this new agreement, is it therefore quite relevant to understanding how this implicates the trade part of this analysis. The book also includes a chapter that focuses on regional trade agreements and climate change (chapter 7) by exposing the effects that regionalism has had on multilateralism, the decreased popularity of multilateral and international agreements, and the use of regional trade agreements to promote climate change mitigation. This analysis is extremely insightful following the recommendations I received from Professor Hubert on my research proposal.

The World Bank. *International Trade and Climate Change: Economic, Legal, and Institutional Perspectives*, (Washington, DC: The International Bank for Reconstruction and Development / The World Bank, 2008).

Sources developed and published through the World Bank have always been quite reliable as basic sources of information and statistics in research with international components. This source discusses a variety of topics that are relevant for the basic knowledge required for conducting my research, such as how climate change measures affect competitiveness, the implication of carbon leakage, the relationship between Kyoto and WTO, as well as the liberalization of trade in clean energy technologies. However, the discussion overall are quite short a present the issues quite briefly, as each topic discussed in just a few pages. Also, this source is not directly a legal analysis, it is a discussion encompassing economic and legal perspectives – lots of empirical evidence and charts and numbers and statistics, which may be interesting to look at current numbers should I realize that they are of value to my own research

Journals and Articles

Droege, Susanne *et al.* “The Trade System and Climate Action: Ways Forward under the Paris Agreement” (2017), 13:2 S.C. J. Int’l L. & Bus. 195.

Green, Andrew & Tracey Epps. “Is there a Role for Trade Measures in Addressing Climate Change?” (2008) 15:1 UC Davis Journal of International Law & Policy 1.

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Lewis, Joanna I. “The Rise of Renewable Energy Protectionism: Emerging Trade Conflicts and Implications for Low Carbon Development” (2014) 14:4 Global Environmental Politics 10.

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Thomas, Kevin & Brittany Stares. “Is Canadian trade association lobbying aligned with Canada’s Paris Agreement commitments?” Briefing Note (2017) Vancouver: Shareholder Association for Research & Education.

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Bell-Pasht, Kyra. "Treaty-Based Investor-State Arbitration and Canadian Environmental Governance" (2015), 27 J. Env. L. & Prac. 141.

Boute, Anatole. "The Potential Contribution of International Investment Protection Law to Combat Climate Change" (2009), 27:3 Journal of Energy & Natural Resources Law, 333.

This article discusses the investor protections found in investment treaties that are relevant to the issue of climate change, and references relevant arbitral tribunal decisions as well as NAFTA provisions. The presentation of the fair and equitable treatment standard and the principle of investor's legitimate expectations in the context of climate change regulation is particularly relevant to my research paper. The author is a law professor and presents sound justified arguments. The detail and extensive references to scholarly articles, arbitration decisions and treaty provisions, as well as the fact that Nigel Bankes is credited as the reviewer of this article, all indicate that this article is quite reliable.

The author presents an interesting perspective on the relationship between international investment protection law and climate change mitigation, as well as the role the Kyoto Protocol could play as an interpretive tool in investor-state disputes. While the author's intention is to demonstrate that international investment law can be utilized to benefit climate change mitigation as an "ally of environmental and development policies" (p.336), both sides of the argument are laid out in the article. The author even addresses the possibility of investor's claiming a violation of the fair and equitable treatment standard in the face of emission caps or limitations, because they had a legitimate expectation that they would be able to continue emitting carbon dioxide. This is also particularly relevant for my research paper. However, throughout the article the author seems to focus on investments in developing countries and countries with economies in transition, especially in the context of low carbon investments in energy projects, which is not quite the main focus of my research paper.

Diepeveen, Rosalien, Yulia Levashova & Tineke Lambooy. "Bridging the Gap between International Investment Law and the Environment", 4th and 5th November, The Hague, The Netherlands' (2014) 30:78 Utrecht Journal of International and European Law 145.

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Miles, Kate. “International Investment Law and Climate Change: Issues in the Transition to a Low Carbon World” (2008) *Society of International Economic Law, Online Proceedings of the Inaugural Conference, Working Paper No 27/08*. Available Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154588;

International Trade and Investment Law

Monographs

Schill, Stephan W. *The Multilateralization of International Investment Law*, International Trade and Economic Law, vol 2, (New York: Cambridge University Press, 2009). ProQuest Ebook Central, <<https://ebookcentral-proquest-com.ezproxy.lib.ucalgary.ca/lib/ucalgary-ebooks/detail.action?docID=461168>>.

The Role of the State in Investor-State Arbitration, in Nijhoff International Investment Law Series, vol 3, Rodrigo Polanco Lazo & Shaheez Lalani, eds, (Leiden, NL: BRILL, 2014). ProQuest Ebook Central: <<https://ebookcentral-proquest-com.ezproxy.lib.ucalgary.ca/lib/ucalgary-ebooks/detail.action?docID=1875460>>.

Tienhaara, Kyla. Chapter 38: “Investor–state dispute settlement” in *Regulatory Theory: Foundations and applications*, Peter Drahos, ed, (Acton, AUS: ANU Press, 2017).

Trebilcock, Michael, Robert Howse & Antonia Eliason. *The Regulation of International Trade*, 4th ed (London: Routledge, 2013).

This book provides an in-depth presentation of the basic concepts of international trade. It is used as the textbook for the International Trade Law class at the University of Calgary and therefore is very comprehensive and has a neutral and explanatory tone. The authors also present and critique both sides of the arguments discussed. This source will serve to establish the basis of the knowledge on international trade and the General Agreement on Tariffs and Trade (GATT) required for my major research paper. Chapter 17 entitled “Trade and the environment” lays out the relationship between international trade law and environmental standards and addresses issues such as competitiveness and climate change

through both GATT and the NAFTA. Furthermore, this secondary source also includes a chapter entitled “Trade and Investment” (chapter 15) presenting a general overview of international investment concepts such as foreign direct investment, the Multilateral Agreement on Investment, bilateral investment treaties, as well as the investment provisions and associated jurisprudential issues included in free trade agreements like chapter 11 of NAFTA (investor-state dispute settlement).

Journals and Articles

Johnson, Lise & Oleksandr Volkov. “State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law” (2014) 5:1 Investment Treaty News 3. Online: IISD <https://www.iisd.org/sites/default/files/publications/iisd_itn_jan_2014_en.pdf>.

Laird, Ian A. “TPP and ISDS: The Challenge From Europe and The Proposed TTIP Investment Court” (2016) 40 Can.-U.S. L.J. 106.

VanDuzer, J. Anthony & Melanie Mallet. “Compliance with Canada's Trade and Investment Treaty Obligations: Addressing the Gap between Provincial Action and Federal Responsibility” (2016), 54:1 Alta. L. Rev.

Wellhausen, Rachel L. “Recent Trends in Investor-State Dispute Settlement” (2016) 7:1 JIDS (Journal of International Dispute Settlement) 117.

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OECD, Directorate for Financial and Enterprise Affairs. “Fair and Equitable Treatment Standard in International Investment Law” (2004) OECD Working Papers on International Investment, 2004/03, OECD Publishing. Online: <https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf>.

CETA

Monographs

Un nouveau pont sur l'Atlantique: L'Accord économique et commercial global entre l'Union européenne et le Canada, Sous la direction de Christan Deblock, Joël Lebullenger & Stéphane Paquin, (Québec: Presses de l'Université du Québec: 2015).

Journals and Articles

“Making Sense of the CETA: An Analysis of the Final Text of the Canada-European Union Comprehensive Economic and Trade Agreement” September 2014, Scott Sinclair, Stuart Trew & Hadrian Mertins-Kirkwood, eds, Canadian Centre for Policy Alternatives.

Maltais, Alexandre L. “L'investissement dans l'Accord économique et commercial global Canada-Europe et ses conséquences pour le Québec” (2011) Rapport de recherche de l'Institut de recherche en économie contemporaine.

Polonskaya, Ksenia. “Frivolous Claims in the International Investment Regime: How CETA Expands the Range of Frivolous Claims that May be Curtailed in an Expedient Fashion” (2017) 17 *Asper Rev Int'l Bus & Trade L* 1.

Sardinha, Elsa. “Towards a New Horizon in Investor–State Dispute Settlement? Reflections on the Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA)” (2016) 54 *The Canadian Yearbook of International Law* 311.

VanDuzer, J. A. “Investor-state Dispute Settlement in CETA: Is it the Gold Standard?” *Commentary No. 459, Trade and International Policy*, October 2016, C.D. HOWE Institute.

Other

Global Affairs “Canada- European Union Comprehensive Economic and Trade Agreement”, Government of Canada, Date modified: 01 December 2017, online: <<http://www.international.gc.ca/gac-amc/campaign-campagne/ceta-aecg/index.aspx?lang=eng>>.

The Global Affairs Canada website is the first source for learning about CETA and understanding its text and functioning, which are essential for the second and third parts of my research paper. It doubles as both a primary source and a secondary source as it includes the official text of the Agreement, along with highlights, summaries, and commentary on each chapter along with timelines of the main events and benchmarks of the negotiation and drafting process.

As this is a government website, the intent is not only to educate and make the information available to the population, but also to promote the agreement and its benefits in order to boost approval. As such, there are no real criticisms or potential downsides addressed, but a lot of praise for the outcome and achievements related to the agreement. While this must indeed be kept in mind, this website presents a reliable source as the first place to look to get a clear picture of the agreement’s content and the government of Canada’s intentions and objectives related to CETA. It may also be insightful to compare some of the content with the equivalent European Union site (below). The manner in which they present the agreement and discuss its highlights and accomplishments may provide insight into how it will play out in the future and whether the priorities differ.

“In Focus: EU-Canada Comprehensive Economic and Trade Agreement (CETA)”, European Commission, Last update: 11 October 2017, online: <<http://ec.europa.eu/trade/policy/in-focus/ceta/>>.

Multilateralism, Bilateralism and Unilateralism

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Bodansky, Daniel M., Jutta Brunnée & Lavanya Rajamani. *International Climate Change Law* (Oxford: Oxford University Press, 2017). (repeated)

Leal-Arcas, Rafael. *Climate Change and International Trade* (Cheltenham, UK: Edward Elgar Publishing, 2013). (repeated)

Epps, Tracey & Andrew Green. *Reconciling Trade and Climate: How the WTO Can Help Address Climate Change* (Cheltenham, UK: Edward Elgar Publishing, 2010). (repeated)

Journals and Articles

Andonova, Liliana B., Michele M. Betsill & Harriet Bulkeley. "Transnational Climate Governance" (2009) 9:2 *Global Environmental Politics* 52.

Bodansky, Daniel. "What's in a Concept? Global Public Goods, International Law, and Legitimacy" (2012) 23:3 *EJIL* 651.

Bodansky, Daniel. "What's So Bad about Unilateral Action to Protect the Environment?" (2000) 11:2 *EJIL* 339.

Eckersley, Robyn. "Moving Forward in the Climate Negotiations: Multilateralism or Minilateralism?" (2012) 12:2 *Global Environmental Politics* 24.

Falkner, Robert. "A minilateral solution for global climate change? On bargaining efficiency, club benefits and international legitimacy" (2016) 14:1 *Perspectives on Politics* 87.

Morgera, Elisa. "Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law" (2012) 23:3 *EJIL* 743.

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Shaffer, Gregory & Daniel Bodansky. "Transnationalism, Unilateralism and International Law" (2012) 1:1 *Transnational Environmental Law* 31.

UNIVERSITY OF CALGARY

FACULTY OF LAW

LAW 703 – GRADUATE SEMINAR IN LEGAL RESEARCH & METHODOLOGY

ANNOTATED BIBLIOGRAPHY

Redefining the Provincial Role in Federal Undertakings

BY

JAMIE GIBB

DECEMBER 6, 2017

ANNOTATED BIBLIOGRAPHY

Research Topic: **Redefining the Provincial Role in Federal Undertakings**

The purpose of this research project is to determine what the provincial government's role in an interjurisdictional projects entails. As established in *Coastal First Nations v British Columbia*, the province has a constitutional authority to conduct its own environmental study and attach conditions related to provincial authority that go beyond those imposed by the federal government in its approval of a project. Furthermore, provinces have a constitutional duty to fulfill its obligations to consult and accommodate potentially affected First Nations before issuing provincial approvals and permits required for projects like Trans Mountain pipeline. In light of these two factors, my research intends to explore whether the provincial and federal government owe a joint duty to consult or whether their obligations are separate. Should the duty to consult remain unitary, the question this paper will seek to further explore is whether a province has the ability to deem federal consultation inadequate.

1) Alastair R. Lucas & Chidinma B. Thompson, "Infrastructure, Governance and Global Energy Futures: Regulating the Oil Sands Pipelines" (2016) 28:3 Journal of Environmental Law and Practice 355-394.

Al Lucas and Chidinma Thompson, examine the regulatory structure in Canada through a constitutional lens. The authors refer to a decision gap which exists due to federalism. This gap leaves provinces and First Nations disadvantaged due to the separation that exists between federal and provincial jurisdiction regarding interjurisdictional pipelines. Lucas and Thompson propose joint review panels for the environmental assessment of interjurisdictional pipelines. They state, that formalizing the participation process of provinces at the beginning of projects, would help avoid this decision gap. The current framework the authors outline requires the NEB to cooperate with provinces only when the provinces have jurisdiction regarding environmental and aboriginal matters. Lucas and Thompson therefore call for a statutory amendment to formalize the process of provinces. This article is pertinent to my research as I intend to further explore the decision gap which Lucas and Thompson identified. The evaluation of the constitutional basis of the federal and provincial jurisdiction is also key to my review process.

2) Anna Johnston, "Imagining EA 2.0: Outcomes of the 2016 Federal Environmental Assessment Reform Summit" (2016) 30:1 Journal of Environmental Law and Practice.

This article provides the reform suggestions from the 2016 Federal Environmental Assessment Summit. One of the primary objectives of the necessity for reform is to create a new environmental assessment framework that would gain public trust and confidence in decisions. The panel noted that by trying to streamline the process, they have in fact intensified social, political and legal conflicts around interprovincial projects. Furthermore, in order for the Federal Government to uphold its constitutional duty to Indigenous peoples there must be a shift in the way the Federal Government reviews and makes decisions regarding the environmental impact of projects. Although there were several suggestions made, including shifting from a project specific impact assessment to a regional impact assessment which would include sustainability, one specific reform will be of interest to my research paper. The committee stated that although it may be a Federal assessment, all stakeholders ought to be equally involved. This would include provinces, municipalities,

Indigenous communities, NGO's and experts. They stated that by taking a broad joint approach, a sense of ownership would be established and understanding of current issues. They say that this would result in less litigation and resistance to the project as a whole. The criticism of the regulatory process will be insightful in determining the provincial role for my project.

- 3) **Brenda H. Powell, "Environmental Assessment & the Canadian Constitution: Substitution and Equivalency", (2014) Environmental Law Centre, online: <<http://elc.ab.ca/media/94543/EAConstitutionBriefFinal.pdf>>.**

Brenda Powell wrote this article with input from professor Alastair Lucas. Powell provides an analysis of the constitutionality of the substitution and equivalency approach that is currently being permitted by the *Canadian Environmental Assessment Act*, 2012. Equivalency agreements are used in interprovincial projects whereby environment is a shared jurisdiction thus requiring an assessment under both the provincial and federal regulatory regime. Powell advocates for the abandonment of the substitution process. She emphasizes that need for greater cooperation in circumstances where there is shared jurisdiction rather than substitution. This article was written before the *Coastal First Nations* decision was released and therefore it will be utilized with this in mind. Powell although disagreeing with the equivalency agreements, strongly advocates for the federal role in the assessments. She continually states throughout her research that the federal government has significant responsibilities that should not be relinquished. This article helps provide context to the criticism of the CEAA 2012 which eventually led to the Summit in 2016.

- 4) **Bruce McIvor & Kate Gunn. "Stepping Into Canada's Shoes: Tsilhqot'in, Grassy Narrows and the Division of Powers" (2016) 67 *University of New Brunswick Law Journal* 146-166**

Bruce McIvor and Kate Gunn provide an in-depth analysis of the recent Supreme Court decisions *Tsilhqot'in* and *Grassy Narrows*. The authors start by providing a historical overview of section 91(24). They present a timeline of case law which begins to show the slow removal of the exclusive federal jurisdiction over Aboriginal rights. Furthermore, towards the end of the analysis they explore the potential implications of increased provincial power which stems from the Supreme Court's denial of interjurisdictional immunity protection to Aboriginal rights. They discuss the fact that Provinces are more closely tied to resource development, and face significant pressure from communities which affect their ability to hold up the honor of the crown. The authors disagree with the Supreme Court's rationale in disallowing interjurisdictional immunity. They argue that Provinces do not have the ability to appropriately or adequately justify infringements against First Nations communities. This article provides insight to the implications of interjurisdictional immunity.

- 5) **Dwight G Newman, *Revisiting the duty to consult Aboriginal peoples*, 2nd ed (Saskatoon: Purich Publishing Limited, 2014).**

Dwight Newman's book is cited in almost every Aboriginal law scholarship. He appears to be the leading scholar in this area. The book provides an excellent overview of the duty to consult, and provides the appropriate case law which developed the duty to consult. This book will be used in my major research paper to provide a black letter law overview of the duty to consult. One issue with this book, is that it is from 2014 and therefore is not

comprehensive. Newman's book has been criticized for taking a black letter approach to the area of consultation, and not taking into consideration other socio-economic factors. This will be taken into account when using Newman's book to provide an overview of the development of the duty to consult. This book also provides the historical development of the fiduciary duty owed to Indigenous peoples, which will provide context to my research.

6) Grace Nosek, "Re-Imagining Indigenous Peoples' Role in Natural Resource Development Decision Making: Implementing Free, Prior and Informed Consent in Canada Through Indigenous Legal Traditions" (2017) 50:1 UBC Law Review 95.

This article provides an excellent overview of UNDRIP as well as an understanding of how this principle will fit into the resource development industry. Nosek begins her analysis with *Tsilhqot'in Nation v British Columbia*. The author explains that UNDRIP is slowly developing in the shadow of *Tsilhqot'in*. Nosek uses the Northern Gateway pipeline as a case study. This draws numerous parallels with my research topic. The author uses the case study to demonstrate the inadequacy of the environmental assessment process. Despite challenges from First Nations, the Federal Government approved the pipeline. Subsequently, many cases were brought by First Nations communities against the Federal Government. Dosek therefore comments on how it is imperative to re-imagine First Nations role in decision making for natural resource projects. Dosek advocates in light of this, for UNDRIP to be fully implemented in Canada. This article will be extremely useful to my research as UNDRIP will be a focus point for all resource development in the near future.

7) Janna Promislow, "Book Review: The Duty to Consult: New Relationships With Aboriginal Peoples, by Dwight G. Newman" (2010) 48:1 Osgood Hall Law Journal 183.

Janna Promislow provides a critique of each chapter in Newman's most recent book. She critiques the book by stating, that he started with a theoretical approach to the duty to consult, but then appears to have abandoned this framework. She concludes that by abandoning the framework he was not able to discuss the issues surrounding the duty to consult within a broader picture. She critiques Newman by saying that he has completely missed the central issues that have been created by the indivisibility of the crown. As he missed this concept, she notes that he did not evaluate the dynamic relationships of the municipal, provincial and federal levels of government for the purposes of the duty to consult. This article is useful to my research as it appears to echo the views of many other scholars in the field. It will aid me in providing my own critique to evaluate whether he is discussing these doctrines through an academic lens or through a "law in action" as Promislow puts it. It also provides context to the approach Newman takes in his book.

**8) Jessica Clogg, Eugene Kung, Gavin Smith & Andrew Gage, "A Legal Toolbox to Defend BC from the Kinder Morgan Trans Mountain Pipeline & Tankers Project" (2017) West Coast Environmental Law online: <
<https://www.wcel.org/publication/legal-toolbox-defend-bc-kinder-morgan-trans-mountain-pipeline-tankers-project>>.**

This article was written in June 2017 following the British Columbia NDP government's comment that they were going to use 'every tool in their toolbox to stop the pipeline'. The article provides an overview of what the authors think the possible 'tools' the B.C government has. The authors emphasize that the Province of British Columbia has a

constitutional authority to conduct its own environmental assessments and has the ability to impose conditions on a federal undertaking that go beyond the conditions attached by the federal government (*Coastal First Nations v British Columbia*). Further, the Province has a constitutional obligation to fulfill its duty to consult and accommodate affected First Nations before issuing their project approvals. The Province cannot authorize unjustifiable infringements. This article is very pertinent to my project as it shows what the Province has the ability to do. Although, when reading this article, it is important to keep in mind the political background as the writing is very politically charged.

9) John W. Gailus & Nicole D. Bresser, “The Withering of Section 91(24): Is There a Core of Indianness Anymore?” (Paper delivered at the Aboriginal Legal Forum Tulalip Washington) [unpublished].

Gailus and Bresser provide an overview of section 91(24) which gives the Federal government exclusive jurisdiction over “Indians and Lands reserved for the Indians.” They begin with an explanation of the constitutional responsibilities owed by the Federal government, and then discuss the implications of the way the courts have applied interjurisdictional immunity. The authors primary argument is that the federal government is relinquishing its constitutional responsibilities. The paper conducts a thorough analysis of *Grassy Narrows* and *Tsilhqot’in*. Through their analysis of these two cases they conclude that the Federal government supported the Provinces submissions that the federal jurisdiction under section 91(24) is very limited. The authors conclude that this essentially means that the section 91(24) reference only pertains to exclusive federal jurisdiction over reserve lands. This article will be used to grapple with the concept of exclusive federal jurisdiction over Indigenous affairs.

10) Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project’, (November 2016) online:
<https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/TMX_Final_report_en.pdf>.

This report was created by the British Columbia Environmental Assessment Office (EAO) along with the Major Projects Management Office (MPMO) or Natural Resources Canada (NRCan) for the Trans Mountain pipeline. The report sets out how collectively, the province and federal government will approach Aboriginal consultation and accommodation. The report is of particular importance to my project as it explains how the province must retain its authority over consultation within its jurisdiction even though the approach taken to consultation is a joint approach. This report helps to understand the very significant case of *Coastal First Nations v British Columbia*. Furthermore, it provides insight to the environmental assessment process for interprovincial projects and how that relates to the consultation process.

11) Kent McNeil, “The Obsolete Theory of Crown Unity in Canada and Its Relevance to Indigenous Claims” (2015) 20:1 Review of Constitutional Studies 1.

In this article, Kent McNeil discusses the historical development of the Crown. He presents a timeline of cases which aid in determining whether the crown is divisible or indivisible. McNeil evaluates the division of the crown from the standpoint of, whether it helps protect or infringe aboriginal rights. McNeil criticizes Chief Justice McLachlin’s decision in *Grassy Narrows First Nation*, where she concluded that “the crown includes all government power”.

McNeil argues that this has no place within our federalist system. He further criticizes the courts in deciding too much in favor of provincial resource development. McNeil states that the invocation of the unitary crown works against Indigenous groups and further diminishes their rights. This article will be of value to my research, as McNeil's criticism of the unitary crown in *Grassy Narrows First Nations*, and *Tsilhqot'in Nation v British Columbia* will aid in the understanding of the division of powers in relation to provincial and federal jurisdiction over interprovincial pipelines and the consultation of the Indigenous groups.

12) Kent McNeil, "Aboriginal Title and the Provinces after Tsilhqot'in Nation" (2015) 71 The Supreme Court Law Review 67.

Kent McNeil provides an in depth analysis of *Tsilhqot'in Nation v British Columbia*. This article is different from some of the other one's because he is focusing on the constitutional implications of the case. He pokes holes in the Supreme Court's judgment, and provides insight to what the implications of the lack of clarifying multiple legal concepts in the judgment means for the application of law. McNeil states that he thinks the Court went too far in *Tsilhqot'in* to grant the application of provincial laws to Aboriginal rights. Rather, he concludes a preferable approach would have been to allow provinces to regulate resources through regulatory schemes for environmental protection purposes but not for expropriation purposes of natural resources. McNeil's article is helpful to my research as it is approaching the provincial role from a perspective that revolves around the protection of Aboriginal rights.

13) Kerry Wilkins, "Life Among The Ruins: Section 91(24) After Tsilhqot'in and Grassy Narrows" (2017) 55:1 Alberta Law Review, online: <<https://www.albertalawreview.com/index.php/ALR/article/view/791/783>>.

Kerry Wilkins conducts a very extensive review of the supporting evidence that the courts used to rationalized their decisions in *Tsilhqot'in* and *Grassy Narrows*. She concludes that the evidence presented by the court is extremely unconvincing. The article rebuts each ground that the court decided on. Wilkins provides an analysis of the law before and after *Tsilhqot'in* which aids my research in clarifying the role of interjurisdictional immunity. This article provides an excellent foundational definition for interjurisdictional immunity which will be my starting point for future analysis. Wilkins states the doctrinal consequences of the denial of interjurisdictional immunity for section 91(24). She provides two explanations for the Courts interpretation of section 91(24). She says that either Aboriginal rights were never within the core of section 91(24) which would mean abandoning an entire line of jurisprudence stemming from *Delgamuukw*. The other alternative proposed is that Aboriginal rights ceased to be within the core federal jurisdiction in 1982 because section 35 took effect. The debate Wilkins provides is essential to my research topic in understanding the current state of law surrounding jurisdiction and Aboriginal rights.

14) Nigel Bankes, "The Implications of the Tsilhqot'in (William) and Grassy Narrows (Keewatin) Decisions of the Supreme Court of Canada for the Natural Resources Industries" (2015) 33:3 Journal of Energy & Natural Resources Law 188.

Bankes writes his analysis of the implications of *Tsilhqot'in* and *Grassy Narrows* both from the perspectives of the resource developers but also from the point of view of the First Nations communities who wish to engage with the developers. Bankes devotes an entire

section in his paper to the application of federalist principles applied both pre and post *Tsilhqot'in* to Aboriginal title. Bankes highlights three obligations that arose from *Grassy Narrows*: the province must inform themselves of the impact of the project, communicate the results of the assessment to the First Nation community, and deal with First Nations in good faith when addressing their concerns within their jurisdiction. Bankes notes that this raises a separate and independent duty to consult and accommodate. This point made by Bankes is extremely useful to understanding the provincial role.

15) Stephanie Axman & Selina Lee-Anderson, “Putting the “Provincial” back into Federal-Provincial Cooperation: Assessing the Potential Implications of *Coastal First Nations v. British Columbia (Environment)*”(28 January 2016) McCarthy Tetrault (blog), online: <http://www.mccarthy.ca/article_detail.aspx?id=7200>.

Axman and Lee-Anderson provide insight to the *Coastal First Nations v British Columbia (Environment)* decision handed down in January 2016, and the impacts of the decision on the resource development industry. The authors emphasize the need to look at the provincial-federal agreement in question. The impacts of the agreement differ on a case by case basis, depending on the nature of the impact on the provincial interests. The authors discuss that the court's decision may reignite the debate regarding separate decision making processes, in interprovincial projects when one province is more disadvantaged than others. The authors further state, that they interpreted the court's decision to mean that the province could have fulfilled its duty to consult without having to carry out all of the procedural requirements. This article is written by two practicing lawyers at McCarthy Tetrault, and provides a starting point to understand application of *Coastal First Nations*. The Trans Mountain project has an equivalency agreement with the NEB. It is similar to the one the Northern Gateway had. The points raised in this article will be important for me to evaluate in my research, as there are parallels being drawn with the Trans Mountain and federalism.

UNIVERSITY OF CALGARY

FACULTY OF LAW

LAW 703: LEGAL RESEARCH AND METHODOLOGY

THE APPLICATION OF THE POLLUTER PAYS PRINCIPLE IN THE
ENVIRONMENTAL REGULATION OF THE OIL AND GAS INDUSTRY IN
NIGERIA.

ANNOTATED BIBLIOGRAPHY (WORK-IN-PROGRESS)

Compiled by:

Sally Onuorah

This annotated bibliography is a summary of some of the secondary sources that will guide my LL.M major research paper titled “The Application of the Polluter Pays Principle in the Environmental Regulation of the Oil and Gas Industry in Nigeria.” As a work in progress, this submission does not represent an exhaustive bibliography of academic literature relevant to the topic of my research paper. For the purposes of submission, fifteen secondary sources are annotated.

The research question under consideration is to what extent does the Nigerian law apply the polluter pays principle? In answering my research question, I plan to employ the doctrinal and literature review methods.

SECONDARY MATERIALS: ARTICLES

Elvis-Imo, Gina, “An Analysis of the Polluter-Pays Principle in Nigeria” (2017) 1:1 Ajayi Crowther University L J 1.

The author is a lecturer with the faculty of law at the Niger -Delta University, Nigeria. His research interest is centered on Environmental law and policy.

This article is one of the most comprehensive and recent article that provides a thorough and insightful view of the effects and implementation of polluter pays principle in Nigeria. For instance, the article summarizes the important role of command and control regulations and market based instruments in ensuring the effective implementation of the principle to achieve sustainable development and protection of the environment. The author also identifies and addresses contentious questions that emerges in the application of the principle in oil spill incidents especially cases of vandalism and sabotage. The author argues that as a result of the lack of enforcement of various Nigerian environmental laws embodying the principle and inadequacies in regulatory bodies tasked with such functions, the application of the principle to oil related environmental damage is ineffective. The author proposes different possible ways in which the efficient application of the liability principle of polluter pays in Nigeria can be achieved for a successful apportionment of environmental liability, remediation of environmental damage, prevention and control of oil pollution.

The authors intended audience is likely the Nigerian policy makers and legal environmental scholars.

This article will contribute greatly in the writing of my major paper, as it focuses squarely on the application of the polluter pays principle in Nigeria. In particular the author's analysis of the use of the regulatory and market based instruments in ensuring the effective implementation of the principle in practice and his discussion of the application of the principle where there are contending questions on the cause of a spill such as vandalism and sabotage is central to the thesis of my paper.

Joseph, Sally-Ann, "The Polluter - Pays Principle and Land Remediation: A Comparison of the United Kingdom and Australian approaches" (2014) 1 AJEL 24.

The author wrote this article as a researcher at the school of taxation and business law (Atax), University of South Wales. The author's research interest is centered on ensuring the viability and credibility of financial economic and environmental taxation systems.

The purpose of this article is to determine the effects of economic incentives in ensuring an effective application of the principle of polluter pays. The author begins by providing an in-depth analysis of the evolution of the PPP as an economic principle to an international environmental and legal principle and its exceptions. She then compares the "effect of tax incentives" on the environmental regimes of the United Kingdom and Australia in order to ascertain whether it conforms to the principle of polluter pays or falls under the exceptions of principle as provided under the "OECD's 1971 Recommendation of the Council in the implementation of the PPP." The author argues that the use of "tax subsidies" that might involve transferring the costs of pollution prevention and control to the society, employed under the environmental regimes of the OECD countries under study is not in compliance with the principle of the polluter pays. She posits that such aid is not acceptable unless it falls under the listed exceptions.

The author's intended audience is likely the policy makers of the comparative jurisdictions and economists.

This article is highly pertinent to my paper as it provides comprehensive analysis and an excellent critique of the polluter pays principle as an economic based environmental policy. The article also provides summary of literatures relevant to my papers.

Poulter, Susan R., “ Cleanup and Restoration: Who should pay” (1998) 18 J. Land Resources & Envntl. L., 77.

The author at the time of writing this research was a professor of Law at the College of Law, university of Utah. Her research interest is centered on engineering and the environment, toxic torts, environmental law and business.

The purpose of this article is to determine who has the responsibility to pay for the cleanup and remediation of polluted mine sites. This article contributes to the literature on the polluter-pays principle by exploring at how the liability to clean up and remediate polluted sites cannot be effectively achieved under the torts law but under the United States Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”). The author begins by evaluating and comparing the efficiency of fault based liability under the torts law and strict based liability under CERCLA in achieving the remedy of cleanup and remediation of polluted mine sites. The author posits that the strict liability rules under CERCLA are highly effective in obtaining the remedial measures of cleanups and restoration of old polluted mine sites.

The author’s intended audience is likely the United States policy makers and legal environmental scholars.

Although this article deals with reclamation and cleanup of polluted mine sites, it will provide the background context in the review of literatures on who should pay for the cost associated with prevention and control of pollution?” This article will be used to understand the effectiveness of fault and strict based liability rules in achieving and securing environmental compliance of protection and reclamation of polluted environment to its former natural productive state.

Stoczkiwick Marian, “The Polluter-Pays Principle and State aid for Environmental Protection” (2009) 6:2 J for European Envntl & Planning L., 171.

The author is an associate professor at the Faculty of Law, Jagiellonian University. His research interests are centered on environmental law, energy and competition law.

The author outlines an overview of the application of polluter pays principle under the European community treaty as a cost internalization, equity, non-subsidization and environmental principle. The author explores the incorporation and essence of the principle under the environmental policies of the European community. He then analyses its application under the environmental policies, guidelines and case laws of the European community and critiques the propriety and otherwise of the provision of state assistance and its conformity with the principle. He concludes that the efficacy of the providing state assistance as part of the measure for protection of the environment must not circumvent the essence of the principle or its legitimate exceptions.

The author's intended audience is likely the policymakers, judges, editors of law journal and the European community.

The author's discussion of the theoretical underpinnings of the principle of polluter-pays as an economic, equity and environmental principles are relevant to my paper particularly in understanding the different context and ideas inherent in the interpreting the principle. The author's analysis on the provision of state aid, which is in compliance with the essence of the principle, provides useful ways in understanding instances in which the state assistance can be justified in the remediation of polluted sites as well as to safeguard the environment.

De Sadeleer, Nicolas Michel, "The Polluter-Pays Principle in EU Law-Bold Case Law and Poor Harmonization" (2012) Oslo Universitetsforlaget , 405.

The author is a professor of law at St. Louis University, Brussels. His research interests are centered on EU Environmental law. He is also a guest professor of law at the University College London.

In this article, the author posits that there are identifiable ambiguities associated with the interpretation and application of the liability principle of polluter-pays within the context of "environmental taxes and liability rules." To support his argument, the author examines the extent to which the principle can serve as a tool of deterrence and liability under the EU environmental tax policy and Environmental liability regime. . The author also includes a discussion on case laws dealing with the allocation of liability in cases of accidental oil spills, polluted sites caused as a result of effects of release of toxic pollutants from different activities. Based on the analysis, the author concludes by observing that although the principle is vague as a result of unclear theoretical contexts surrounding its description and purview but such should not necessitate to its absolute disapproval.

The author's intended audience is likely the EU policy makers, editors of the law journals, environmental legal scholars.

Although, the author did not seek to identify or suggest practical ways through which the law can be heightened to address the difficulties associated with applying the principle of polluter-pays, this article is useful as it examines competing ideas underlying the principle. The author's discussion on the various ambiguities that exist in the description and application of the principle from the economic and environmental standpoint is also relevant to my paper.

Cordato, Roy E. "The Polluter Pays Principle: A Proper Guide for Environmental Policy" (2001) Institute for Research on the Economics of Taxation 1.

The author holds a Ph.D. in economics and is a senior economist at the institute for Research on the Economics of Taxation, Washington. The author is also a research fellow with the Independent institute in Oakland, California. His research interests are centered on law and economics.

This article takes a different step from all the economic literatures on the polluter-pays principle by exploring how the principle could be applied to address cost of damage to the property rights of those who have suffered as a result of environmental pollution. The author argues that the principle has been misapplied by various economists to address only costs of control of environmental pollution and not costs of damage to the property rights of people to a resource caused as a result of the pollution. The author proposes a "property rights based polluter pays principle" as the best approach for addressing the barriers that exist in ensuring the effective implementation of the principle in environmental problems. The author supports his arguments by analyzing how the "property rights approach to the principle of polluter pays" can address the ambiguities associated with the principle, boost "economic efficiency" and control environmental pollutions.

However since the principle operates as a principle of international environmental policy, where states are major actors, the article fails to discuss how the property rights polluter pays principle will be implemented. Otherwise the article provides a summary of description of the different perspective of the principle that may help inform my analysis. Also, the author's discussion of the effectiveness of the use of market-based regulations in making the polluter pay is relevant to my paper.

Ebeku, Kaniye SA. "Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria" (2003) 12.2 Review of European Community & Intl Envtl L 208.

The author is a practicing lawyer and a lecturer at the Rivers State University of Science and Technology, Port-Harcourt, Nigeria. His research interest is centered on customary environmental law of indigenous people of Niger-Delta of Nigeria.

The author evaluates the attitude of Nigerian courts in deciding cases of oil spill related environmental pollution. He examines several case laws on such pollution before and after 1990. He argues that the judicial decisions of the court on oil spill related cases pre and post -1990 were not aimed at ensuring environmental protection in Nigeria. He further provides an analysis of factors that may have led to such judicial oversight which include the reluctance in making decisions that will affect the economic affairs of the country and over reliance in the technicalities of law i.e. strict proof of causation. He proposes that irrespective of the fact that the production of oil and gas resources plays a vital role in the economic development of Nigeria, Nigerian judges in deciding oil spill related cases should gear towards the approach of environmental protection and sustainability.

The author's intended audience are likely the Nigerian Judges and legal environmental scholars.

Although the six case laws examined by the author are not current, the article will be useful as I intend to review select Nigerian case laws on oil spill related environmental pollution to assess whether the principle of polluter-pays has been applied to encourage sustainable development and achieve environmental remedies of clean up and remediation of damage done to the physical environment as a result of oil spill.

Larson, Eric Thomas. "Why Environmental Liability Regimes in the United States, the European Community, and Japan have grown Synonymous with the Polluter Pays Principle" (2005) 541 V and J Transnat'l L 38.

The author is a senior legal counsel at CHS Inc. The author wrote this article when he was a student at Vanderbilt University Law School. His research interests are centered on Environmental law, mergers and acquisition.

The author argues that the "polluter-pays environmental liability regime" is highly efficient in clean up and remediation of environmental harms and should be adopted by developing countries. To support his argument, the author first describes the evolution of the principle's ratification before examining the effects of a strict or fault based liability principle of polluter-pays under the various environmental liability regimes of the countries under study. The author also provides an analysis of key sources that have informed the global recognition and adoption of the principle as an efficient liability model under the environmental policies of the countries.

The author's intended audience is the editors of the law journal, his instructor and scholarly peers.

This article is relevant to my research for my major paper, as it will guide me to understand the ways of how liability has typically been allocated for the costs relating to clean up and remediation of oil related environmental pollution across the jurisdictions under study between the tax payers, industry and government. The overview of the sources that led to the adoption of the principle will help inform my analysis on ways through which the importance of application of the liability principle of polluter-pays can be widely recognized in the oil and gas industry in Nigeria.

Mamlyuk, Boris, "Analyzing the Polluter Pays Principle Through Law and Economics" (2010) 18 Southeastern Env'tl L& J 1.

The author at the time of publishing this article was a visiting scholar at Cornell Law School. He was a Ph.D. candidate in Law, Economics and Institutions at the CLEI Centre, Faculty of Law, University of Torino, Italy. His research interests are centered on international legal theory, law and development.

The author provides an in-depth analysis of the economic theory of the polluter pays principle outlining its strength and weaknesses. The author argues that the

implementation of the “economic theory of the principle” can be effective under the domestic context but cannot be efficient under the international context as it fails to adequately achieve protection of the environment and address environmental pollution. He asserts that “states will find it difficult to allocate costs of prevention and control of pollution between multiple actors.” The author went further to evaluate the efficiency of liability principle of polluter-pays with “Ronald Coase reciprocity principle” and “Calabresi-Melamed cheapest cost avoider Principle” as economic mechanisms in addressing environmental pollution. . He submits that these theoretical principles cannot address future environmental risks. He proposes a “a multifaceted theoretical model which comprises of environmental law and economics as a possible solution to addressing or minimizing the problem of environmental pollution.

The author’s intended audience is likely the editors of the law journal, members of the faculty of law, University of Torino.

This article is relevant to my research paper because it provides background context in understanding the theoretical underpinnings of the polluter pays principle as an economic approach and its efficiency in addressing environmental pollution within the domestic context (Nigeria).

Okenabirhie, Theresa O. "Polluter Pays Principle in the Nigerian Oil and Gas Industry: Rhetorics or Reality?" (2008) 9 Environment and Social Issues in the Energy Industry.

The author is a practicing lawyer in the legal division of the Department of Petroleum resources, Nigeria. Her research interests are centered on Nigerian environmental laws and policies that regulate the oil and gas sector.

In this article, the author examines the effect of the implementation of the principle of polluter-pays in the oil and gas industry of Nigeria. The author argues that although the principle is entrenched in most of the environmental laws and regulation governing the oil and gas sector in Nigeria, its application is marred with difficulties resulting to its ineffectiveness in minimizing and control of oil related environmental pollution. The author supports its arguments by providing an analysis of the Nigerian environmental legislations that embodies the polluter pays principle provisions and identifies the challenges in both the regulatory and institutional frameworks associated with ensuring effective implementation of the principle.

The author’s intended audience is likely the policy makers, judicial officers and executive government of Nigeria.

However, this article did not proffer any recommendations as to the practical ways in which the challenges enunciated could be addressed. The author also did not conduct and justify the use of a comparative methodology although she referred to it as one of the methodology to be used in the article. Otherwise, the article provides useful insights to my discussion on the challenges impairing the efficient application of the principle in Nigerian environmental regulations.

Olaniyan, Ayobami. "Imposing Liability for Oil Spill Clean-Ups in Nigeria: An Examination of the Role of the Polluter-Pays Principle." (2015) 40 J L Policy & Globalization 73.

The author is an Associate Research Fellow at the institute for Oil, Gas, Energy, Environment and Sustainable development, Afe Babalola University, Nigeria. His research interests are centered on Natural resources, Energy and Environmental Law.

The purpose of the article is to analyze whether the efficient application of the principle of polluter pays could curb “the problem of environmental degradation resulting from oil spill.” The author begins by examining different approaches of the implementation of the principle within the international context consisting of the “Organization for Economic Co-operation and Development (“OECD Countries”), United Nations, European Community” and the Nigerian legal regimes and case laws. Based on his analysis, the author posits that the principle is ineffectively enforced in Nigeria. The author went further to identify the barriers that impedes the efficient implementation of the polluter pays principle in averting the regular occurrence of oil spills and allocating liability for oil spill cleanups in Nigeria. He then goes on to proffer recommendation on measures that should be put in place under the laws and agencies regulating oil spill related environmental pollution in order to improve the effect of the principle of polluter-pays in deterring and minimizing the menace of oil spill pollution prevalent in Niger Delta region of Nigeria. He also provides an in-depth analysis on what the legal significance would be if such recommendations or course of action should be implemented.

The author’s intended audience is likely the government of Nigeria, policymakers and stakeholders in the oil and gas industry.

This article will be useful for my research paper because it provides valuable information as to the relevance of applying the polluter pays principle and barriers hindering its effective implementation to oil spills incident in Nigeria.

Fagbohun, Olanrewaju, “The Imperatives of Environmental Restoration due to oil pollution in Nigeria” (2007) 18 Stellenbosch L. Rev.

The author is an associate professor at the Lagos State University. He teaches private and property law and is also a coordinator of Environmental Law and Allied Disciplines of the Centre for Environment and Science Education.

This article looks at the environmental and social consequences of oil pollution arising from the exploration and development of oil and gas resources in Nigeria particularly the Niger Delta region. The author notes the urgent need of environmental remediation due to the prevalence of oil spill pollution in the oil and gas industry as well as to complement the sole pursuit of continued economic development in Nigeria. He went further to identify the gaps and barriers that exist in the enforcement mechanisms of current environmental regulatory and Institutional frameworks to remediate and restore polluted environment. The author concludes by proffering recommendations on effective regulatory measures that will ensure and secure enforcement and compliance of

environmental laws aimed at remediation and restoration of polluted environment to its natural productive state.

The author's intended audience is likely the policy makers, editors of the law journal and members of the faculty of law.

This article is relevant to my paper, as it will be used to understand the inherent weaknesses in the enforcement and compliance of environmental laws regulating the oil and gas industry in Nigeria.

Vlavianos, Nickie, "Creating Liability Regimes for the Clean-up of Environmental Damage: The Literature" (1999) *J Envtl L & Prac* 145.

The author wrote this article while in graduate school. The article is a section of her LLM thesis and as such the author did not have authority on the issue at the time of writing.

The article is a critique of the policy of the Alberta Energy Appeal Board (EAB)'s policy of holding the last licensee of an oil well or a contaminated site liable for the cost of conservation and reclamation irrespective of the activities of prior licensees. The author attempts to develop a theory of environmental liability by reviewing existing literature that focuses on the general liability regime for clean up of environmental damage. The author holds the view that the EAB 's general policy on holding the last licensee liable for past environmental damage, does not appear to accord with the general approach favored by the reviewed literatures on the environmental liability principles of polluter pays and beneficiary pays.

The author's intended audience is likely her thesis supervisor, editors of the law journal and scholarly peers.

The article provides useful insights on the underlying theoretical rationale that should be considered in interpreting the meaning of the "polluter pays" principle. The author 's review of literature on the general liability regime for clean up of environmental damage was comprehensive and will be useful in the various sections of my paper particularly the literature review section.

Ezeibe, Ken Kingsley, "The Legislative and Institutional Framework of Environmental Protection in the Oil and Gas Sector in Nigeria- A Review" (2011) *Nnamdi Azikiwe University J of International L & Jurisprudence* 1.

The author is a legal practitioner in Nigeria. He has published so many articles on inadequacy of the current legal and statutory framework for environmental protection in Nigeria.

The author examines the legal and regulatory framework that ensures protection and development of the environment in Nigeria. The author argues that although "the Nigerian government and legislature is "environmental conscious in theory", that the

current Nigerian regulatory and enforcement regime is inadequate to effectively protect the environment and curb the problem of environmental pollution. The author proposes for “repeal and harmonization of environmental laws” in order to address the problem of ineffective enforcement mechanisms. The author concludes by suggesting practical measures and ways through which the environmental enforcement regime regulating oil and gas industry such as the National Oil Spill Detection and Response Agency (Establishment) Act 2006 (“NOSDRA Act”) and National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 (“NESREA Act”) should be sought to control and abate environmental pollution stemming from oil and gas activities in Nigeria.

The author’s intended audience is likely the Nigerian government and policy makers.

This article is relevant to my research as it will help me to understand the current gaps and barriers that exist in the legal and regulatory framework regulating oil spill related pollution in Nigeria.

SECONDARY MATERIALS: ONLINE PAPERS

Muhammed Munir, “ History and Evolution of the Polluter Pays Principle: How an Economics idea became a legal principle. < <http://dx.doi.org/10.2139/ssrn.2322485>>

The author is an associate professor and chairman of the department of law, International Islamic University, Islamabad. His research interests are centered on environmental law and policy.

The author argues that the polluter-pays principle widely known as an “economic principle of environmental policy” applied inconsonance with the strict based liability is very effective in abatement and control of environmental pollution. To buttress his argument, the author first discusses the principle’s history, development and then provides a critique of the principle in the OECD and EC’s definition and application. He also identifies the different theoretical perspective of the application of the principle as a solution for the control and abatement of environmental pollution by environmental economists and lawyers. He concludes by providing potential ways in which the principle can be implemented effectively in different contexts of pollution and other activities that endangers the environment.

The author’s intended audience is likely the editors of the journal and other faculty members and policy makers.

The article is highly relevant to my research paper as it provides summary of economic theoretical principles and incentives that seeks to address environmental pollution and solve the problem of externalities of cost.