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Abstract: In the late twentieth century, environmental policy swept the world, and among its primary instruments were processes for evaluating the adverse impacts of proposed actions. In all countries these processes quickly came into conflict with established bureaucracies, none more powerful and resistant to change than those in charge of water resources development. They also conflicted, in many cases, with established ideas of governance, right down to principles of federalism, judicial review, and the separation of powers. So it was in Canada, where in the late 1980s three water resources development schemes, each one more enormous, initiated the commonwealth's approach to environmental impact assessment and challenged the ability of the national government to protect environmental values at all. The litigation was heavy and prolonged. In the end, federal environmental authority gained a significant foothold, but one insufficient to protect the natural and human resources at stake. The litigation also illustrated, as has been the experience in the United States, the critical importance of citizen enforcement actions and judicial review in securing the objectives of environmental law.

INTRODUCTION

In the late 1980s, environmental law came to Canada, riding on the backs of three water projects that, together, challenged the government's approach to environmental protection right down to constitutional principles and the allocation of powers. The first made environmental impact review law; the second made it constitutional; the third made it work.

The litigation was fierce and of first impression. It was surrounded by equally fierce politics and the passions of people so thoroughly con-

* Professor of Law, Tulane University. The research assistance of Christa Fanelli, Cashauna Hill and Tinnetta Rockquemore, Tulane Law School '05, and Lena Giangrosso, '07, is acknowledged with gratitude. For the author's histories of similar United States environmental cases, see RICHARD J. LAZARUS & OLIVER A. HOUCK, ENVIRONMENTAL LAW STORIES (2005); Oliver A. Houck, *More Unfinished Stories:* Lucas, Atlanta Coalition, *and* Palila/Sweet Home, 75 U. COLO. L. REV. 331 (2004); Oliver Houck, *Unfinished Stories,* 73 U. COLO. L. REV. 867 (2002); Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases That Changed the American Landscape,* 70 TUL. L. REV. 2279 (1995–96).

vinced they were in the right that they did not need to explain. Environmentalists took to the streets; Crown and Provincial Ministers traded insults; First Nation tribes paddled a flotilla in protest down the Hudson River to the island of Manhattan; some people went to jail. Canadians then and since use words like "fiasco," "embarrassment," and "long litany of screw ups" to describe the action.[1] At the end of the day, by hook and by crook, two of the projects were completed. The largest and most complex, however, ceded to another vision of the environment, governance, and, at bottom, what water is for. They are known as Rafferty-Alameda, Oldman, and the Great Whale.

It is no accident that these extraordinary challenges arose out of water resource projects. There are two things about water that are all but irreconcilable. One is pragmatic: it is the lifeline of every civilization on earth,[2] and so it has fallen to civilization's engineers to wall off the floods, slake the droughts, divert the waters, and harness their power—the Aswan Dam, the Tennessee Valley Authority—some of the proudest monuments of humankind. And a few of the more regrettable.

The other thing about water is spiritual. The rivers and lakes that refract the light, wash away sins and renew souls are the mark of baptism[3] and the home of Siddhartha;[4] they "make glad the City of

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[1] George N. Hood, Against the Flow: Rafferty-Alameda and the Politics of the Environment 128 (1994) (stating that there were a litany of screwups); Carol Goar, *The Politics Behind Ottawa's Concern for James Bay,* Toronto Star, July 18, 1991, at A17 (stationg that it was a fiasco and an embarrassment).

[2] A colleague and water lawyer in the ancient capital of Sevilla has written wryly of "the peculiar tendency of rivers to flow through cities." Email from Maria Louisa Real, Counsel, Confederación Hidrografica de Guadalquivir, to author (Dec. 12, 2004) (on file with author).

[3] Marilynn Robinson, Gilead 24–25 (2004), stating:

> Ludwig Feuerbach says a wonderful thing about baptism. I have it marked. He says, "Water is the purest, clearest of liquids; in virtue of this its natural character it is the image of the spotless nature of the Divine Spirit. In short, water has a significance in itself, as water; it is on account of its natural quality that it is consecrated and selected as the vehicle of the Holy Spirit. So far there lies at the foundation of Baptism a beautiful, profound natural significance."

Id.

[4] Hermann Hesse, Siddhartha 118 (Hilda Rosner trans., New Directions 1951) (stating "there was a man at this ferry who was my predecessor and teacher. He was a holy man who for many years believed only in the river and nothing else. He noticed that the river's voice spoke to him. He learned from it; it educated and taught him . . . ."); *see also* Margaret Mead, People and Places 266–67 (1959):

God."[5] We are made of water. Every culture reveres it. There is something terrible about burying aquatic systems and their inhabitants, entire ways of life, under a hundred miles of a hundred feet of darkness.[6] For all time. Seen from this end of the spectrum, the engineer's triumph is a loss too painful to bear.

The environmental movement in the United States was born largely of that pain. In the early twentieth century the Sierra Club, until that point a gentrified collection of weekend hikers, turned radical at the prospect of converting a granite-peaked, waterfall-studded valley the size of Yosemite into the Hetch Hetchy reservoir,[7] and became the most powerful environmental voice in the United States. Fifty years later it would lose its federal tax exemption for lobbying against another government water project, Glen Canyon dam on the Colorado River.[8] The first U.S. environmental lawsuit in modern times opposed the Storm King Mountain power plant that threatened to kill millions of aquatic organisms in the Hudson River,[9] and the first case to define impact assessment and send environmental law into orbit arose over thermal discharges from a nuclear power plant into the Chesapeake Bay.[10] Water

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> Another religious practice which has come down through history is the use of blessed water for special purposes—to purify the thing it touches, to remove evil, or simply to bless and purify a person who wishes to pray or who has finished praying. However, the idea that water is pure and can be used in special ways connected with religion is such a natural one for human beings to have when they are trying to get closer to the supernatural world that we believe many different peoples have thought of it.

Id.

[5] *Psalms* 46:4 (King James) ("There is a river, the streams whereof shall make glad the city of God, the holy place of the tabernacles of the Most High.").

[6] *See* Hal Kane, *The Dispossessed*, World Watch, July/Aug. 1995, at 7, stating:

> A World Bank study has found that public works projects in the developing world now force more than 10 million people out of their homes every year. . . . Large dams—about 300 are built each year–account for nearly half the total. Even as objections to these projects are raised on environmental, as well as humanitarian, grounds, even larger dams are being designed.

Id.

[7] *See* Stewart L. Udall, The Quiet Crisis 121–22 (1963).

[8] Thomas B. Allen, Guardian of the Wild: The Story of the National Wildlife Federation, 1936–1986, at 147 (1987).

[9] *See generally* Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608 (2d Cir. 1965). For background on this case, see *Unfinished Stories, supra* note *, at 869–80.

[10] *See generally* Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971). For background on this case, see *Unfinished Stories, supra* note *, at 876, 878, 880–93. The court's opinion, which defined the requirements for environmental impact assessment, was followed by a string of lawsuits challenging the U.S. Army

was a primary driver for environmental law in the United States. As it would be for Canada.

I. Water on the Plains: The Rafferty-Alameda Dams

Those who came to settle North America did not find it easy anywhere, but some particularly harsh scenarios played out on the western prairies which cut a wide swath north from Kansas and Nebraska, through the Dakotas and across Alberta, Saskatchewan, and Manitoba.[11] Lured on by railroad promotions that combined fantasy with outright fraud, the prairie settlers broke the earth, ploughed under the native grasses, planted wheat, lived in houses of sod, endured unimaginable winters, and prospered or failed by the rains. "[R]ain would follow the plough" declared the agronomists of the day,[12] the theory being that the release of moisture from cultivated soil seeded the atmosphere and prompted an ever-increasing cycle of precipitation. Of course, the opposite happened.

Severe droughts in the late 1800s bankrupted platoons of settlers, leading, among other things, to a call by U.S. Geological Survey chief John Wesley Powell for the water-based zoning of the West.[13] Railroad and real estate boomers, threatened by the proposal, replied by driving Powell from office, but they seized on one part of his vision: a series of water supply dams to feed their land scheme promotions. So began federal water resources development in the western United States.[14] Thirty years later, the dust bowl threw a serious curve into settlement on the plains, a curve from which they have not since fully recovered and perhaps never can. Storms of snow and dirt rose from the prairies, blackened the skies and, dumped loads that buried telephone poles as far east as Chicago and Albany.[15] A Canadian who lived through it recalls a joke about the Saskatchewan farmer who went out

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Corps of Engineers and the Tennessee Valley Authority's water resources projects directly. *See infra* notes 50–51.

[11] For classic descriptions of the hardships of prairie life, see, e.g., Willa Cather, O Pioneers! (Houghton Mifflin 1988) (1913); Maria Sandoz, Old Jules (Hastings House 1960) (1935).

[12] Udall, *supra* note 7, at 94. For a detailed critique of water resources development in the western United States, see generally Marc Reisner, Cadillac Desert (1986).

[13] *See generally* Wallace Stegner, Beyond the Hundredth Meridian: John Wesley Powell and the Second Opening of the West (1982) (describing the life and proposals of John Wesley Powell).

[14] *Id.*; *see also* Udall, *supra* note 7, at 88–96.

[15] Ian Frazier, Great Plains 196–97 (1989).

to cultivate his land and ended up finding it in Manitoba.[16] When the winds finally died, the answer was: more dams.

A. *A Case for the Engineers*

> The [U.S.] Army Corps of Engineers, arguably the preeminent dam builders in the world, told us that it would take them eighteen years to build the Rafferty and Alameda dams. . .[T]he Saskatchewan engineers responded with more than a little bravado and smug nationalism that it would only take us three years. They were wrong.
>
> —*George Hood, project manager, Rafferty-Alameda dams*[17]

George Hood lived the saga of the Rafferty-Alameda dams. He helped plan them, promoted them, and suffered along with the other occupants of the rollercoaster as they bounced among provincial and national authorities and then the courts. He begins an account of his experiences with the observation, "The predominating unit of time in Saskatchewan is not the minute or the hour, or even the day, but the season."[18] He means the growing season, of course, and for the farms near Estevan in the south of the province it has been a hard fight to keep a crop of wheat on wafer-thin topsoil laced with stones and rocks from the glacial valley of the Souris River. The landscape he saw was "lacking in natural beauty." Rather, it was strewn with oilfield pumpjacks and pipelines, spoil mounds from coal mines, two power plants "frequently shrouding the city in an acidic haze," and a hodgepodge of small dams and culverts designed to convert the feast-or-famine waters of the Souris river to human use.[19] Clearly, to Hood, this was a place that could use some engineering.

Unlike most western rivers, the Souris is fed only by rainfall, so in wet years it can produce floods several miles wide, and the years in between will be so dry you can step across it in dress shoes.[20] Respecting no borders, the river rises in Saskatchewan, snakes South into North Dakota, and then back up into Manitoba. The United States had been busy on its stretch of the Souris, building dams for irrigation and flood control, and by the 1960s it had twenty-one dams in the watershed making claim to most of its flows. It was not until the 1970s that Saskatche-

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[16] Hood, *supra* note 1, at 6.
[17] *Id.* at 2.
[18] *Id.* at 5.
[19] *Id.* at 8.
[20] *See id.* at 11–12.

wan began asserting the Canadian claim, including one rather aggressive proposal to build a canal rerouting the river away from the United States entirely. When, in 1969, the river poured down to flood the capitol of North Dakota for forty straight days, the Americans were willing to see Canada put in some dams of its own. They found their champion in a border rancher who rode into the North Dakota legislature on the issue of taming the Souris, Orlin "Bill" Hanson. Hanson was a friend and neighbor of the future deputy premier of Saskatchewan, Eric Berntson. Berntson represented residents along Moose Mountain Creek, future site of the Alameda Dam. Delivering a dam to your home district is The Prize. The politics were right for the deal.

The planners went to work. Confronted by the unhappy fact that the anticipated benefits to agriculture would not offset project costs, they added a power plant, boat ramps and other bells and whistles.[21] They also consulted with their U.S. counterparts, the U.S. Army Corps of Engineers, who told them that a project of this size would take decade to complete, maybe two.[22] The Canadians thought the figure crazy; they could do it in three years.[23] They were off by fifteen.

Finally, in 1986, Premier Devine unveiled a plan for two dams, the Rafferty and the Alameda.[24] There was a glitch, however. The projects would have to pass Saskatchewan's environmental review process, and the early feedback was acerbic. The proposal contained no benefit-cost analysis, no description of mitigation measures, no operational plans, and quite a few unsubstantiated claims.[25] Indeed, there was no indication of where the Alameda dam would be built at all. Rather hard to conduct an adequate review on that record. Responding to these criticisms, the Rafferty-Alameda team went into a hurry-up offense, according to engineer Hood a "sixteen week blitz" to get its environmental documents in order.[26] They knew what they were going to do. It was simply a matter of jumping through the hoops.

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[21] *See generally id.*

[22] Hood, *supra* note 1, at 2. The U.S. Army Corps of Engineers' reputation for project construction is matched by its reputation for manipulating project purposes, and costs and benefits, in order to obtain the necessary approvals. *See* Michael Grunwald, *A River in the Red; Chanel Was Tamed for Barges That Never Came*, Wash. Post, Jan. 9, 2000, at A-1. *See generally* Arthur E. Morgan, Dams and Other Disasters: A Century of the Army Corps of Engineers in Civil Works (1971); Nat'l Wildlife Fed'n & Taxpayers for Common Sense, Crossroads: Congress, the Corps of Engineers and the Future of America's Resources (2004).

[23] Hood, *supra* note 1, at 2.

[24] *Id.* at 38.

[25] *Id.* at 41.

[26] *Id.* at 47.

B. *A Case for the Sportsmen*

> Rafferty-Alameda Dam Could Reduce Bird Populations By 30,000, Report Says.
>
> —*Headline, Toronto Star, 1991*[27]

The highest of the hoops was a rising environmental awareness across Canada and a particularly active local sportsmen's organization, the Saskatchewan Wildlife Federation. Sportsmen's organizations go way back in U.S. history to the days of Teddy Roosevelt, when they were instrumental in the elimination of market hunting.[28] Alarmed by the devastation of waterfowl and wetlands during the droughts of the 1930s, duck hunters promoted some of the first conservation laws of the twentieth century, including the purchase and protection of the wetlands these birds needed to breed, feed, and survive.[29] In the 1940s and '50s, watching new threats to their hard-won resources from dams and canals, they lobbied through a law, noble in purpose if short on results, that declared fish and wildlife conservation a co-equal purpose of water resources development.[30] In the 1960s, hunting and fishing organizations were the first to protest, then oppose, a new construction binge by the Corps of Engineers, Bureau of Reclamation, and like-missioned agencies. They had their own lobby in Washington D.C., the National Wildlife Federation, which had looked at new-fangled environmentalism with some suspicion but was about to catch the wave.[31] When, in the early 1970s, public interest law firms for environmental protection such as the National Resources Defense Council and the Environmental Defense Fund appeared on the scene and started winning lawsuits (and head-

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[27] TORONTO STAR, July 5, 1991, at D10.

[28] For background on sportsmen's organizations, see WILLIAM T. HORNADAY, OUR VANISHING WILD LIFE: IT'S ENVIRONMENT AND PRESERVATION 53–61 (1913); George Reiger, *Hunting and Trapping in the New World*, *in* WILDLIFE AND AMERICA: CONTRIBUTIONS TO AN UNDERSTANDING OF AMERICAN WILDLIFE AND ITS CONSERVATION 42, 44, 46–47, 52 (Howard P. Brokaw ed., 1978); Richard H. Stroud, *Recreational Fishing*, *in* WILDLIFE AND AMERICA, *supra*, at 53–84 and see generally ALLEN, *supra* note 8.

[29] *See, e.g.*, Pittman-Robertson Wildlife Restoration Act, 16 U.S.C. § 669 (West 2006); Fish and Wildlife Coordination Act, 16 U.S.C. § 661–667 (West 2006); Migratory Bird Hunting Stamp Act, 16 U.S.C. § 718 (West 2006); Dingell-Johnson Sport Fish Restoration Act, 16 U.S.C. § 777 (West 2006). *See generally* MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW (3d ed. 1997).

[30] *See* 16 U.S.C. § 661–667.

[31] *See generally* ALLEN, *supra* note 8.

lines), the National Wildlife Federation followed suit.[32] Within a few years it had a full docket, primarily against dams, channels, and other water projects.[33]

Meanwhile, north of the border, the Canadian Wildlife Federation, a loose conglomerate of state hunting and fishing groups with barely the budget to hold an office together, moseyed forward in no particular hurry.[34] Onto the scene walked Ken Brynaert, an entrepreneur with ideas to grow the organization to fit the times. He had a plan; all he needed was $150 thousand in startup money.[35] "It shouldn't take a week," he told the Canadian Federation's board.[36] "You've got a week" said its President, Orville Erickson.[37] Orville was also President of the Saskatchewan Wildlife Federation and a conservationist (the word "environmentalist" came very slowly to the sportsmen's community) to the core. He and Brynaert would power the national group forward. And he would come to hate the Rafferty-Alameda dams.[38]

In the short run, however, Brynaert had exactly seven days to make his case for a new Canadian Wildlife Federation. He hopped the next flight south to Washington D.C. and met with the National Wildlife Federation's chief executive, Tom Kimball. Kimball, formerly director of the fish and game departments in both Arizona and Colorado, had enormous credibility in the sportsman's world. He was also a devout Mormon with a flair for the malaprop (he spoke of "expo-

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[32] Personal observation: The author served as General Counsel to the National Wildlife Federation during this time.

[33] *See generally* Cape Henry Bird Club v. Laird, 484 F.2d 453 (4th Cir. 1973) (challenging the environmental impact statement on the Corps dam); Avoyelles Sportsmen's League v. Alexander, 473 F. Supp. 525 (D. La. 1979) (challenging a private defendants' land-clearing operations under the Clean Water Act); S. La. Envtl. Council v. Sand, 629 F.2d 1005 (5th Cir. 1980) (challenging the environmental impact statement on the Corps navigation project); Nat'l Wildlife Fed'n v. Gorsuch, 530 F. Supp. 1291 (D.D.C. 1982) (challenging the EPA determination that water quality changes caused by dams were not required to be regulated under the National Pollutant Discharge Elimination System established by § 402 of the Clean Water Act), *rev'd* 693 F.2d 156 (D.C. Cir. 1982); La. Wildlife Fed'n, Inc. v. York, 761 F.2d 1044 (5th Cir. 1985) (dealing with the regulation of dredge and fill under the Clean Water Act); S.C. Dep't of Wildlife & Marine Res. v. Marsh, 866 F.2d 97 (4th Cir. 1989) (challenging water quality impacts of Corps dam).

[34] Telephone Interview with Ken Brynaert, former Executive Director, Canadian Wildlife Federation (May 20, 2005). The description that follows of the Canadian Wildlife Federation is taken from the interview.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

tential growth") and a keen sense for the right thing to do. Kimball's Federation had members, money, and a good set of monthly magazines. He lent Brynaert the monies he needed to get started, put International Wildlife Magazine at his service for new Canadian members, and welcomed him to the family. Where Brynaert met the Federation's environmental lawyers and got the idea.

The Canadian Wildlife Federation case against Rafferty-Alameda was right out of the environmentalist bad-moments-in-water-development playbook. In the first place, it was flooding out prime wildlife habitat; nearly everything that swims, flies, or walks on four legs in the western plains is found in or on the banks of rivers like the Souris, the Platte, and the San Pedro. In the second place, it was a rip-off, funneling more than $100 million in public monies to a handful of floodplain farmers looking to make more money out of wet crops like sugar beets that had no business on the western plains in the first place. The rest of the project purposes were window dressing. It would be a lot cheaper to pay the farms at issue to set back from the river. Wetlands and waterfowl up and down the continent had taken a huge beating to agriculture over the last century, and now to the dam building boom. Rafferty-Alameda could take 30,000 more. It was time to draw the line.

In 1987, at a joint meeting of the Canadian and National Wildlife Federations in Quebec City, a resolution was passed to oppose the dams.[39] More aggressive, they passed a censure motion against the Canadian Minister of the Environment for failing to assert federal jurisdiction over the projects. Brynaert then delivered the censure to the Minister in person, at his hotel room in Quebec. More aggressive still, he was going to litigate.

C. *The Government Gets the Call*

> In the Canadian context, what the environmental assessment process applies to, particularly at the federal level, has been determined as much by how it evolved as anything else.
>
> —*George Hood, project manager* [40]

The governance of Canada is pretty much what Americans thought they were creating 200 and some years ago, a partnership of states and federal interests in which the federals were confined to a very small box, and the rest was left to state capitals. Of course, the

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[39] *Id.; see also* HOOD, *supra* note 1, at 47.

[40] HOOD, *supra* note 1, at 59.

United States began to depart from this model as early as 1787 when it traded the Articles of Confederation for the Constitution and has been departing ever since with new orbits of national authority to meet at first economic, then social, and now security needs. Canada, meanwhile, has clung to the states-rights model, tested increasingly by more global imperatives. One of the stiffest tests would be environmental policy.

There was another understanding as well: the judiciary. Courts at all levels were to resolve disputes before them; they did not set policy, nor did they gainsay the policies of elected officials. The United States broke this mold too, early on, when the Supreme Court in *Marbury v. Madison*[41] declared itself competent to declare policies enacted by the legislature unconstitutional, and over the last century U.S. courts have become players in racial integration, school prayer, abortion rights, and other sensitive social issues. Canadian courts, as those of mainland Europe and England, have viewed these events with alarm and resisted all initiatives to join the fray. Environmental law would put this philosophy to another severe test.

The root problem was as follows: Neither the delegates to the U.S. Constitutional Convention of 1787 nor the drafters of the Canadian Constitution Act of 1867 had the slightest notion of environmental problems nor concern to address them. No language even close to the word "environment" appears in either document. Under constitutions establishing governments of limited powers, then, authority to protect the environment would not seem to lie at the federal level at all. The United States would come to a different answer slowly, over time, through an expansive interpretation of the federal power to regulate interstate commerce,[42] an interpretation under serious counter-attack today by those who would de-nationalize environmental law.[43] Canada would take a different route.

As in the United States, the Canadian Constitution spells out national powers with precision, including a few related to the kind of environmental issues that would be waiting 100 and some years down

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[41] *See generally* Marbury v. Madison, 5 U.S. 137 (1803).

[42] For a description of Commerce Clause challenges to environmental law, see Robert V. Percival, *"Greening" the Constitution—Harmonizing Environmental and Constitutional Values,* 32 Envtl. L. 809, 830–33 (2002) and see generally Christine A. Klein, *The Environmental Commerce Clause,* 27 Harv. Envtl. L. Rev. 1 (2003).

[43] *See generally* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) (implying that regulation of intra-state wetlands is beyond federal constitutional authority); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (challenging federal protection of endangered species).

the road. The most relevant of these national powers was the authority to legislate on navigation, fisheries, and federal lands.[44] At the same time, the Constitution gave the provinces exclusive powers over, among other things, public works, property, and the "development of natural resources," including the production of electrical energy.[45] Dams come to mind. While the Canadian government had some foundation for passing laws to protect the fishery, and perhaps even to prevent its contamination by pollution,[46] it was on thin ice when it came to enacting general environmental law. And the first of the new environmental laws to sweep the United States, Canada, and the rest of the world were very general indeed: environmental impact review. The lead vehicle was the U.S. National Environmental Policy Act of 1969 and its principal requirement, an environmental impact statement for major federal actions. Canada would inch toward the same objective, very gingerly.

The federal government in Ottawa was small, underpowered, and far away from nearly every activity in Canada that impacted the environment.[47] Environmental protection in the 1970s had acquired some cachet, but it had also acquired some strong opponents including, for openers, a Who's Who of U.S. and Canadian industry. On thin ice

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[44] Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), *as reprinted in* R.S.C., No. 5, pt. VI, § 92 (App. 1985) (describing Exclusive Powers of Provincial Legislatures). For further information on federal environmental jurisdiction in Canada, see Marcia Valiante, *"Welcomed Participants" or "Environmental Vigilantes"? The CEPA Environmental Protection Action and the Role of Citizen Suits in Federal Environmental Law,* 25 DALHOUSIE L.J. 81, 91–96 (2002) and see generally John Borrows, *Living Between Water and Rocks: First Nations, Environmental Planning and Democracy,* 47 U. TORONTO L.J. 417 (1997), and Sven Deimann, Comment, R. v. Hydro-Quebec: *Federal Environmental Regulation as Criminal Law,* 43 MCGILL L.J. 923 (1998).

[45] Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), *as reprinted in* R.S.C., No. 5, pt. VI, § 92A (App. 1985) (stating that the legislature may exclusively make laws regarding non-Renewable Natural Resources). For further information on federal environmental jurisdiction in Canada, see generally Borrows, *supra* note 44; Deimann, *supra* note 44; Valiante, *supra* note 44.

[46] *See generally* The Queen v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401.

[47] Yves Corriveau, *Citizen Rights and Litigation in Environmental Law NGOs as Litigants: Past Experiences and Litigation in Canada, in* ENVIRONMENTAL RIGHTS: LAW, LITIGATION & ACCESS TO JUSTICE 117, 117–18 (Sven Deimann & Bernard Dyssli eds., 1995), stating:

> Canada is the second largest country in the world: from east to west, 5514 kilometers separate Cape Spear in Newfoundland from the Yukon-Alaska border. It is therefore difficult for the 86 people responsible for enforcing the laws of Environment Canada and the personnel of the provincial Environment Ministries to maintain an adequate surveillance of all of the areas within their jurisdictions.

Id.

constitutionally and looked on with suspicion by provincial governments jealous to retain their own autonomy, Ottawa's caution towards imposing environmental impact requirements was heightened by its perception of what was unfolding south of the border,[48] where environmentalists had taken the same requirements to court to challenge government programs with alarming success. The American lawsuits led to delays and injunctions while new impact statements were written and their often-embarrassing contents were exposed to the press. Among the casualties of this litigation were water resources development projects, on which elected politicians depended to please constituents and fill campaign coffers. The very first U.S. environmental impact statement cases enjoined the Cross Florida Barge Canal,[49] Gilham Dam,[50] and the Cache River Bayou DeVieu,[51] all big price-tag projects of very doubtful merits.[52] Message to Canada from the United States: environmental impact review can be dangerous to your political base, treat with caution.

And so Canada did.[53] Tentatively, feeling its way, the federal government issued a cabinet directive in the early 1970s creating a federal Environmental Assessment and Review Process, unfortunate acronym "EARP," run by a new Federal Environmental Review Office, even more

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[48] *Id.* at 119.

[49] *See generally* Envtl. Def. Fund, Inc. v. U.S. Army Corps of Eng'rs, 324 F. Supp. 878 (D.D.C. 1971).

[50] *See generally* Envtl. Def. Fund v. Tenn. Valley Auth., 339 F. Supp. 806 (D. Tenn. 1972), *aff'd*, 468 F.2d 1164 (6th Cir. 1972). These proceedings continued later. *See generally* Envtl. Def. Fund v. Tenn. Valley Auth., 371 F. Supp. 1004 (D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

[51] *See generally* Envtl. Def. Fund, Inc. v. Hoffman, 421 F. Supp. 1083 (D. Ark. 1976), *aff'd*, 566 F.2d 1060 (8th Cir. 1977).

[52] Indeed, NEPA disclosures lead to the eventual cancellation of both the Cross Florida canal and the Cache River project. *See supra* notes 49, 51.

[53] G. Bruce Doern, Getting It Green: Case Studies in Canadian Environmental Regulation 12 (1990), stating:

> Environment Canada's inherent capacity was blunted from 1975 until the late 1980s by four dynamics. The first was an inability to establish and carry out rigorous compliance procedures. The second was a weakening through budget cuts of an already overtaxed scientific and investigative capacity. The third was the federal government's insecurity in its relations to the provinces and among its own departments. And finally, Environment Canada was itself primarily a technical department, possessing only limited economic and even, to some extent, legal literacy and analytical capacity. Directly or indirectly, all of these elements were indicators of the low position that environmental policy and implementation occupied on the political and economic agenda.

Id.

unfortunate acronym "FEARO."[54] The process, so written, went into hiding.[55] In 1979, propelled forward by an increasingly restive public, the Parliament tried to move the ball forward, directing the federal Minister of the Environment to coordinate federal impact reviews and issue guidelines for doing them.[56] On the campaign trail, the conservative party even promised to legislate an environmental review process itself, only to lose its ardor upon winning the elections.[57] Instead, five years later, the Environment Ministry issued an administrative Guideline Order asking that the "initiating department" undertake a "self assessment process" to "ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered."[58] This Order would set the rules of the game when Rafferty-Alameda and its companion water projects came on stage.

The guideline process was simple.[59] The federal agency constructing or licensing a project did a first screen, with the assistance of FEARO, to decide if it had environmental problems. If not, end of story. If so, FEARO appointed an Environmental Assessment Panel of experts with relevant knowledge and no conflict of interest.[60] After its own investigation and public consultation, the Panel reported its findings and recommendations back to the construction agency and the environment minister.[61] Should these two authorities reach different conclusions, the matter went to the Cabinet itself.[62] It was a clean-looking drill and, for those familiar with NEPA and the U.S. experience with a process controlled far more exclusively by development agencies, one that promised fair results. If in fact it could be enforced. Which is where the Rafferty and Alameda cases came in.

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[54] *See* Environmental Assessment and Review Process Guidelines Order, SOR/84–467 (1984) (Can.), *available at* http://www.ceaa-acee.gc.ca/013/0002/earp_go_e.htm [hereinafter EARP Guidelines Order]; Roger Cotton & John S. Zimmer, *Canadian Environmental Law: An Overview,* 18 CAN.-U.S. L.J. 63, 75 (1992).

[55] *See* Constance D. Hunt, *NEPA's Legacy Beyond the Federal Government,* 20 ENVTL. L. 789, 793 (1990).

[56] *See id*; Cotton & Zimmer, *supra* note 54, at 75.

[57] *See generally* EARP Guidelines Order, *supra* note 54.

[58] *Id.* § 3.

[59] *See id.*; Cotton & Zimmer, *supra* note 54, at 75–76. The description of the EARP guideline process that follows is taken from these sources.

[60] EARP Guidelines Order, *supra* note 54, §§ 20–22.

[61] *Id.* § 31.

[62] Can. Wildlife Fed'n Inc. v. Canada (Minister of the Env't), 4 C.E.L.R. (N.S.) 201, 225 (1989) (T.D. Can.).

D. *In with a Bang:* Rafferty-Alameda I

> [T]here is an irony in these proceedings which could make a cynic cackle with glee.
>
> —*Canadian Wildlife Federation v. Minister of the Environment*[63]

Rafferty-Alameda was the first of the dam projects to court, and the suits came in waves. The initial lawsuit was filed by one Donald Wilkinson, a rancher who sought to quash a set of public hearings on the dams scheduled during peak ranching season.[64] He pointed out that he had only sixty days to prepare comments on a new impact statement of 1805 pages (the Rafferty-Alameda team had indeed been busy).[65] Further, the public hearings seemed timed to minimize opposing voices and unwelcome news. When a member of the provincial parliament confronted Premier Devine with complaints about the schedule from the Stock Growers Association, he was told that "history will show what you know and don't know about the stock growers would fill a large room, my boy."[66] My boy. It was the attitude, and it would infect everything about the process from then on. When questioned about the reason for submitting two separate environmental reviews for the dam projects and a third for the power station, although they were connected to each other at the hip, indeed each justified the other, provincial Minister of the Environment Swan replied: "That's the way they came to us; they'll be dealt with in that manner."[67] End of discussion. Answers like this from public officials tend to breed their own opposition.

After a short hearing, the Saskatchewan Court of Queen's Bench dismissed Wilkinson's suit on technical grounds: since the environmental board holding the hearing would make no legally binding decisions, it didn't matter if the proceedings were rigged.[68] Further, the ranchers could always submit their comments later. The ensuing public hearings on the Rafferty-Alameda impact statement were the short-

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[63] *Can. Wildlife Fed'n Inc.*, 4 C.E.L.R. (N.S.) at 213, 225.

[64] Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)* (22 Sept. 1987) (Mr. Lyons) 4–7, *available at* http://www.legassembly.sk.ca/hansard/21L1S/87-09-22.pdf [hereinafter 22 Sept. Proceedings]. *See generally* Wilkinson v. Rafferty-Alameda Bd. of Inquiry, [1987] 64 Sask. R. 170.

[65] *Wilkinson*, 64 Sask. R. at 171.

[66] 22 Sept. Proceedings, *supra* note 64, at 5–6.

[67] Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)* (3 July 1987) (Mr. Shillington) 19–20, *available at* http://www.legassembly.sk.ca/hansard/21L1S/87-07-03.pdf.

[68] *See Wilkinson*, 64 Sask. R. at 172.

est in history for an environmental review.[69] But only the opening shot had been fired.

Next into the fray came a local coalition called the Association to Stop Construction of the Rafferty Alameda Project, a.k.a. SCRAP.[70] Following Minister Swan's environmental clearance, SCRAP challenged the adequacy of the underlying review under the Saskatchewan Environmental Assessment Act. The government responded with a familiar litany of defenses, starting with the proposition that SCRAP had no standing to bring the case.[71] The court found SCRAP's members, which included several local landowners, sufficient for standing[72] and, further, that the complaint raised a "real and substantial controversy which is appropriate for judicial determination," the adequacy of the environmental review.[73] So far so good. Then the court fainted. Dismissing a claim for damages, it turned to the crux of the matter: an environmental review that allegedly failed to "deal fully with [the] impact to the environment."[74] This claim fell to a bevy of defenses familiar to a reader of, say, Charles Dickens and the inscrutable mysteries of the law. By statute, the duty to conduct an adequate review fell to the Lieutenant Governor, not the Environment Minister (as if they were not the same government) and, adding greater insult, even if SCRAP could prove violations on the part of the Minister, they were not enforceable because "the Minister answers to the Legislature alone."[75] At least insofar as compliance with environmental statutes was concerned, the Minister was above the law. If this opinion held, environmental law in Canada was on the rocks.

Enter the Canadian Wildlife Federation with a more potent claim.[76] It wasn't just the Saskatchewan government that was violating the law; it was the federal Ministry of Environment in Ottawa failing to follow the EARP Guideline Order. The Ministry had conducted no environmental review and, instead, cleared the project based on the Saskatchewan process.[77] Angered by the Ministry's refusal to consider

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[69] *See* 22 Sept. Proceedings, *supra* note 64.

[70] *See generally* Ass'n of Stop Constr. of Rafferty Alameda Project v. Saskatchewan, [1988] 68 Sask. R. 52.

[71] *Id.* ¶ 1.

[72] *Id.* ¶¶ 7, 30.

[73] *Id.* ¶¶ 38–39, 44.

[74] *Id.* ¶¶ 71, 74.

[75] *Id.* ¶¶ 75, 85.

[76] *See generally* Can. Wildlife Fed'n Inc. v. Canada (Minister of the Env't), [1989] 3 F.C. 309 (T.D. Can.).

[77] Interview with Ken Brynaert, *supra* note 34.

its several requests (even the famous, hotel-room-delivered motion to censure brought no response), the Federation sought a court order that the Ministry conduct its own review. The Federation's complaint alleged that the provincial assessment did not consider impacts beyond its borders, including U.S. impacts (of course, to have done so would have admitted the federal nature of the impacts), nor did it consider effects on (federal) fisheries and, most importantly, migratory waterfowl that were protected by international treaties.[78] Once the federal Minister was seen to have jurisdiction, he would be compelled to convene the independent Environmental Review Panel, and it would be a whole new ballgame.

The Rafferty-Alameda project, strongly supported by the provincial government, was a hot potato, however, and the Minister wanted no part of it. He argued, first, that the EARP guidelines were only suggestions from the federal government, not law, and, further, that the project had been fully reviewed by Saskatchewan.[79] The guidelines applied only if there was no "duplication resulting from the application of the process," he noted, and federal review here would add just such duplication.[80] The federal trial court rejected both defenses. It found that the EARP guidelines were "not a mere description of a policy or programme," they were regulations and created rights that were "enforceable by way of *mandamus*."[81] As for duplication, the Rafferty-Alameda affected areas of central federal responsibility, migratory birds for one; indeed, the federal Environment Ministry itself had written Saskatchewan that there were "a number of important information gaps" concerning areas of federal concern.[82] And so, on April 10, 1989, a day that, to the project proponents, will live in infamy, the court enjoined construction of the Rafferty Dam, then only twenty percent complete.[83] Through this ruling, the fledging and politically weak Ministry of Environment had done with its guidelines what it could never have done in the Parliament: it had passed a binding law.

A scant two months later, the appellate court upheld the ruling.[84] According to Ken Brynaert, who was in attendance, the judges did not

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[78] *See Can. Wildlife Fed'n Inc.*, 3 F.C. at 313–14.

[79] *Id.* at 315.

[80] *Id.*

[81] *Id.* at 322.

[82] *Id.* at 323.

[83] Hood, *supra* note 1, at 70; *see also* Canada (Attorney Gen.) v. Saskatchewan Water Corp., [1990] 88 Sask. R. 13, ¶ 23.

[84] *See generally* Can. Wildlife Fed'n Inc. v. Canada (Minister of the Env't), [1989] 2 W.W.R. 69 (F.C.A. Can.).

even bother to retire to consider the government's case; they whispered among themselves a little and then ruled: appeal denied.[85] The success of the lawsuit sent shockwaves across Canada. It was the first case enjoining a government project of any kind on environmental grounds. It emboldened a broad band of citizen groups to think that the government, too, would have to answer to the law, and that the courts would back them up.[86] On the day of the opinion, a member of the provincial House of Commons from Saskatoon, Saskatchewan, rose to say: "I was pleased to hear that the federal license has been lifted by the courts, and this government has been shown for what it is, that this government can't be trusted when it comes to the environment in our province."[87]

News of the *Canadian Wildlife Federation* verdicts hit the Rafferty-Alameda team like the end of the known world. They had fully expected to win in court.[88] Nobody understood the opaque EARP guidelines and this was, after all, their dam, not Ottawa's. Eric Berntson told a standing-room only crowd at Estevan that he was "madder than hell" about getting stopped by people "no more interested in the environment than they are in flying to the moon."[89] He was almost drowned out, however, by the "background roar" from opposition members.[90] To him and his supporters, and to the very end, they were on the side of the angels; the uproar was simply about a bumbling, intrusive federal agency and politics-as-usual. And so, they would ratchet up the politics on their side. They even made their own movie, "Dreams in the Dust."[91] It featured a widow whose husband keeled over from a heart attack when he learned of the project delays. Engineer Hood's chapter on the fight that followed is entitled "Getting The Better of Them."[92]

Given a mission it had by no means sought, the federal ministry (now called Environment Canada) had to conduct an environmental review. Scrambling and under pressure, in August 1989 the agency completed an internal review, found no environmental problems, and

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[85] Interview with Ken Brynaert, *supra* note 34.

[86] *See, e.g.*, Hood, *supra* note 1, at 73.

[87] Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)* (10 Apr. 1989) (Mr. Atkinson) 22, *available at* http://www.legassembly.sk.ca/hansard/21L3S/89-04-10.pdf.

[88] Hood, *supra* note 1, at 70 (describing the proponents' reaction as an "unbelievable blow").

[89] *Id.* at 71–72.

[90] *Id.* at 72.

[91] *Id.* at 158–59.

[92] *Id.* at 81.

approved a new license for Rafferty-Alameda.[93] And without doubt hoped that it could walk away. Instead, this time, it prompted two lawsuits, one by the Canadian Wildlife Federation against Rafferty[94] and the other by two farmers, the Tetzlaff brothers, against Alameda.[95] The Tetzlaffs' case had a special tug to it: Alameda Dam had originally been proposed for the Souris River well upstream of its confluence with Moose Mountain Creek. That was in fact the location analyzed in Saskatchewan's environmental impact review. Now, the site had been moved downstream, by more than fifty miles, and on top of their property which would lie forever under 120 feet of water.[96] To the Rafferty-Alameda team, no worries; the Tetzlaffs would be paid for their land.[97] It was simply a matter of money.

Back in court, the issues in these cases were no longer whether Environment Canada had to conduct a review but, rather, whether the issues were serious enough to invoke the independent review panel and the full EARP process. The trial court minced no words. The EARP guidelines might be ambiguous, but there was no avoiding the major impacts of the Rafferty Dam with promises of unproven and unspecified mitigation.[98] The government's position that it was too late to apply the guidelines—having itself refused to apply them earlier—"could make a cynic cackle with glee."[99] Most stingingly, the court referred to the government's arguments as attempts to "excuse lawbreaking":[100] "If there be anyone who ought scrupulously to conform to the official duties which the law casts upon him or her in the role of a high State official it is a Minister of the Crown. That is just plainly obvious."[101]

This language was more than a shot across the bow of the environmental bureaucracy. It was a shot through the hull. The court quashed the licenses unless the Ministry convened an Independent Review Panel for the Rafferty-Alameda dams.[102]

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[93] *See id.* at 77.
[94] *See Can. Wildlife Fed'n Inc.*, 4 C.E.L.R. (N.S.) at 201.
[95] *Id.* at 202.
[96] *Id.* at 210–11.
[97] Hood, *supra* note 1, at 85.
[98] *Can. Wildlife Fed'n Inc.*, 4 C.E.L.R. (N.S.) at 218–20.
[99] *Id.* at 225.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 226.

E. *Out with a Whimper:* Rafferty-Alameda II

> Really, the whole thing was just a charade.
>
> —*Rod MacDonald, Stop Construction of the Rafferty-Alameda Project (SCRAP)* [103]

Environment Canada was back on the hot seat. Complicating the matter, and with the political assistance of their neighbors across the border, the Rafferty-Alameda team managed to insert into a pending U.S.-Canada boundary waters agreement a $51 million subsidy from the Americans for construction of the two dams, which were to be completed "expeditiously" and to hold Canada liable for any breach of the pact.[104] Armed with this new argument and with its own lobbying clout against a federal environment ministry whose political base consisted of the diffuse support of environmental groups who spent most of their time criticizing the ministry for poor performance, the dam boosters cut a very sweet deal.[105] Environment Canada would go ahead and appoint its Review Panel. But at the same time, land acquisition and construction of associated works for the projects could continue. Only work on the Rafferty dam within the Souris River itself would be halted. Environment Canada would, further, compensate Saskatchewan up to $10 million for project delays. Engineer Hood and his colleagues uncorked the champagne.

The prospect of now conducting an independent environmental review on a project released for construction, for which the government would itself be liable for any delays, to say nothing of the cost of possible alterations or an ultimate decision not to proceed, was not lost on anyone. To a spokesperson for SCRAP, now out of the legal action but still into the political fight, the process was a "farce."[106] Most journalists saw it the same way.[107] Certainly the proponents saw it that way. According to engineer Hood, as soon as the second license was issued on Rafferty, work on the dam "rumbled on into the night,

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[103] Chris Wattie, *Chief Justice Denies Injunction to Stop Rafferty-Alameda Dams,* The Rec. (Kitchener-Waterloo, Ont.), Nov. 16, 1990, at F11.

[104] *See* Canada (Attorney Gen.) v. Sask. Water Corp., [1991] 1 W.W.R. 426, 435 (T.D. Can.).

[105] The Hood team's elation with the deal is recounted at Hood, *supra* note 1, at 119. The description of the agreement is taken from this account.

[106] *See* Wattie, *supra* note 103.

[107] *See* Dennis Bueckert, *Court Rejects Bid to Stop Rafferty Dam,* The Rec. (Kitchener-Waterloo, Ont.), Dec. 21, 1990, at A8; David Suzuki, *The Environmental Assessment Dilemma: At Best, Process Can Only Reveal Areas of Ignorance but It's Our Best Way to Raise Substantive Questions,* Toronto Star, Nov. 10, 1990, at D6.

unabated, twenty-four hours a day, seven days a week until freeze-up."[108] Locals came out in lawn chairs to watch the action. In the dam building business, construction is nine/tenths of the law.

Environmental law itself, meanwhile, had reached its high water mark on Rafferty-Alameda. From here on it went ebb. By Spring 1990 the Rafferty dam was two-thirds completed and construction had reached the Souris River itself, forbidden ground under the agreement.[109] Learning of it, the Review Panel threatened to quit on rather obvious grounds: why bother to study a fait accompli? When the federal Environment Minister simply wrung his hands in despair, Saskatchewan Premier Devine seized the moment and went for the gold, ordering construction to resume on "all aspects of the project."[110] The Panel resigned.[111] Environmental review was moot.

But not the legal actions. Alleging a violation of the hard-fought Saskatchewan-Environment Canada agreement, the Attorney General of Canada had filed his own suit to enjoin construction on Rafferty-Alameda until the Panel ruled.[112] The court, retreating to the mindset expressed in the SCRAP opinion, ruled that such relief simply could not be obtained against the Crown.[113] Even if it could, the court added, the agreement was a nullity because it had not been approved in the correct manner.[114] The court denied the injunction and then dismissed the case entirely because once the project was substantially completed (because there was no injunction) "there would no longer be any purpose in holding a trial."[115] Catch 22: The Crown was above the law; its agreements on behalf of the public were not worth the signatures that executed them; there was no need to restrain a project pending environmental review because, once the project was completed, there would be nothing left to litigate no matter what the review disclosed.

The outcome of the Tetzlaffs' case was even more bizarre. They had sought the same ends, a review panel and a halt until the panel had reported.[116] But, the court held, reading the EARP guidelines with

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[108] Hood, *supra* note 1, at 82 (photo caption).

[109] *See Sask. Water Corp.*, 1 W.W.R at 438; Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)* (27 Apr. 1990) (Hon. Mr. McLeod) 10, *available at* http://www.legassembly.sk.ca/hansard/21L4S/900427.pdf.

[110] *Sask. Water Corp.*, 1 W.W.R. at 439.

[111] *Id.*

[112] *Id.* at 440.

[113] *Id.* at 441–42.

[114] *Id.* at 447.

[115] *Id.* at 444.

[116] *Can. Wildlife Fed'n Inc.*, 4 C.E.L.R. (N.S.) at 203.

finely-honed legal minds, while the guidelines required a Review Panel, there was no "*requirement* that any report be made and considered before any ministerial decisions are made."[117] Continuing in this vein, the court held that any obligation not to proceed during the review "depends for 'enforcement' on the pressure of public opinion and the adverse publicity which will attach to a contrary course of action."[118] To which conclusion one might ask: why, then, have courts of law?

In February 1991, almost as an afterthought, Environment Canada went forward to appoint a review panel for the remaining Alameda Dam.[119] That August, however, with the dam thirty percent complete, the Rafferty-Alameda team produced a consultant to say that an uncompleted dam could cause increased flooding. The federal Environment Minister then announced that he would no longer seek to suspend construction while the review took place.[120] Construction was not just nine/tenths of the law. It became ten/tenths.

The aftershocks of Rafferty-Alameda reverberated across Canada. On the one hand, it was a bad show all round. Everyone ended up feeling betrayed: the Ministry, certainly the environmentalists, even the construction team. The press hooted. Legal commentators were unsparing. Even engineer Hood, rewarded with the completion of his life's work, would write a book in the role of victim, unfairly treated by press, public, and federal government alike. Orville Ericksen went into retirement and died quietly, folded over his tackle box on a fishing trip in the north woods with Ken Brynaert.

In the end, it was the Oldman verdicts that lived on. Like it or not, and somewhat by the back door, Canada now had an environmental review law that it had to deal with. And a judicial opinion that stated, if there was anyone, further, who had to comply with the law's requirements, it was "high State officials" and "Ministers of the Crown." But would courts actually make that happen?

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[117] Can. Wildlife Fed'n Inc. v. Canada (Minister of the Env't) [1991] 1 F.C. 641, 667.

[118] *Id.* at 666.

[119] Dennis Bueckert, *Another Panel Will Review Rafferty Dam,* The Rec. (Kitchener-Waterloo, Ont.), Feb. 6, 1991, at F8.

[120] World News Digest, Facts on File, *Rafferty Dam Construction Cleared,* Aug. 29, 1991.

II. The Second Front: Oldman Dam

> The fight over the Oldman River dam issue is one of the longest, most bitter and occasionally bizarre episodes in the history of Alberta's conservation movement.
>
> —*Ed Struzik, Edmonton Journal, 1992*[121]

There are always two embarrassments mentioned in the short history of Canadian environmental law. One is Rafferty-Alameda; the other is Oldman dam. Much of what happened will look familiar: a fledging federal environmental agency struggling to find its bearings against a province ready to battle and to call its bluff. Only here there was a new dimension that would grow larger in the Great Whale project yet to come: Native Canadians, in this case the Blackfoot Indian nation, had been occupying the Oldman watershed for up to 12,000 years.[122] By the end of the saga one of them would be serving a year sentence, and Oldman dam would be exhibit A before an international tribunal on free trade.

A. *The River and Its People*

> That river was never put aside for economic benefit, it was put aside by the creator for every living thing.
>
> —*Edwin Yellow Horn, Peigan Nation*[123]

The Oldman is not a plains river. It rises from snowmelt in the Rocky Mountains and comes tumbling down in chutes and pools with a trout fishery said to be the best in the country. The Blackfeet are thought to have come into the region after crossing the Bering Sea from Asia, but their story of Genesis begins with being placed here by Naipi, the Old Man, who made the world and everything in it. At which point, after instructing the people how to hunt and live, Naipi

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[121] Ed Struzik, *Supreme Court Decision Caps 2 Decades of Acrimony over Dam,* Edmonton Journal, Jan. 24, 1992, *available at* http://www.nisto.com/cree/lubicon/1992/19920126.html.

[122] Jack Glenn, Once Upon an Oldman: Special Interest Politics and the Oldman River Dam 17 (1999). The author provides a description of the River and the history of its human occupation that follows. *Id.* at 13–24; Univ. of Guelph, Guelph Water Management Group, Land Use and Settlement in the Oldman River Watershed, http://www.uoguelph.ca/gwmg/wcp_home/Pages/O_he_lu.htm (last visited Apr. 18, 2006) [hereinafter Guelph, Land Use and Settlement].

[123] Patrick Nagle, *Alberta Town Looks Forward to Benefits of Oldman Dam,* The Rec. (Kitchener-Waterloo, Ont.), May 23, 1992, at C12.

is said to have retreated "to the high mountains in the headwaters of the river that now bears his name"—the Oldman.

The Peigan tribe, the largest of the Blackfoot nation, were buffalo hunters and when European fur traders encountered them in the early 1800s they controlled the plains from the Canadian Rockies east into Saskatchewan and south into Montana. With the arrival of the snows, the Peigan, like Naipi, withdrew to the Oldman valley where they remained until spring. Their central wintering ground was at the confluence of Crow Lodge Creek and the Oldman River as it emerged onto the plains, lined by cottonwood trees, a thin ribbon of green against a flat and treeless prairie. The river stages marked the seasons for the Peigan; they timed their sweats and sacred ceremonies by its rise and fall.[124] To Milton Born With A Tooth, the Oldman was a "religious ecosystem."[125] To the oncoming whites, it was a "water resource."

The first white entrepreneurs into the area were American whiskey traders, up from Montana, forcing the Dominion government to send in the Mounties and build the usual fort. Before long, white settlers were on their way in as well. One of the whiskey settlements was called Fort Whoop-Up. The Peigan resisted what they saw as invasion.[126] They did not trap furs or swap goods with the newcomers; they lived on the buffalo and continued to do so until the firepower of horses and rifles made the high plains a killing ground and the buffalo numbers plummeted.[127] By the late 1870s the herds at last failed to show up and the Peigan, dying of starvation, came to terms. In 1877 the Blackfoot nation surrendered all of their lands, including the Oldman watershed, to the Crown in return for small, tribal reservations and the right to continue to trap, fish, and hunt throughout the region. The Peigan chose a site on the Oldman, failed at farming, succumbed to alcohol, smallpox, the plague, tuberculosis, and influenza; by the early 1900s they were down to 250 souls. They stand at perhaps 1500 today.[128] Whatever tangible symbol remains of their religion and culture lies in the upper reaches of the Oldman River as it comes out of the mountains, less than a dozen miles upstream.

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[124] GLENN, *supra* note 122, at 207.

[125] *See id.* (quoting Milton Born With A Tooth).

[126] *Id.* at 206–07.

[127] *Id.*

[128] *See* Univ. of Guelph, Guelph Water Management Group, Peigan (Pikuni) and Blood (Kainaiwa) Nations, http://www.uoguelph.ca/gwmg/wcp_home/Pages/O_he_fn.htm (last visited Apr. 18, 2006).

The first whites tried to farm dry soils with scarce rainfall until, in 1890, an enterprising Mormon by the name of Ora Card dug an irrigation canal from the river to his settlement.[129] Joining forces with a British coal company and then the Canadian Pacific Railway, the immigrants expanded their irrigation projects to make crops a little more tenable and, from the Crown's point of view, to put some Canadians in the way of American boomers from the south bent on expanding their "manifest destiny" and looking north.[130] The Dominion Land Act made irrigated lands available for one-fifth the going market price (in the United States, the Reclamation Act made them free for the taking), and federal irrigation laws promised more diversion projects. In the words of one historian, a "happy band of politicians, railway officials, land developers and government engineers" reached their prime before and after the First World War.[131] Their assumption was that irrigation was profitable and would pay its way. The dust bowl proved otherwise. The railroad went into deep deficit, sold off its lands, and scrambled to get out of the irrigation business. Water resources development in southern Alberta, round one, was not a big success.

Round two followed the Second World War, when returning soldiers and new waves of immigrants again looked to the western plains. The federal government launched new water projects to assist them, but soon learned, as it had thirty years earlier, that "irrigation in western Canada was a money-losing proposition."[132] As Ottawa maneuvered to get out of the business, in stepped Alberta which was placing its bets on the future through expanded agriculture, food processing, and crops like sugar beets that required more water.[133] While ninety percent of Canadian farmers relied on natural precipitation for crops and ranching, the western plains depended overwhelmingly on irrigation.[134] For Alberta, that meant only two sources and one of them was Oldman.

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[129] *See* Irrigation. . . History of Irrigation in Southern Alberta, http://www.uleth.ca/vft/Oldman_River/Irrigation.html (last visited Apr. 18, 2006) [hereinafter Irrigation]; *see also* GLENN, *supra* note 122, at 19–21; Guelph, Land Use and Settlement, *supra* note 122. The description of irrigation ventures that follows is taken from these sources.

[130] GLENN, *supra* note 122, at 20.

[131] *Id.* at 21.

[132] *Id.* at 22.

[133] Irrigation, *supra* note 129; GLENN, *supra* note 122, at 22.

[134] Irrigation, *supra* note 129; GLENN, *supra* note 122, at 22. *See generally* Friends of the Oldman River Soc'y v. Canada (Minister of Transp.), [1992] 1 S.C.R. 3 (Can.) [hereinafter *Oldman River II*].

B. *The Dam and Its People*

> Mercy on your soul! You have been assailed by the Southern Alberta water lobby.
>
> —*Owen G. Holmes, letter to the federal Minister of Environment, 1986*[135]

The first serious proposals to dam the Oldman River date back to the 1950s with a federal-provincial study, released ten years later, recommending a location at the confluence of the Crows Nest, Castle, and Oldman, the Three Rivers site.[136] A decade of environmental reviews and public meetings followed, capped by the disappointing conclusion of the Alberta Environment Council that "an onstream dam [was] not required at this time, nor in the foreseeable future."[137] If one were to be built, however, a better location would be on the Peigan tribe reserve.[138] The Peigan promptly put in a demand for compensation, and lots of it.[139] Nobody seemed happy, and the project appeared doomed.

Plans like this, however, do not go away. In 1984, taking advantage of a crippling summer drought, Alberta Premier Peter Lougheed announced that his government would proceed with the dam at the Three Rivers location.[140] He anticipated, he said, "no environmental concerns."[141] The environmental facts of life, however, are that dams block fish runs, and irrigation return flows are notoriously high in silt, fertilizers, pesticides, and salts and metals leached from the soil.[142] A federal study, completed a few years later, found that there could be significant impacts indeed on water quality, fisheries, and the Peigan reservation downstream.[143] The Edmonton Journal saw what was coming. It editorialized: "The Oldman Dam has the potential to be an . . . environmental disaster."[144]

As the proposals for the Oldman waxed, waned, and shifted locations, a fledgling group of farmers and environmentalists started rais-

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[135] Letter from Owen G. Holmes to the Honorable Lucien Bouchard, Federal Minister of Environment (Apr., 1986), *reprinted in* GLENN, *supra* note 122, at 130.

[136] GLENN, *supra* note 122, at 26.

[137] *Id.* at 33.

[138] *Id.*

[139] *Id.* at 39–40.

[140] *See* Struzik, *supra* note121.

[141] *Id.*

[142] Univ. of Guelph, Guelph Water Mgmt. Group, The Oldman River Watershed, http://www.uoguelph.ca/gwmg/wcp_home/Pages/O_home.htm (last visited Apr. 18, 2006).

[143] GLENN, *supra* note 122, at 111.

[144] *Id.* at 43 (citing to the EDMONTON JOURNAL).

ing questions, then criticisms, and the battle lines slowly formed.[145] Politically, however, it was no contest until they called on a national environmental network for help. Down from Calgary came Martha Kostuch, an expatriate from Minnesota, a veterinarian by trade and an environmentalist by passion who was now living in a town called Rocky Mountain House, six hours of hard driving away.[146] The first thing Martha did was organize the Friends of the Oldman River Society, acronym FOR; "We wanted something with a positive ring," she explains. As the issues heated up and insults flew, then nasty letters, then intimidating phone calls—at one point Martha had the Mounties tap her phone to monitor the threats she was receiving—there was an advantage to managing this campaign from Calgary. The pressure on local opponents was also relentless. Alberta sought in court to discover the identities of the Society's local members, which could have put the livelihoods of more than one, particularly those who worked for or with the provincial government, in jeopardy. These are small towns. Everyone knows everyone. When the Society gave notice it intended to sue over Alberta's approvals for the dam, the provincial Environment Minister Ken Kowalski branded them "pot smoking social anarchists." [147] He later accused them of inciting violence.[148] Pressed to explain, he apologized.[149] More or less. And much later.

The Peigan tribe was torn.[150] Desperately poor and in need of government aid, they were offered millions of dollars in mitigation for the dam, which translated into schools, education, the improvement of their lives. But the tribe was tied to the river, root and branch, every aspect of its physical and spiritual culture. Which way did responsibility lie? Deeply divided, the tribal council voted not to oppose. On the other hand, a warrior group within the tribe, the Lonefighters, maintaining a warrior tradition of young braves that extended back beyond memory, took a more aggressive stance.[151] They would fight the dam to the end, indeed beyond the end. Their spokesman was Milton Born With A Tooth. They would not join with Martha Kostuch's Friends of

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[145] *See id.* at 50–55.

[146] Telephone Interview with Martha Kostuch, Founder, Canadian Environmental Network, May 30, 2005. The description of the early opposition that follows is taken from this interview.

[147] GLENN, *supra* note 122, at 51.

[148] *See* Interview with Martha Kostuch, *supra* note 146.

[149] *See id.*

[150] GLENN, *supra* note 122, at 195–204.

[151] *Id.* at 76–86.

the Oldman, but they would pursue their own legal strategy.[152] And they would also raise hell. The stage was now set for a battle that would test not only the warring parties but the Canadian government and its authority to make environmental policy at all.

C. *Oldman Goes to Court*

> Why should ordinary citizens find it necessary to go to court to force their own government to respect the law?
>
> —*Editorial, Lethbridge Herald, 1993*[153]

The legal actions orchestrated by Martha Kostuch and the Society took two paths. The first asserted federal jurisdiction over the project under the EARP guidelines.[154] In 1986, Alberta had requested a permit from the Ministry of Transport for work in a navigable water, the same license that would trigger federal responsibility in Rafferty-Alameda. Beginning in 1987, local environmentalists started petitioning both the Transport and Fisheries ministries to comply with the guidelines.[155] The Ministry of Fisheries replied that it had delegated its responsibilities to the province; Transport replied that this was Alberta's dam. Friends of the Oldman River then petitioned the Ministry of Environment to invoke the guidelines directly[156] and was refused. The federals wanted no more to do with this one than they did Rafferty-Alameda.

Meanwhile, the Society went to provincial court challenging Alberta Environment Minister Ken Kowalski's "interim" approvals for the dam for lack of public participation.[157] Kowalski described the charges as "absurd, nonsensical and to the point of being ridiculous."[158] In his view—reminiscent of government officials around the globe—he *was* the public. In December 1987 the Chief Justice of the Queens Bench of

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[152] *See id.* at 237–46. The Peigan tribe brought several claims based on cultural and treaty rights to the flow of the Oldman River. While these claims may have provided leverage in negotiating compensation and other terms from the government, none were successful in court. Note that the term Peigan and Piikan are used interchangeably throughout the text.

[153] Editorial, LETHBRIDGE HERALD, Jan., 1993, *reprinted in* GLENN, *supra* note 122, at 248.

[154] *See* GLENN, *supra* note 122, at 61–63. *See generally* Friends of the Oldman River Soc'y v. Canada (Minister of Transp.), [1990] 2 F.C. 18 (Fed. Ct. Can.) [hereinafter *Oldman River I*].

[155] *Oldman River I*, 2 F.C. at 18.

[156] *See id.*

[157] *See id.*; GLENN, *supra* note 122, at 54, 55.

[158] *See* Struzik, *supra* note 121.

Alberta ruled quite the contrary, that the provincial approvals had "[denied] affected parties the opportunity to voice their concerns", and quashed the licenses.[159] His decision was not well received. One local mayor said the judge was "nuts" and "should be sued."[160] Alberta did the next best thing and appealed the verdict.[161] Then it allowed a $97 million construction contract before the appeal could be heard.[162] Going one better, then it dropped its appeal and issued itself a new license.[163] This response would set the pattern for all that followed.

The Oldman River Society was not without recourses of its own. In August 1988, as the river was being diverted into side channels to prepare the dam site, Martha Kostuch swore an affidavit before a local justice of the peace that the construction was violating the national Fisheries Act, a federal criminal offense.[164] In her view the case was clear: the only court decision on the matter had ruled the approvals unlawful.[165] When the Alberta Attorney General asserted jurisdiction over the case, however, Ottawa, with obvious relief, promptly transferred the case to the province.[166] Where of course it expired.[167] Alberta was not about to sue itself over Oldman Dam.

By spring 1989, despite harsh winter construction conditions, the dam was 40% complete, building continued, and the legal actions had not panned out on any front. Then, a miracle occurred. That March, federal Judge Cullen, sitting in Saskatchewan, found the Ministry of Transport bound by the EARP guidelines in *Canadian Wildlife Federation I,* Rafferty-Alameda dam.[168] Within days, Friends of the Oldman River was in federal court in Alberta, seeking application of this precedent and federal environmental review for Oldman Dam. This lawsuit became the main event.

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[159] *See* GLENN, *supra* note 122, at 159; Jim Morris, *Oldman Dam Draws Controversy: Alberta Project Hotly Debated for 34 Years,* THE REC. (Kitchener-Waterloo, Ont.), Aug. 15, 1992, at F10; Struzik, *supra* note 121. *See generally* Friends of the Oldman River Soc'y v. Canada (Minister of Transp.), [1992] 1 S.C.R. 3 (Can.).

[160] GLENN, *supra* note 122, at 56.

[161] *See* Struzik, *supra* note 121.

[162] *Id.*

[163] *Id.*

[164] *Oldman River II*, 1 S.C.R.at 3.

[165] *See* Interview with Martha Kostuch, *supra* note 146.

[166] *See Oldman River II*, 1 S.C.R. at 3; Struzik, *supra* note 121.

[167] Martha would go on fighting all the way to the Supreme Court to assert criminal jurisdiction impugning the Crown Attorney General for dereliction of duty, but to no avail. Interview with Martha Kostuch, *supra* note 146. Enforcement of criminal laws is in all countries viewed as highly discretionary. If the cops want to look the other way, they may.

[168] *See generally* Can. Wildlife Fed'n, Inc. v. Canada (Minister of the Env't), [1989] 2 W.W.R. 69 (Fed. Ct. Can.).

It is sometimes hard to appreciate, and to understand, the intransigence of the players in environmental litigation. Most lawsuits are about money. Very few environmental suits, however, are about money, at least on the part of the people who bring them. What they want is deeper and far less attainable: they want something they care about left alone. They are not easy to deal with because a deal offering them half of the pot is still the death of a loved one. How does one halve a river? And so when Alberta offered to sweeten the pot on the fisheries impacts of Oldman Dam by enhancing the fisheries on other rivers in the system,[169] that meant little to local environmentalists and less to the Peigan tribe. True, you might be able to buy out a desperately poor tribe for money and aid. But to environmentalists whose roots in something like the Oldman River are equally spiritual, if not overtly religious, these cases are like defending Eden from an invader who is intent on ignoring their issues, funneling money to friends, inventing bogus benefits, and breaking the law. An invader who doesn't understand them at all.

For Alberta, the dynamics were different but no less vitally felt. Projects like these were the future of the region. Who could farm the plains without water? The projects were, further, planned by duly-elected officials. What happens though is that, at some early point, having planned them, the officials adopt these projects like children and quite soon the line between public good and private ego disappears. Not only is their project on the line, *they* are on the line, and so begin the insults, the hyperbole, and the need to ram it through come hell or high water. When Alberta attacked its critics as anarchists and defended its dam in terms of "feeding a hungry world,"[170] it probably believed what it was saying. Deep down, though—and one does not have to dig too far—Alberta was defending power. If the Friends of the Oldman River won the EARP guidelines case and established federal environmental review of provincial projects, no end of sovereignty would be lost. To say nothing of lucrative contracts and political clout. To Alberta, Oldman Dam was civil war.

The first EARP case did not go well for the environmental plaintiffs. The trial court was on a hot seat and not inclined to follow the Rafferty-Alameda decision. Ruling in August 1989, he found a way out, holding that while Rafferty-Alameda involved an international commission and international impacts, Oldman was purely local so

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[169] GLENN, *supra* note 122, at 53–54.
[170] *Id.* at 44.

the Ministry of Transport's license did not invoke EARP review.[171] Martha Kostuch was devastated,[172] but giving up is no more part of the DNA for a person like Kostuch than it is for government planners. She plunged immediately into an appeal, while Alberta rolled its bulldozers and deepened the diversion canals for the dam. The appeal would cost money. Friends of the Oldman held a fundraiser, a "celebration" of Oldman with Canadian folk music immortals like Gordon Lightfoot and Ian and Sylvia and turned out another Woodstock, with thousands of people in the fields, national press coverage, money in the appeal fund.[173] But they had yet to win in court.

Five months later they did. In March 1990, an appellate court ruled, as in Rafferty-Alameda, that the federal Transport license required environmental review and ordered both Transport and Fisheries to comply.[174] The appellate decision "sent panic through the ranks of dam supporters," and it did not stop there.[175] The federal Minister of Environment wrung his hands, lamenting openly that for years everyone had thought its guidelines were unenforceable.[176] Apparently, the good old days had ended.

With obvious reluctance, the Minister convened an Environmental Review Panel for Oldman Dam.[177] Alberta, meanwhile, did the smart thing. It appealed the decision to the Supreme Court and proceeded post haste towards completing the dam. The Environment Ministry—unsure of whether it had the authority to enjoin the construction, unsure of whether, even if it did have the authority, Alberta would obey (just look at what had happened with Rafferty)—did nothing at all.[178] Which would simply replay the Saskatchewan scenario, but for the legal challenges made to the Supreme Court and their outcome. Alberta's claim went deep: the national government had no constitutional authority to require environmental impact review.

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[171] *See generally* Friends of the Oldman River Soc'y v. Canada (Minster of Transp.), [1990] 1 F.C. 248 (Fed. Ct. Can.), *rev'd by Oldman River I*, 2 F.C. 18.

[172] GLENN, *supra* note 122, at 65.

[173] *Id.* at 66.

[174] *See Oldman River I*, 2 F.C. at 18.

[175] GLENN, *supra* note 122, at 69.

[176] *Id.*

[177] *Id.* at 72.

[178] *Id.*

D. *The Peigan Make Their Move*

> I'm going to continue what I'm doing slowly to mentally and physically dismantle this dam.
>
> —*Milton Born With A Tooth*[179]

Meanwhile, as Alberta hurried its bulldozers and dallied on its appeal, the Peigan Lonefighters were about to take matters into their own hands.[180] Seeing no relief from the court actions and the dam going up before their eyes, on August 3, 1990, they announced a "ground breaking ceremony,"[181] rented a bulldozer from a local construction company and began a cut into the government's diversion canal to return the Oldman River to its natural channel. At a press conference in nearby Head-Smashed-In-Buffalo-Jump, Milton Born With A Tooth explained that the Lonefighters were acting to protect the Peigan way of life. "No more courts for me, no more panels for me. It's time passion is brought back to this country" said Born With A Tooth.[182] The Lonefighters also believed, apparently on advice from tribal counsel, that their actions on tribal land were perfectly lawful. What followed was a comic-tragedy of mistrust and botched communication.

Milton Born With A Tooth did not act alone. He had significant support from the Peigan tribe, which in turn was acting in the swirl of First Nation rights marches, sit-ins, occupations, and violence that culminated in the summer of 1990, Canada's "summer of discontent."[183] The Peigan list of grievances against Alberta and the federal government went back 100 years. They viewed the treaties they executed as "shams," signed by white Indian agents whose corruption was legendary. "Heck," one current tribal leader says, "we didn't know how to read and we didn't know how to write; we were still riding around on horses and shooting Winchesters." In the early 1920s, without so much as a by-your-leave from the tribe, Alberta had cut an irrigation canal across the reservation. The Peigan still consider it il-

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[179] *Id.* at 94.

[180] *Id.* at 76–93. The description of the Lonefighter action that follows is taken from this source.

[181] GLENN, *supra* note 122, at 77.

[182] William Walker, *Ottawa Refuses to Shut Down Oldman Dam,* TORONTO STAR, May 22, 1992, at A15.

[183] Telephone Interview with Edwin Small Legs, Tribal Council Member, Blackfoot Confederacy, June 3, 2005. The descriptions of Milton Born With A Tooth and Edwin Small Legs that follow are taken from this source.

legal. By the late 1960s, as Oldman Dam was percolating along, their suspicions and sense of injury were already high.

The Peigan opposition to the Oldman dam had been led in the 1970s by Nelson Small Legs, a tribal chief for more than a decade. Nelson's son Edwin grew up with Milton Born With A Tooth, two more going-nowhere kids, as he describes it, cut loose in the poverty and hopelessness of the reservation. In 1978 the two teenagers learned of the American Indian Movement south of the border, studied up on it, and fell in. "It changed our lives," says Edwin. They joined the Native American Walk Across America that summer and it opened their eyes to the problems they faced and their possibilities. Edwin Small Legs recalls: "We met an old lady on the march who told us, 'We're already sick here. Just you wait. You're going to catch cold too.'"

Now, a decade later, Alberta was building its dam, thumbing its nose at the environmental lawsuits and the Peigan's own cases were going nowhere as well. What the Lonefighters did next was planned civil disobedience. They sat down, recalls Edwin Small Legs, and "decided that somebody had to go to jail." Nobody was paying any attention to their protests or even to court decisions. Milton Born With A Tooth spoke up. "I'll do it," he said. "I'll go to jail." And so, on a hot day in August, he rented the bulldozer, went to work, and called in the press. There is a photo of Milton, his sister, and an unnamed Lonefighter on a dike at the construction site.[184] Milton is long haired, broad faced, and naked from the waist up. He is wearing an amulet around his neck, and he is smiling.

Events ran their inevitable course. The Lonefighter bulldozer sank into the mud and became inoperable for days. Somehow they got a forklift, hauled it out, and soon both machines were digging dirt. Alberta went into negotiations with the Tribal President and agreed not to invade the reservation. But the Lonefighters, marching to their own drum, went on pecking away at diverting the canal. Then, on September 7, and without any further communication with the President or Tribal Council, Alberta officials entered the reservation supported by Royal Mounties, in camouflage and heavily armed. They impounded the bulldozer, and, helicopters circling overhead, moved into the Lonefighter camp. No one got hurt. But two shots were fired. The government forces halted and eventually pulled back. The man who fired the shots was Milton Born With A Tooth.

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[184] GLENN, *supra* note 122, at 91.

E. *The Supreme Court Rules*

> Alberta argues that the *Guidelines Order* attempts to regulate the environmental effects of matters largely within the control of the province and, consequently, cannot constitutionally be a concern of Parliament. In particular, it is said Parliament is incompetent to deal with the environmental effects of provincial works such as the Oldman River Dam.
>
> —*Supreme Court of Canada,* Friends of the Oldman River Society v. Canada[185]

Meanwhile, back in Ottawa, the Ministry of Environment's inaction on Oldman Dam was becoming embarrassing. Once Alberta appealed the decision against its project, an assistant to the federal Environment Minister announced that the Environmental Review Panel was "on ice" until the appeal was resolved.[186] Friends of the Oldman petitioned a federal court to order the Minister to move. Under the protective cover of the order, a less-than-eager Ministry finally convened its panel, which went to work on its own assessment, conducted its own hearing, and prepared its report. Alberta, unwilling to compromise its legal position, refused to participate in the review process but mounted a "truth squad"[187] to monitor the proceedings and had its views well represented. At a hearing in Lethbridge one supporter stated that the dam planners were "educated engineers" and "shouldn't be questioned."[188] Truth be told, in their heart of hearts, most engineers would agree. Meanwhile, construction continued on the dam. When asked whether Alberta could actually operate the dam without federal approval, the provincial Environment Minister observed, "Of course we can . . . we're doing it now."[189]

In another building in Ottawa, the Supreme Court was slowly grinding its way through the briefs and arguments of Alberta and no fewer than five sister provinces who saw very clearly that their turf was on the line. Weighing in for the environmentalists was Brian Crane, a senior attorney from Ottawa who had succeeded before these same judges in *Canadian Wildlife Federation* not so very long before. Finally, in February 1992, the court ruled. One can usually tell how a case will

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[185] *Oldman River II*, 1 S.C.R. at 63.

[186] GLENN, *supra* note 122, at 103. The description of the panel's actions that follow is taken from this source.

[187] *Id.* at 109.

[188] *Id.* at 106.

[189] *Id.* at 113.

turn out with the first few sentences of any opinion. In this case, the Supreme Court of Canada began: "The protection of the environment has become one of the major challenges of our time."[190] Attorney Crane must have been feeling pretty good at this point.

The opinion moved through the statutory issues like so much underbrush. Yes, the EARP guidelines order had been authorized by a statute.[191] And no, it did not conflict with the authorities of Transport and Fisheries.[192] And no, although the dam was largely completed, it was not too late for mitigating measures or to declare the law before them.[193] Then it arrived at the main event: in a government of limited powers with natural resources development authority explicitly reserved to the provinces, was a federal environmental review process, even one created by federal statute, constitutional?

To Alberta and her sisters the guidelines order was a "constitutional Trojan horse" enabling Ottawa, "on the pretext of some narrow ground of federal jurisdiction," to intrude deeply into matters that were "exclusively" the provinces' domain.[194] The issue was cosmic, because if the provinces were correct, then national environmental review for all but federal lands and fisheries would be history. Not very good history for Friends of the Oldman River, or for the Canadian Wildlife Federation for that matter, which had already seen what provincial reviews produced. Federal environmental authority in the Canadian constitutional framework was, and remains, one of the hottest questions in Canadian environmental law, and everyone had an opinion.[195] Some simply denied it: "environmental protection" was not a federal power.[196] Others taking a "conceptual" or "global" view found federal environmental authority in such "general" constitutional provisions as criminal law, taxation, or trade.[197] The Oldman court did neither. Instead it took a middle course, but one with a very wide middle that would accommodate major national primacy in environmental law.

The middle course was to look at the "basic functions" of the federal sectoral agencies in this case,[198] Transport and Fisheries. Did the

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[190] *Oldman River II*, 1 S.C.R. at 16.

[191] *Id.* at 6.

[192] *Id.* at 7.

[193] *Id.* at 80.

[194] Jean Leclair, *The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity*, 28 Queen's L.J. 411, 424–30 (2003).

[195] *Oldman River II*, 1 S.C.R. at 62–63.

[196] *Id.* at 64.

[197] *Id.* at 65–72.

[198] *Id.* at 37, 44.

EARP guidelines impose a new legal order on these constitutionally-created ministries or simply stretch their powers to include environmental considerations? Faced with the disagreeable alternative of invalidating an environmental process the court plainly believed would benefit the licensing decisions of Transport and Fisheries (citing a United Nations report to the effect that development and environmental protection were compatible),[199] the court found that the guidelines' "intrusion into provincial matters" was only "incidental" to the "pith and substance" of the federal programs.[200] Environmental review was simply an instrument that helped focus the way these agencies did business, and one that, the court stressed, only bound them to a process and not to a particular result.[201] If, in the end, the Ministry of Transport or Fisheries chose to ignore an Environmental Review Panel, it could do so. Of course, while technically correct, any lawyer knows that process determines outcomes and that environmental process could be used very effectively to change private and government plans. The effect of the opinion, though, was to legitimize Canadian federal environmental law, at least within the bounds of established federal jurisdiction. The provinces would have to get used to a new national order. As would the Minister of Environment, now saddled with more responsibility than he ever wanted.

F. *Requiem*

> There is no way the dam will ever be shut down.
>
> —*Ken Kowalski, Alberta Minister of Public Works, 1992*[202]

In May 1992, the Oldman Dam Environment Review Panel issued its report.[203] It was strong medicine. The adverse effects of the dam would be severe, particularly on fisheries, archeological sites, and the Peigan culture. The provincial environmental review had been so sketchy that conclusions on other environmental effects were not pos-

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[199] *Id.* at 37 (quoting Can. Council of Res. & Env't Ministers, Report of the National Task Force on Environment and Economy, Sept. 24, 1987 which states "Our recommendations reflect the principles that we hold in common with the World Commission on Environment and Development (WCED). These include the fundamental belief that environmental and economic planning cannot proceed in separate spheres. Long-term economic growth depends on a healthy environment.").

[200] *Id.* at 75.

[201] Glenn, *supra* note 122, at 111.

[202] *Id.* at 111–13. The description of the report that follows is taken from this source.

[203] *Id.* at 111.

sible to draw. The project had created great divisiveness, uprooted the lives of displaced farmers, and its claimed need for increased irrigation acreage had not been shown. Overall, the project was "not acceptable."[204] The first and best option was to "decommission" it.[205]

Shades of the Alberta Environment Council report on Rafferty-Alameda, fifteen years earlier. And equally unavailing. Oldman Dam at this point was 80% complete. Always quick with a quote, Alberta Minister of Public Works Ken Kowalski (he had been promoted from the provincial Environment Ministry; following the Supreme Court ruling he had even called for the abolition of the Environment Ministry) labeled the Review Panel report "technically adolescent."[206] The dam would be completed, he said, no matter what the Review Panel did. He was correct.

Here, now, was the federal government, the Review Panel report in hand calling for a decommissioning of Oldman Dam, the dam all but completed and staring it in the face, and Alberta saying you'll decommission Oldman over our dead body. Predictably, perhaps inevitably under the circumstances, the federal Ministry blinked, asking only that the province mitigate impacts on the Peigan and the fisheries.[207] The Peigan negotiations would go on for years. The fisheries were another matter. Canadian biologists had predicted that the dam would present an insurmountable obstacle to the prize species of the region, the bull trout.[208] Three years after the gates closed, a magazine reported that Alberta's remaining bull trout "teetered on the brink of extinction."[209] Alberta reacted promptly. In May 1995 its legislature proclaimed the bull trout one of the province's "official emblems."[210] Problem solved.

Milton Born With A Tooth was convicted on several counts of firearms violations.[211] He said he was firing warning shots, in the air, aiming to miss. The government insisted he shot at the Mounties. He soon became a First Nation celebrity. The Grand Chief of the Assembly of Manitoba Chiefs declared his people "supportive of the principals

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[204] *Id.* at 112.

[205] *Id.* at 113.

[206] *Id.*

[207] GLENN, *supra* note 122, at 128.

[208] *Id.* at 129.

[209] *Id.*

[210] *Id.* The account of the trial that follows is taken from this source.

[211] Press Release, Mother Earth Def. Fund, More Injustices Over Oldman Dam—Federal Inquiry Sought (Jan. 8, 1995) *available at* http://www.nanews.org/archive/1995/nanews03.004.

behind Milton's actions to defend his territory and Mother Earth."[212] He continued: "The longer those in positions of power continue to prioritize economic interests over environmental impacts, the closer we move toward global destruction."[213] Born With a Tooth's trial judge was not impressed. Quite the opposite, he conducted the trial with such overt hostility to the defense as to prompt an outcry from the press and, eventually, a reprimand.[214] And so Born With a Tooth, too, went up on appeal, to have his conviction reversed and remanded for a new trial, which was scrupulously fair, but he had fired the shots, and that was all it took to meet the allegations. He was sentenced to sixteen months in jail, served twelve, and moved away. He had once said, "I'm going to do it my way...if the valves [in the dam] are not open in the next few days or weeks, they'd better kill me before I get home because I'm willing to die for this."[215] He tried, he wasn't killed, but he lost. Come to think of it, in a sense he was killed too.

The Peigan came out a little better. In 2001 they changed their name, rejecting the English version and reverting to their own pronunciation, Piikan.[216] Two years later they struck a settlement of their claims against Alberta and the government of Canada for $64 million in cash and an ongoing study on the future impacts of the dam on the environment and the Piikan culture. They were training fifteen of their own tribe as environmental scientists, archeologists, and sociologists for the study.[217] They were concerned for the long term. They secured a re-opener of the cash settlement depending on the study results. The dam was a fait accompli. The environment lost. But they would win something important. Edwin Small Legs says, "I can tell you this. If it hadn't been for Milton and what he did, we would not have that $64 million today."[218]

The Province of Alberta had an answer to the bad press created by the Environment Review Panel report. It planned a large public ceremony to inaugurate Oldman Dam.[219] Exercising his talent with words once again, Alberta Minister Kowalski christened the event "A

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[212] *Id.*

[213] GLENN, *supra* note 122, at 129. Among other things, the judge denied Born With A Tooth bail four times while awaiting trial, detainment that the Alberta Civil Liberties Association said "defies belief." *See* Press Release, Mother Earth Def. Fund, *supra* note 211.

[214] Walker, *supra* note 182.

[215] GLENN, *supra* note 122, at 114.

[216] Interview with Edwin Small Legs, *supra* note 183.

[217] *Id.*

[218] *Id.*

[219] GLENN, *supra* note 122, at 114.

Festival of Life: A Celebration of Water." In addition to the usual formalities, presided over by the provincial Premier, the four-day program included "wild water rides, a children's carnival, a canoe and kayak whitewater competition . . . a 500-seat dinner for dignitaries, a concert by Canada's top country band . . . and a church service."[220] Martha Kostuch, no slouch for a phrase, had her own name for it: a "festival of death, the death of three rivers."[221] She called up the scheduled country band and asked, "Do you know what it is you are celebrating?"[222] The band cancelled. The Peigans refused to participate as well, not just the Lonefighters but the whole tribe. Kowalski accused Kostuch of inciting violence. Milton Born With A Tooth did not help matters by calling a radio show to declare his willingness to lay down his life to stop the dam.

Minister Kowalski finally called off the ceremony, alleging a criminal conspiracy. The *Calgary Herald* advised him to "put up or shut up."[223] He did neither. Instead, in lieu of his public celebration, at dawn on July 23, 1992 a squadron of sixteen flag-bearing horsemen galloped to the top of the dam where they were duly photographed and memorialized. "[A] respectful affirmation," said the *Alberta Report*, "of their support for water management in Southern Alberta and their contempt for the threats of violence that have prevented a public celebration."[224] Observed the *Calgary Herald*, it was "more like a public relations attempt at damage control."[225] Years later Martha Kostuch said that she thought it might be better to leave the dam stand-

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[220] *Id.*

[221] *Id.* at 115*; see* Interview with Martha Kostuch, *supra* note 146.

[222] Interview with Martha Kostuch, *supra* note 146; *see* GLENN, *supra* note 122, at 115.

[223] GLENN, *supra* note 122, at 116.

[224] *Id.*

[225] *See* Morris, *supra* note 159. Martha Kostuch soldiered on citing Canada's failing environmental politics to the Environmental Committee of the North American Free Trade Agreement, with Oldman Dam as Exhibit A. Press Release, Friends of the Oldman River, Further Delay in Release of Commission for Environmental Cooperation's Factual Record on Canada's Non-Compliance with Environmental Laws (June 24, 2003) (explaining Ms. Kostuch's position with respect to the dam issue). At the same time, Friends of the Oldman River was submitting a detailed five-year critique to the Canadian Environmental Assessment Agency of its performance under the new Environmental Assessment Act. Martha Kostuch, CEAA 5 Year Review (2003), *available at* http:/www.ceaa.gc.ca/013/001/0002/0004/0001/kostuch_f.htm. The organization and reputation of the Society gained during the Oldman Dam fight were being put to new environmental ends.

ing after all, as a "monument to government stupidity."[226] It would make a bigger tourist attraction that way, she added.[227]

And so it ended at Oldman dam. Bitter to the last. Canadian environmental law was constitutional, but it had failed to catch the train.

III. Worlds Collide: The Great Whale

> Quebec is a vast hydro-electric plant in the bud, and every day, millions of potential kilowatt hours flow downhill and out to sea. What a waste.
>
> —*Robert Bourassa, Premier, Quebec Province*[228]

In April 1971, the government of Quebec announced plans to build one of the most massive construction works in the world in one of the most untouched regions of the world, a vast complex of lakes, rivers, tundra, and forests east of Hudson Bay called the Canadian Shield. Designed in three phases, phase one would drain six entire rivers into the La Grande River, doubling its flow and funneling it towards an underground powerhouse more than twice the size of the Notre Dame Cathedral.[229] Four powerline corridors would cut through hundreds of miles of the forest to Montreal and, of considerable importance as things turned out, to New York and New England as well.[230] The La Grande project required a thousand kilometers of access roads, four main dams and 130 kilometers of dikes and reservoirs flooding 8700 square kilometers, 5% of the land surface of the province and a much higher percentage of its lakes and wetlands.[231] By comparison, Rafferty-Alameda and Oldman dams were mere pretenders.

La Grande was just the start. All three phases, when completed, would consume twenty wild rivers and cover an area equal to the size

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[226] *See* Morris, *supra* note159.

[227] *Id.*; *see* Jamie Linton, *The Geese Have Lost Their Way,* Nature Canada, Spring 1991, at 27, 28.

[228] Linton, *supra* note 227, at 28.

[229] *Id.* at 28–29.

[230] *See generally* Sam Howe Verhovek, *Power Struggle,* N. Y. Times, Jan. 12, 1992, § 6, at SM16 (stating that the electricity generated in the Canadian North races down the transmission lines that stretch like forests of steal across the tiaga, into New York state and ultimately that crosses a grid that reaches into every home, apartment, factory and office in the state).

[231] Harvey A. Feit, *Hunting and the Quest for Power: The James Bay Cree and Whitemen in the 20th Century: Part II: The Cree Struggle to Maintain Autonomy in the Face of Government Intervention*, (2004) *available at* http://arcticcircle.uconn.edu/CulturalViability/Cree/Feit1/feit2.html.

of France.[232] Even more spectacular was Quebec's further dream of damming off James Bay entirely with a 100 mile dike and sending its waters to the western plains, as far away as California.[233] The Province stood to make a fortune. Better yet, none of these impacts would be felt by Quebecois. The project was sited on the territory of the Cree Indian Nation. Only nobody bothered to tell the Cree.[234]

The struggle that followed pitted two passionate antagonists, each with its history of grievance and a struggle for self-determination. For the next twenty years, the Canadian government was largely a bystander, a position it would officially describe as alert neutrality.[235] In one corner of the ring stood Quebec, whose separate language, culture, and politics fed a near-constant quest for greater autonomy, if not outright independence.[236] Vive la Quebec Libre!, said at least in jest, at times seriously, and often as a bargaining chip, has never been far from the surface in Quebec City and Montreal. Few better ways than a hydroelectric power bonanza to provide an economic base for these and more modest ambitions. And lest one forget, emerging from a history of English dominance and alert for further insults, Quebecois were the least prepared Canadians then or now to take directions from Ottawa. These were Quebec's projects. They would be built and guarded by its alter ego, the James Bay Development Corporation.

In the opposite corner of the ring stood the largest and most functionally-independent First Nation left on the North American continent this side of Mexico.[237] Northern Quebec east of James and Hudson bays has been inhabited by the Cree since the glaciers retreated some 5000 years ago.[238] Subgroups of Cree pushed south into the swamps that line the American border and then west to the plains,

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[232] Verhovek, *supra* note 230.

[233] *Id.*

[234] Harvey A. Feit, *Hunting and the Quest for Power: The James Bay Cree and Whiteman Development*, *in* Native Peoples: The Canadian Experience 101, 112–13(R. Bruce Morrison & C. Roderick Wilson eds., 2004) [hereinafter *Hunting and the Quest for Power I*].

[235] *See* Boyce Richardson, Strangers Devour the Land: the Cree Hunters of the James Bay Area Versus Premier Bourassa and the James Bay Development Corporation 22 (1975).

[236] The information that follows regarding the Cree Indian Nation is taken from Richardson, *supra* note 235, at 20, 22, 27, 327–29; *see also Hunting and the Quest for Power I*, *supra* note 234, at 113–14 (providing background information for the discussion of the La Grande River project that follows).

[237] Catholic Encyclopedia (2005), *available at* http://www.newadvent.org/cathen/04477a.htm; *see Hunting and the Quest for Power I*, *supra* note 234, at 101.

[238] *See, e.g.*, Encyclopedia of North American Indians, *available at* http://college.hmco.com/history/readerscomp/naind/html/na_009000_cree.htm (last visited Apr. 18. 2006) (noting that the Cree story has its origins around James Bay in prehistoric times).

displacing the Blackfoot and other tribes.[239] They were entrepreneurial with other tribes and then with Europeans. They trapped and traded freely and, according to the explorer Mackenzie, one of the first Europeans to know them, they were sharp negotiators but "naturally generous, good-tempered, and honest."[240] Catholic missionaries a century later reported them "high in morality."[241] Depleted elsewhere by white settlements and disease, the James Bay Cree remained almost entirely on their own in the north woods, with its cold winters and summer rains and legendary biting insects, intact and self sufficient, a hunting culture with a sophisticated ethic towards the place they lived. The James Bay projects would challenge the Cree ethic and independence, face on.

A. *Planning by Surprise: La Grande*

> When the dams are built where will the animals go? The caribou won't know which way to go.
>
> —*Samson Nahacappa, hunter, Cree Nation*[242]

There were in fact three lawsuits, each one brought by the Cree against the James Bay projects. They filed the first one in 1971,[243] immediately upon learning the Quebec government's plans for the La Grande and its watershed, two-fifths of the Cree territory. The Cree complaint was deceptively simple. These were their lands; Quebec couldn't just come and take them. They ended up in a provincial court before provincial Judge Albert Malouf, whose middle-eastern background perhaps found more resonance with the plaintiffs than with the many corporate and government attorneys.[244] An Indian law expert by the name of James O'Reilly represented the Cree, and in fire and eloquence he was Irish to the bone.[245] Lead attorney for Quebec was Jacques LeBel, who by coincidence was the brother-in-law of Quebec Premier Robert Bourassa, author and champion of the James Bay

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[239] *See id.*; CATHOLIC ENCYCLOPEDIA, *supra* note 237.

[240] CATHOLIC ENCYCLOPEDIA, *supra* note 237.

[241] *Id.*

[242] RICHARDSON, *supra* note 235, at 179. This magnificent book, written by a Montreal newspaper reporter who left his job to follow the Cree and the LaGrande project, presents a full account of the first Cree lawsuit against the James Bay development.

[243] *See generally* Kanatewat v. James Bay Dev. Corp., [1974] R.P. 38 (Can.) [hereinafter *Kanatewat I*] (note that this case has been incorrectly titled in the reporter as Le Chef Max "One-Onti" Gros-Louis c. Société de développement de la Baie James).

[244] RICHARDSON, *supra* note 235, at 30.

[245] *Id.* at 24.

plan.[246] It was an environmental case, but under a different name and a different set of rules. The root issue was whose lands these were and what the project was going to do to them. To the government it was no contest, and they treated it that way: Canadian lands belonged to the provinces and the impacts of the project would be beneficial to everyone, including the Cree.

The Cree case was an inextricable mix of history, religion and ethics, all centered on the hunting way and its relation to the lands, waters, and animals on which it depended. Today, we would use the phrase "the environment" but, as the trial would reveal, no such word began to convey the meaning of this relationship to the Cree. Frank Speck, an early ethnographer, called Cree hunting a "religious occupation."[247] A later researcher, Harvey Feit, set out in a doctoral thesis to study one Cree hunting community on the shores of James Bay.[248] He was suspicious, he later wrote, of popular images of these Indians as either "ecological saints" or as "wanton over-exploiters."[249] What he found was a complexity in the order of Catholic or Talmudic doctrine.

Hunting was the organizing principle of Cree life, and the word itself had at least five separate meanings ranging from observing to lying in wait, from taking game and fetching, to growing and continuing to grow.[250] Every element in nature had its spirit, and the closest to humans were animals, who had their own ethics and who, at appropriate times, gave themselves up to humans to be killed. Successful hunters, Feit observed, demonstrated "competence because they maintain that delicate balance with the world in which animals die and are reborn in health and in continuing growth." Over-harvested animal populations became "angry" and denied the hunter. These were not just words. For centuries Cree wardens had supervised individual hunting territories of more than a hundred square miles, monitoring the game, advising the hunters, limiting the take, and reinforcing the ethic. All the things that environmentalists would come to say about the interconnectedness of life and its spiritual dimension, the Cree lived. But not, perhaps, for very long. There never would be another collection of witnesses like these. Brought in from the high woods, the Cree hunters

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[246] *Id.* at 34.

[247] Harvey A. Feit, *Hunting and the Quest for Power: The James Bay Cree and Whitemen in the 20th Century: Part I: The Contemporary Cree Hunting Culture* (2004), *available at* http://arcticcircle.uconn.edu/CulturalViability/Cree/Feit1/feit1.html.

[248] *Hunting and the Quest for Power I, supra* note 234, at 101.

[249] *Id.*

[250] *See id.* at 102. The description of the Cree hunting ethic is taken from this source.

and their families gave their testimonies and then wandered the streets of the city, marveling at the traffic, the height of the buildings, and the volume of trash.[251]

To the whites, of course, all of this was incomprehensible. The more so because the Cree witnesses spoke in several dialects and the proceedings were conducted through translators into both English and French.[252] If one wanted to listen at all. One witness writes that it was a "dialogue of the deaf" for the provincial and corporate lawyers, "who began the case without really thinking it was necessary" and only woke up to the fact that the judge was paying attention as the proceedings wore on.[253] Judge Malouf was respectful to the native witnesses, asking one, whose answers had been cut short in cross-examination, if he had finished his answer. "It's ok," said Billy Diamond, a Cree chief.[254] "It's not ok," the judge said, "If you have not finished it you will be given the opportunity to finish it. That's why we're here."[255] After a few days of testimony, he rejected the government's motions to dismiss. There were real issues here, he said.[256]

There were two real issues, one of law and one of fact. The legal case was of first impression and rather breathtaking: were these really Cree's lands? To the Cree, of course, the very idea of ownership was counter-cultural. "It is quite ridiculous," said Cree hunter Ronnie Jolly, "this idea of the white man that a person can own all of the earth, and everything under it, and everything that moves on it."[257] As was the idea of money, particularly money in compensation for the loss of land. William Rat testified,

> When you talk about money I do not really know the value of it. I do not use it very often . . . . It is the white man who has the money, and on the other hand, the Indian has the land. The white man will always have the money, and will always want to have the land.[258]

Losing the land would be "like losing my life," he said.[259] He meant, of course, much more than land; he meant a relationship to the land as

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[251] RICHARDSON, *supra* note 235, at 28.
[252] *Id.* at 23.
[253] *Id.* at 23, 27.
[254] *Id.* at 41.
[255] *Id.* at 42.
[256] *Id.* at 30.
[257] RICHARDSON, *supra* note 235, at 104–05 (photo caption between pages).
[258] *Id.* at 246.
[259] *Id.* See also the testimony of Job Bearskin:

strange to the government attorneys who were examining him as a relationship with Mars.

O'Reilly's legal argument was that the Cree and other tribes had always been protected by the English Crown, and that the settlers were instructed as explicitly as in instructions from King George III to the Canadian Governor in 1763 "not to disturb them in the Possession of such Parts of the said province as they at present occupy or possess."[260] From then on, all acts of government from the Crown and Quebec, including extension of the Province north to James Bay, were done in recognition of "the rights of the Indian inhabitants," subject only to later, negotiated treaties.[261] Which in this case had not taken place. All of which, to O'Reilly, meant that the Cree had land rights. These rights had been abrogated by the sudden, massive, and unannounced James Bay plans.

The government's primary defense, besides their conviction that the Cree claims were unthinkable, was that the Cree had abandoned their described lifestyle some time ago. And if they hadn't, it was high time they should. Wasn't it a fact that the Cree used outboard motors now?, asked the government attorneys. Yes, a Cree answered, but we also go upriver by canoe.[262] Don't the Cree use ski-dos and snowmobiles? Yes, a Cree answered, but when people leave for their traplines they still go by dogsled and wear snowshoes.[263] What were the Cree witnesses eating in Montreal . . . white man's food, no? Answer: "I have come to the stage that I can hardly eat this food."[264] Cree hunter John Kawapit continued, "When I go back home to Great Whale River I'll be able to eat better, because I will be eating the food that I have been eating in the past."[265] But were they telling the truth? One forty-two-year-old Cree hunter had been called in by his Chief to testify about the effects of a James Bay access road across his trapline. In the courtroom he was asked to put his hand on the bible and swear to tell

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> It can never be that there will be enough money to help pay for what I get from trapping. I do not think in terms of money. I think more often of the land because the land is something you will have for a long time. That is why we call our traplines, our land, a garden.

Id. at 121.

[260] *Id.* at 26.

[261] *Id.*

[262] RICHARDSON, *supra* note 235, at 35.

[263] *Id.*

[264] *Id.* at 42.

[265] *Id.*

the truth. A long dialogue with the translator ensued. "He does not know whether he can tell the truth," the translator told the judge. "He can tell only what he knows."[266]

The government's main witness was an anthropologist who said that the Cree culture described was on the verge of collapse.[267] He gave it seven years, maximum. And, for the Cree's own good, the sooner that they adapted to the white man's ways the better. To be sure, "bringing up 16,000 whites" into the middle of the Cree society, for conjunction of a project of this size, "the shock [was] going to be brutal."[268] But it was perhaps "the only way to make a culture react," and then "really begin to participate" and "take its development in hand."[269] The Cree's anthropological witness, the above-mentioned Harvey Feit, held a different view.[270] Feit, who had lived with the Cree for several years, described a struggling but still self-sustaining culture. In fact he saw considerable potential for adding more Crees to the subsistence hunting culture. If these people were to adapt successfully to the white man's life, he said, it would have to be incrementally and over time. A sudden shock would destroy them.

The shock came instead from Judge Malouf. Capturing seventy-eight days of testimony from 167 witnesses, and after several months of deliberation, his 170 page opinion found as a matter of law that England and then Canada had always treated the Indians as sovereigns of their land and undertook to possess their lands by treaties or other negotiations, not by simple appropriation.[271] While Native conceptions of property ownership differed from that of the whites, they had their own rules and legally protected rights. On the facts, he credited the Cree witnesses and several supporting scientists, who testified to severe disruption of the culture and livelihoods by even the access roads and preliminary construction works. In a detailed (seventy page) summary of the evidence, he documented the "dependence of the indigenous population on the animals, fish and vegetation in the territory," on which the works would have "devastating and far reaching effects."[272] Seeing the law, facts, and equities so plain, he found

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[266] *Id.* at 46.
[267] *Id.*
[268] RICHARDSON, *supra* note 235, at 247–48.
[269] *Id.* at 248.
[270] *Id.* at 249. The description of Feit's testimony that follows is taken from this source.
[271] *Id.* at 20, 296–97.
[272] *Id.* at 298–99. *See generally Kanatewat I*, R.P. 38.

that the loss of the Cree way of life "far outweigh[ed]" the monetary losses to the corporations. He enjoined the project.[273]

Quebec's response was disbelief, then defiance. With the eager assistance of an inflamed media, it presented itself as the victim of a robbery with catastrophic losses of income, jobs, and a secure future.[274] It accelerated project construction. (Have we seen this before?) The weekend following the stop order, with work proceeding apace, it imposed a news embargo on the area; pilots who flew reporters in to see what was going on would lose their licenses.[275] The James Bay Corporation rushed to file its appeal and to stay Judge Malhouf's injunction.[276] Within days the appellate court heard the stay motion. They had questions only for attorney O'Reilly, none for the government, and the tenor was not friendly. (Opening question: "Well, Maitre O'Reilly, what have you got to say?").[277] Within five hours the stay was lifted. A Cree appeal to the Supreme Court died.[278] The construction continued to roll. Quebec, Saskatchewan, and Alberta were all reading out of the same playbook: construction beats law. Then fate took a hand.

Throughout the winter and in extreme cold, construction stalled at the primary dam site.[279] Two rival unions had a falling out. After a series of minor flare-ups, a group of workers seized some bulldozers and other heavy equipment and rammed it into the power plant. Then they set it on fire. The company was forced to fly the entire crew out, 1400 men. The work stopped for months. Asked by a reporter for his reaction to these events, a local Cree said, "If you don't quote me, I'll tell you; it sure as hell beats an injunction."

The respite was short-lived. By the next summer the appeals court was ready to hear the James Bay Corporation's case and rule. It was aided by two compendious briefs, in four volumes, two from each side.[280] The one that they evidently read more closely was from James Bay. In this brief, and in the court's opinion which was in large part indistinguishable from it, the Canadian Shield was not the homeland of Cree Nation but, rather, the Quebec frontier already settled by whites

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[273] RICHARDSON, *supra* note 235, at 29. *See generally Kanatewat I*, R.P. 38.

[274] *See generally Kanatewat I*, R.P. 38.

[275] RICHARDSON, *supra* note 235, at 299.

[276] *Id.* at 300.

[277] *Id.*

[278] *Id.* at 301.

[279] *Id.* at 301–02. The description of the disturbance that follows is taken from this source.

[280] *Id.* at 311.

and in need of their improvement.[281] The Cree life described by Judge Malhouf was ancient history. Justice Turgeon, writing the main opinion for the court, agreed with the corporation on "the lack of importance of country food in the diet of the Indians," who ate "as do people inhabiting the urban centres."[282] He found that "a considerable number of [Cree] occupy interesting jobs" and did not "give themselves over to hunting and fishing except [for] recreation."[283] The James Bay project would provide a "salutary shock" to these people and "help in the elaboration of the necessary policies of transformation."[284] The Justice chided the trial court for failing to "see in the proof all that these conflicts could bring of a positive nature."[285] Positive to the environment, as well. Far from drowning out fish and wildlife, the dams and reservoirs would actually increase wildlife populations and spare them the hazards of uncontrolled nature and flooding.[286] As for native rights to the land and its resources, they simply did not exist and never had, not since the King's first charter to the Hudson Bay Company.[287] Judgment reversed.

The Cree's first lawsuit failed in court, but its attendant publicity succeed in prompting the government to negotiate terms for the now inevitable La Grande phase of the James Bay development.[288] With the construction in full swing and no leverage from the law, the Cree were under enormous pressure to take whatever they could get.[289] Chief Billy Diamond later explained, "we saw the need to limit the damages, seek remedial works and have certain fundamental rights recognized . . . . We really had no other choice."[290] The government added pressures of its own. Again, Chief Diamond: "not only did the negotiators come in with [surrender of land claims] as a condition which was not subject to discussion or debate, but Canada made it clear that if we did not proceed with the agreement process, unilateral legislation would have

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[281] RICHARDSON, *supra* note 235, at 312.

[282] *Id.* at 313; *see generally* Kanatewat v. James Bay Dev. Corp., [1973] 41 D.L.R. (3d) 1.

[283] RICHARDSON, *supra* note 235, at 313.

[284] *Id.* at 314.

[285] *Id.*

[286] *Id.* at 315–16.

[287] *Id.* at 316.

[288] *See generally* Harvey A. Feit, *Hunting and the Quest for Power: The James Bay Cree and Whitemen in the 20th Century: Part III: Cree Autonomy and the Aboriginal Rights Agreement* (2004), *available at* http://arcticcircle.uconn.edu/CulturalViability/Cree/Feit1/feit3.html [hereinafter *Hunting and the Quest for Power III*].

[289] RICHARDSON, *supra* note 235, at 319.

[290] UNI, Sovereign Injustice: Relevance of the James Bay and Northern Quebec Agreement, http://www.uni.ca/library/si_sect08.html (last visited Apr. 18, 2006).

been imposed on us in any case."[291] Nor were the pressures limited to future threats. In November 1993, the Grand Council of the Cree explained, "the position of our people was desperate, and programs upon which we depended were being cut and frozen, including while negotiations were underway." Against this backdrop, it is remarkable that the Cree walked away with anything at all.[292]

What they walked away with was the James Bay Northern Quebec Agreement, ratified by the Cree Nation (described as "very reluctant") and the Canadian Parliament. The agreement extinguished native land claims in return for the creation of small, Cree-owned reserves and a $225 million payout.[293] The Cree maintained hunting rights and, under state supervision, their own regulatory scheme.[294] The La Grande project would go forward, but the location of its major power plant would be moved one rapid upstream, saving a historic Cree rendezvous of central cultural and religious importance.[295] No other project modifications were obtained. No river would be spared.

And so, the project described by Quebec Premier Bourassa as a "conquest" of the Canadian North[296] went forward. Twenty years later a brochure of Hydro Quebec, the $34 billion utility charged with realizing this conquest, urged the reader to "Follow the Energy Road!," where "You will experience the infinite landscapes and brilliant skies where thousands of Quebec workers built the La Grande complex."[297] Thousands of Quebec workers but very few Cree.[298] As of 1991 only five residents of the town of La Grande worked for Hydro-Quebec.[299] Half the town was unemployed, and the entire population suffered from "alarming rates of alcohol abuse, teenage pregnancy, divorce, and suicide."[300] The hydro dams had also converted harmless forms of

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[291] *Id.*

[292] *Id.*

[293] Alex Roslin, *Cree Denounce Quebec, Assert 'Control' of Lands; Withdraw from Treaty to Protest Judge's Replacement,* Montreal Gazette (Mar. 10, 2000), *available at* http://www.nben.ca/environews/media/mediaarchives/00/cree.htm; *see also Hunting and the Quest for Power I, supra* note 234, at 114–19 (describing the Cree's negotiation and implementation of an autonomy agreement).

[294] *Hunting and the Quest for Power I, supra* note 234, at 115.

[295] *Hunting and the Quest for Power III, supra* note 288.

[296] *See* Sean McCutcheon, Electric Rivers: The Story of the James Bay Project 34 (1991).

[297] Linton, *supra* note 227, at 28.

[298] A subsequent Parliamentary inquiry revealed massive corruption in the La Grande complex construction, and near-total exclusion of the Cree, in violation of the James Bay Agreement. Richardson, *supra* note 235, at 321.

[299] *Id.*

[300] Linton, *supra* note 227, at 30.

mercury, leached from the trees and soils, into to methyl mercury, toxic to fish and humans.[301] By 1984, a study of the Cree community of Chisasibi, downstream from the La Grande complex, found 64% of the residents carried methyl mercury levels above the toxic threshold.[302] Hydro-Quebec responded by telling the Cree to eat less fish.[303] Asked about the positive impacts of the project on the community, Sappa Fleming, the former Mayor of the Inuit population in Great Whale, said, "Well, my children can choose from six different kinds of potato chips at the Northern [grocery store] . . . I suppose that is a kind of progress."[304]

The same brand of progress came to the wildlife of the region. When the massive sluices and diversions opened in the 1980s, 10,000 caribou drowned making the crossing in the modified and unfamiliar waters.[305] Migration patterns throughout the region were scrambled. One old-timer said, "The geese have lost their way."[306]

The first Cree lawsuit against the James Bay development had two other impacts not lost on the Cree or anyone else. The first was to politicize a loose grouping of tribes and family groups into a centralized Cree Council with allies in politics, international assemblies, and the rising environmental community. The second was to underline the need for legal leverage and to find it beyond Indian claims in the emerging field of environmental law. The cases to come would be based on the same claims raised in the Rafferty-Alameda and Oldman dam cases. Once again, Canada would claim no responsibility for the projects. Indeed, it would claim no responsibility under the James Bay Northern Quebec Agreement either. These claims would be put to the test as Quebec now moved to phase two of the James Bay development, Great Whale.

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[301] Verhovek, *supra* note 230.
[302] *Id.*
[303] *Id.*
[304] *Id.*
[305] Linton, *supra* note 227, at 30.
[306] *Id.*

B. *Great Whale I*

> [T]he central question about the Great Whale Basin is this: Should large parts of it be underwater?
>
> —*Sam Howe Verhovek,* The New York Times

The Great Whale is a special river even by Canadian standards, an entire country of special rivers. It inspires poetry out of hard-nosed journalists and scientists alike. One reporter writes,

> As the Great Whale river rises east out of Hudson Bay in northeastern Canada, its broad sandy shores quickly give way to a carpet of light-green lichen studded with granite outcroppings. Beyond the banks lies a vast expanse of black spruce and tamarack, great coniferous forests, broken here and there by lakes and bogs and kettle ponds.[307]

It is a landscape that teems with life in fall and spring, he continues, "when enormous herds of caribous stomp across the earth and millions of migratory birds tarry in the estuaries of James and Hudson Bays, some stopping to double their weight as they feast on eelgrass and coastal shrimp before flying as far south as Tierra del Fuego."[308] It is also one of the least studied landscapes in North America, one of the farthest from urban centers and universities, but this much is known: "With its many rapids and falls, and its canyons and cliffs, it is a spectacularly beautiful river."[309]

With one extra twist. The confluence of the Little Whale River and James Bay is a gathering ground for Beluga Whales—"small, strikingly white creatures" against blue water that return every summer.[310] They do not come to calve or feed but to rub off their old skins on the shallow rocks and "frolic" in the surf. Hence the name. Only the Beluga no longer come to the mouth of the Great Whale. They were wiped out of this migration years earlier by the Hudson Bay Company. But several hundred Beluga come to the mouth of the Little Whale River, which would be eliminated by the James Bay development project, phase two.

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[307] Verhovek, *supra* note 230.

[308] *Id.*

[309] McCutcheon, *supra* note 296, at 140.

[310] *Id.* at 165. The description of the beluga whales that follows is taken from this source.

The Great Whale project began for the Cree exactly as the La Grande had. Without notice.[311] But not by surprise, because back from political exile to lead the province of Quebec once again was Robert Bourassa. His passion for the project had not changed. Nor had his attitude towards the Cree. As he explained to the press, "conquerors are not courteous."[312] A Cree summary of the battle that followed notes that, "in 25 years of dealing with us, he never once, not even to the day he died, visited a Cree village."[313] Nor had the project changed its posture towards the environment. One historian writes: "That the James Bay rivers should be turned to electricity to feed the world's hungriest and greediest energy markets and that James Bay itself should become the continent's water tank" was, in Quebec's view, "rational and inevitable."[314] A consultant for the project company explained, "In my view, nature is awful, and what we do is cure it."[315]

The Cree were not going to take this one lying down any more than they had the last. "We would like to avoid violence,"[316] said Bill Namagoose. "It gets you a lot of publicity, but you can't eat publicity. We don't want to lose our land."[317] They elected a new Grand Chief, Matthew Coon-Come, a young, slim, and passionate man with a flair for oratory and a mandate to stop the hydroelectric development.[318] Quebec professed surprise, arguing that the Cree had, in the James Bay Agreement, accepted that "these known projects and any additions or substantial modifications to Le Complex La Grande" shall be considered as "subject to the environmental regime only in respect to ecological impacts" and that "sociological factors or impacts" would not be grounds for the Cree to "oppose or prevent the said developments."[319] To which the Cree replied that this surrender of claims applied only to La Grande, phase one, and not the phases to come.[320] And further, even if otherwise, the entire Agreement was void for the above-mentioned duress, throw in fraud, misrepresentation, and non-

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[311] *Id.* at 42.

[312] *Id.*

[313] Grand Council of the Crees (of Quebec), *Cree Legal Struggle Against Great Whale Project* (2000), http://www.waseskun.net/cree.htm.

[314] *See* McCutcheon, *supra* note 296, at 148, quoting Camille Dagenais, former head of SNC, an engineering contractor for Groupe Lavalin, which constructed the La Grande complex. *Id.* at 145.

[315] *Id.* at 148.

[316] William Walker, *Who Controls the Environment?,* Toronto Star, July 14, 1991, at B4.

[317] *Id.*

[318] McCutcheon, *supra* note 296, at 152.

[319] *Id.* at 154.

[320] *Id.* at 155.

fulfillment by Canada of its part of the bargain.[321] Whatever the merits of these positions, they put all the more weight on the forthcoming environmental review.

Familiarly, by now, Quebec was determined to keep whatever environmental review was necessary at home and firmly under its thumb. Hydro-Quebec's first move was to split the project in two parts—(1) the main power projects and (2) the access and logistical support (roads, airports, construction camps)—and then offer an assessment of part one only, thereby avoiding consideration of the whole.[322] Both Quebec and federal authorities approved.[323] Once the Hydro-Quebec assessment was made, under the Quebec process members of environmental review committees did not get to ask their own questions for the company to answer.[324] One observer commented, "They were like people judging a job candidate on the basis of her answers to her own questions."[325] Better yet for Hydro-Quebec, questions of the need for the project, its purposes, alternatives, and basic design were not on the table either.[326] Only those measures to attenuate project impacts were germane.[327] The cheapest of which was paying money. The company had paid the Cree upwards of $100 million to expand their project at La Grande.[328] Then, they said, even for the Cree it's all about money. The Cree replied that there was no reason not to take it: Hydro-Quebec had destroyed the La Grande river by that point anyway.[329]

To both sides, though, the main chance was the new $12.6 billion project on the Great Whale River and its tributaries, the most northern of the three phases of the James Bay project, involving hundreds of kilometers of new roads and power lines, three new power stations, five new reservoirs, and flooding 4400 more square kilometers of lands and waters.[330] Faithful to the game plan that had proven so successful in Rafferty-Alameda and Oldman, Hydro-Quebec let bids for the clearing of the main access road.[331] The question was whether

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[321] *Id. See generally* Alison Gale & Michelle Marcellus, *James Bay II: Power Over Land, Economy, People,* BETWEEN THE ISSUES, Mar. 1991.

[322] MCCUTCHEON, *supra* note 296, at 181.

[323] *Id.*

[324] *Id.* at 183.

[325] *Id.*

[326] *Id.*

[327] *Id.*

[328] MCCUTCHEON, *supra* note 296, at 155.

[329] *Id.* (stating that it was already a ruined river).

[330] *Id.*

[331] Grand Council of the Crees (of Quebec), *supra* note 313, at 1.

(the desires of Quebec and Hydro-Quebec notwithstanding) any of this would receive federal environmental review. And if so, so what?

The first answer to the first question was: yes. Canadian Minister of Environment Lucien Bouchard, a Quebecois as well but one who had been scorched by his ineffectual responses in the previous dam cases, admitted federal jurisdiction.[332] In October 1989, he wrote to his provincial counterpart that, given the "considerable magnitude of this project," it was "extremely important" that the assessment be conducted "as objectively and independently as possible," and offered a "cooperative approach."[333] Nothing, of course, was further from Quebec's mind. In the best tradition of the provinces, it did not even reply. One month later Bouchard tried again, this time to the newly-appointed provincial environmental minister.[334] Nothing back. Meanwhile, Federal Administrator of the James Bay Development, Ray Robinson, wrote the Hydro-Quebec vice president for environmental affairs and reiterated that the project was subject to federal environmental review as specified by the provisions of the James Bay Agreement.[335] As the court later notes, "[a]n extensive period of silence then prevails."[336] One full year later, Robinson wrote to the president of the evaluation committee responsible for monitoring the James Bay development, again outlining the federal responsibilities that necessitated federal environmental review.[337] He again wrote Hydro-Quebec to the same effect as well.[338] At which point he appears to have undergone Miraculous Conversion.

That same month, November 1990, Federal Administrator Robinson suddenly informed a Cree audience that he had no mandate for federal environmental review.[339] One might forgive the Cree for feeling, once again, betrayed. They filed suit. Back went James O'Reilly to court on their behalf.[340] And ran into another Judge Malhouf.

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[332] *Id.*

[333] Cree Reg'l Auth. v. Canada (Fed. Admin.), [1992] 1 F.C. 440, 447 (T.D. Can.) [hereinafter *Cree Reg'l Auth. I*]. The description of the Communicators to Quebec and Hydro-Quebec are taken from this source.

[334] *Id.*

[335] *Id.*

[336] *Id.*

[337] *Id.*

[338] *Id.*

[339] *Cree Reg'l Auth. I*, 1 F.C. at 447–48.

[340] The Cree actually filed two suits against the project, the other in Quebec Court, Grand Chief Matthew Coon Come v. Quebec (Procureur Gen.), [1991] 37 Q.A.C. 293 (Can.). The provincial case was dismissed on motion of the Attorney General of Canada because it presented a federal question beyond the jurisdiction of the provincial courts.

Unlike the La Grande case, federal Judge Rouleau was not unduly influenced by a year of testimony and reflection.[341] Nonetheless, his sympathy for the plaintiffs emerges from his recitation of the facts, which read like a chronicle of government bullying and lies.[342] The Cree claim was that sections twenty-two and twenty-three of the James Bay Agreement required the appointment of a federal administrator to supervise the environmental impact of future development and to set up independent evaluation committees "if the development is to have any significant impact" on the native people or wildlife resources of the territory.[343] And so the sections read as an exact replica of the EARP guideline process. "I doubt," noted Judge Rouleau dryly, "that anyone can suggest that the Great Whale phase of the James Bay project will not 'interfere with wildlife and its habitat, resulting in drastic changes to the traditional way of life.'"[344] Of course, Hydro-Quebec was not ready to concede any such thing and had already once marshaled an army of witnesses and lawyers to say so.[345] Denial of impacts was not, however, its main defense. Instead it was denial of the Agreement.

Simply put, Quebec and Hydro-Quebec argued, apparently with a straight face, that the Agreement was not law. It was only a contract, never a statute, and contracts are not enforceable in federal court.[346] When it came to dealing with First Nations, the white man's promises seemed to hold little more water north of the border than they had in the United States. Judge Rouleau, however, read the Agreement the other way. The Parliament, he wrote, in approving the Agreement, clearly required certain conduct of federal officials, including the Federal Administrator Robinson.[347] Even if the law were unclear, the court continued, "the sovereign's intention must be clear and plain if it is to extinguish aboriginal rights."[348] The court concluded, in terms that would have gladdened Judge Malhouf's heart as much as it darkened others in Montreal and Ottawa:

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[341] *See* Cree Reg'l Auth. v. Quebec (Procureur Gen.), [1991] 42 F.T.R. 160, 161–63 (Can.) [hereinafter *Cree Reg'l Auth. II*].

[342] *See id.* at 162–63.

[343] *See id.* at 164.

[344] *Id.*

[345] *See id.* at 163.

[346] *Id.*

[347] *Cree Reg'l Authority II*, 42 F.T.R. at 165–66.

[348] *Id.* at 166.

> I feel a profound sense of duty to respond favorably. Any contrary determination would once again provoke, within the native groups, a sense of victimization by white society and its institutions. This agreement was signed in good faith for the protection of the Cree and Inuit peoples, not to deprive them of their rights and territories without due consideration.[349]

Having found federal jurisdiction, the rest was short work. The government's attempt to bury the environmental review at the provincial level was "intended both to appease [local authorities] and circumvent the native populations" and appeared to have been negotiated by the governments "in an attempt to free themselves" from the responsibilities of federal review.[350] The federal government's argument, further, that it had no responsibility to act until Hydro-Quebec submitted its assessment for review was, in the court's view, "entirely spurious;" Hydro-Quebec could, by this logic, simply withhold its assessment, a "ludicrous result."[351] Pointing out that federal review could not, as with the EARP guideline order, enjoin the project, Judge Rouleau expressed his astonishment that the government would resist it: "[I]f one accepts the federal government's argument that it is willing to comply with its obligations towards the native people of this country, one is at a loss to understand its refusal to fulfill that original contractual obligation" in the James Bay Agreement.[352] One can sense the anger. The implication was clear. The federal government, however, facing a hostile Quebec, was by no means anxious to fulfill its obligations towards the Cree or anyone else. The government, of course, appealed.

The appellate opinion was long, technical, and focused nearly exclusively on the question of federal jurisdiction.[353] At journey's end, it wound up where Judge Rouleau had: Great Whale was subject to federal environmental review. At long last, embarrassed by the press, castigated by the courts, mocked by the provinces, reeling from the after-effects of its timidity in Rafferty-Alameda and Oldman dams, dragged into the ring with its heel marks all the way down the aisle, in July 1991, the Canadian Environment Ministry announced that if Quebec did not want to cooperate the federal government would

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[349] *Id.*

[350] *Id.*

[351] *Id.*

[352] *Id. See generally* Quebec (Attorney Gen.) v. Cree Reg'l Auth., [1991] 43 F.T.R. 240 (F.C. Can. A.D.) [hereinafter *Cree Reg'l Auth. III*].

[353] *See generally Cree Reg'l Auth. III*, 43 F.T.R. 240.

conduct the review of the Great Whale project on its own.[354] Softening its punch, it added that it could not guarantee that Quebec would delay construction until the environmental findings were released.[355] Even this concession was not enough for Quebec's Energy Minister, who told reporters that the province would "never submit" to Ottawa's procedure, adding that what the federal government was doing was "illegal."[356] Illegal or court-ordered, below the bluffs and threats, the federals were now in the game and the time, information, and project delays obtained in their review would prove critical for the Cree.

C. *Great Whale II*

> We wish we had never signed the James Bay Agreement. Its terms have not been honored. You might as well just put a stone around our necks and drown us in the reservoirs.
>
> —*Matthew Coon-Come, Grand Chief, Cree Nation*[357]

In spring 1990, one the strangest processions of the century made its way by water and truck down from the Inuit and Cree villages along James Bay, south to Montreal, and then down the Hudson River to New York City.[358] It was the brainchild of a U.S. kayaker named Denny Alsop who had canoed rivers on the Canadian shield now to be flooded by the James Bay project.[359] One angry American. At his suggestion, the Cree and Inuit built a new kind of boat with the bow of an Indian canoe and the stern of an Eskimo kayak, to which they gave the hybrid name Odeyak. On April 20, Earth Day, with press boats following and helicopters overhead, the Odeyak, supporting canoes and sixty Cree and Inuit, reached Times Square. First to speak was Mathew Coon-Come. "Hydroelectric development is flooding the land, destroying wildlife and killing our people," he said.[360] They would change Hydro-Quebec's world.

The environmental review mandated by Cree II now unfolded on two fronts, each feeding the other and making life increasingly difficult for the Great Whale project. One was in Canada, where Hy-

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[354] *See id.*

[355] *Id.*

[356] Walker, *supra* note 316, quoting Lisa Bacon, Quebec Minister of Energy.

[357] McCutcheon, *supra* note 296, at 153, quoting Matthew Coon Come, Grand Chief, Cree Nation.

[358] *Id.* at 185–86. The description of the flotilla that follows is taken from this account.

[359] *Id.* at 185.

[360] *Id.* at 185–86.

dro-Quebec and its allies hoped to complete the process within a year.[361] Instead, the Cree and other opponents packed the "scoping" meetings that defined the review[362] which, now federal, was not bound by Quebec's will-of-the-applicant standard. The assessment rules that emerged were exigent, requiring, among other things, consultation with the Cree and Inuit communities. Hydro-Quebec cobbled together 5000 pages of studies going back to the first litigation, and, in its haste, gave short shrift to the consultation. Its environmental assessment would end up before three independent review committees, two under the Federal Administrator and established by the James Bay Agreement and the third under the Ministry of Environment and the EARP guidelines order. The corporation demanded a response within forty-five days. The summer construction season was passing and loans were pending. Time was not on Hydro's side.

There was a fourth venue, however. It could not have been anticipated by anyone, and it proved dispositive. Much of the market for the Great Whale project lay south of the border in the New England states.[363] Americans had always been big players in Canadian hydroelectric projects; in fact they owned the first ones outright, and U.S. lenders financed much of the La Grande works, phase one.[364] In the late 1980s, Hydro-Quebec signed power sale contracts with Vermont and Maine, but the big one was an "agreement in principle" for twenty-one years of supply to the New York Power Authority.[365] The New York contract was predicted to meet 6% of the state's total energy needs by the end of the century and bring up to $40 billion in revenue to Hydro-Quebec.[366] The project cost about that much to build. Which is to say that New York held the cards. And its agreement was only "in principle."

Opposition to the Great Whale project along the southern tier began not with its impacts on the distant Cree but with the arrival of gigantic transmission corridors across the towns and dairy farms of Quebecois along the American border.[367] People feared the power lines, their size, sight, magnetic fields, and the herbicides needed to

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[361] *See* Grand Council of the Crees, *supra* note 313. The description of the scoping and assessment that follows is taken from this account.

[362] *See generally* McCutcheon, *supra* note 296.

[363] *Id.* at 92–94.

[364] *Id.* at 160; Grand Council of the Crees, *supra* note 313, at 2.

[365] McCutcheon, *supra* note 296, at 138; Verhovek, *supra* note 230.

[366] McCutcheon, *supra* note 296, at 138. The description of the opposition that follows is taken from this source.

[367] *Id.* at 159–63.

maintain them. They learned about them not from Hydro-Quebec but from American groups and newspapers. Raising these questions they found the company "arrogant" and "contemptuous of the public;" they "tried to mislead." The allegations had a familiar ring. Coalitions of consumers, churches, unions, and environmental and native peoples groups began to oppose the project. They set up an office in Montreal. Below the border, a group of residents calling themselves PROTECT (Prudent Residents Opposed to Electrical Cable Transmission) formed to oppose a line across the New York countryside. No Thank Q Hydro-Quebec campaigned against the lines in Maine and then, breakthrough, succeeded in persuading state legislators to reject the Hydro contract for failure to consider cheaper options such as energy efficiency.

Then, in New York, the wheels came off. Organizations of every stripe, singly and in coalitions, began to lobby politicians to cancel the New York Power Authority agreement.[368] At one point there were at least thirty anti-Great Whale groups on college campuses throughout New York State, and more elsewhere across the Northeast. To Hydro-Quebec and its supporters, Great Whale electricity was a no-brainer for New York: "clean" power, no air emissions, good rates, long term stability.[369] But the opponents raised a larger moral question: was this source clean, or, in the words of a New York reporter, "simply tantamount to exporting environmental and cultural destruction to the taiga"?[370] Hydro-Quebec's campaign featured pictures of its employees "carefully airlifting animals to safety from islands created by the flooding."[371] They didn't persuade one Buffalo politician, who spoke for many when he said that New York should avoid becoming "an accomplice to the crime."[372] And then the Cree, Inuit, and Mathew Coon-Come appeared in Times Square.

At this point, the Hydro-Quebec ball was no longer in Canada's court; it was in Albany with then-Governor Mario Cuomo. The New York Power Authority had already flexed its muscle with the company. In a letter to the New York Times, the Authority's Chairman related: "Largely at my urging Hydro-Quebec agreed not to begin construction of roads and other ancillary features until the entire project has

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[368] *Id.* at 161–62.
[369] Verhovek, *supra* note 230.
[370] *Id.*
[371] *Id.*
[372] *Id.*

undergone review."[373] He continued: "I have personally advised Hydro-Quebec that we will not buy a single kilowatt of its power unless environmental and native peoples' concerns receive full scrutiny under Canadian procedures."[374] In a single stroke, the New York Power Authority had succeeded in accomplishing what the Canadian Ministry of Environment had been unable to do in three tries from Rafferty to Oldman to Great Whale, and it was the most obvious step in the world: stop construction pending environmental review. In late 1992, Governor Cuomo cancelled the $22.7 billion twenty-one-year agreement to buy Hydro-Quebec power, citing lack of future power demands.[375] He had become a believer in "least cost," demand-side management: energy efficiency instead.[376]

A year-and-a-half later, with the Great Whale still alive and under Canadian review, a third Cree lawsuit came down from the Canadian Supreme Court.[377] Hydro-Quebec not only needed U.S. purchasers, it needed the all-clear from the Canadian National Energy Board to export the electricity.[378] The Board's mandate, inter alia, required a finding that the electricity was not needed to meet Canada's own power demands in the foreseeable future.[379] The licensing process began in the late 1980s and, while it was in progress, the Canadian Parliament, conveniently for Hydro-Quebec, repealed this "Canada first" requirement, leaving only a highly discretionary standard that the sale be in "the public interest."[380] Vague standards like this are usually a joy to the regulated community. They release the regulators from pressures of law and subject them all the more to the pressures of politics.

In this case, though, the Energy Board did not give Hydro-Quebec carte blanche. The Cree and environmental groups had intervened in the proceeding to challenge the company's benefit-cost analysis and the Board's exercise of its fiduciary duties towards native peoples.[381] They lost on these claims but won a huge concession: the Board attached conditions to its license that required compliance with the

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[373] Richard M. Flynn, Letter to the Editor, N.Y. TIMES, Jan. 26, 1992, § 6, at 6.

[374] *Id.*

[375] Mark Clayton, *Canadian Court Ruling Heartens Native Groups,* CHRISTIAN SCI. MONITOR (Boston, Mass.), Mar. 2, 1994, at 4.

[376] *See id.*

[377] *See generally* Quebec (Attorney Gen.) v. Canada (Nat'l Energy Bd.), [1991] 3 F.C. 443 (Fed. Ct. Can.) [hereinafter *Quebec (Attorney Gen.) I*].

[378] *Id.* at 446.

[379] *Id.* at 453.

[380] *Id.* at 453–54.

[381] *See id.* at 443.

EARP guidelines and successful completion of that review process.[382] Further, the scope of the environmental review would include not simply the transmission lines carrying the power out of Canada but also the "future construction of production facilities."[383] As the Board noted, the transmission impacts were minor;[384] the production impacts were huge. Another review nightmare for Hydro-Quebec. It appealed, and won before a friendly appellate court.[385] The inclusion of the production facilities was seen as beyond the Board's jurisdiction and ultra vires.[386] And so it was the turn of the intervener Cree and environmental organizations to appeal. They were joined by the U.S.-based Sierra Club Legal Defense Fund and Friends of the Earth.[387] And ultimately, by the Supreme Court of Canada.

In March 1994, a unanimous opinion had little difficulty finding a relationship between the licensing of export and the production of the electricity to be exported. To exclude the production would denigrate the environmental review process. "I would find it surprising," wrote the lead author, "that such an elaborate review process would be created for such a limited inquiry [as the transmission lines only]."[388] But lurking beneath this argument was the one that has continued to haunt all of Canadian environmental law: did such a broad exercise of federal authority by the Energy Board contravene the basic, decentralized structure of the Constitution Act of 1867? Here the court did a lawyerly thing. It said that it would "expressly refrain" from "making any determinations" that interpreted the Constitution in this regard.[389] Next, it proceeded to do so.

"It must be recognized," began the court with some understatement, "that the environment is not an independent matter of legislation" under the Constitution, and that it is a "constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty."[390] When someone starts using the word "abstruse," one senses thin ice. The court had to be "careful," it went on, "to ensure that the Board's authority is truly

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[382] *Id.* at 443, 447.

[383] Quebec (Attorney Gen.) v. Canada (Nat'l Energy Bd.), [1994] 1 S.C.R. 159, 189 (Can.) [hereinafter *Quebec (Attorney Gen.) II*].

[384] *Id.*

[385] *See Quebec (Attorney Gen.) I*, 3 F.C. at 446.

[386] *See id.* at 444.

[387] *See generally Quebec (Attorney Gen.) II*, 1 S.C.R. 159.

[388] *Id.* at 191.

[389] *Id.* at 192.

[390] *Oldman River II,* 1 S.C.R. ¶ 94.

limited to matters of federal concern."[391] The Oldman question, redux. The court explained: "That does not artificially limit the scope of the inquiry to the environmental ramifications of the transmission of power by a line of wire"—a statement which is up to this point clear—"but it equally does not permit a wholesale review of the entire operational plan of Hydro-Quebec."[392] Which at this point is not clear at all. If the review does not include the entire plan, then how much of it? If the federal statutory authority extended to the lines and export, then how far into the access roads, power plants, and mercury toxins could the Energy Board go? Without offering an answer, the court concluded that the Board decision and its environmental conditions, which included consideration of future project construction, "struck an appropriate balance between these two extremes."[393] Court to federal agencies: we really have no idea how to reconcile federal environmental review with the Constitution. But what you're doing here looks okay.

The court was even more equivocal when it came to the question of moving forward on a project while the review was taking place. Here, it stressed that the EARP guidelines did not require the board "to suspend its decision-making until the environmental assessment of *all* future generating facilities is completed" (emphasis added).[394] Which left unanswered the question of suspending *some* of the future facilities, the more imminent ones. Wringing its hands much as the Environment Ministry itself had over the same issue, the court noted that it was "preferable" to treat the environmental concerns before proceeding.[395] Rather than insist on it as a matter of law (and common sense, to say nothing of the preservation of the court's jurisdiction as well), however, the opinion simply approved the Energy Board's retention of authority to cancel the licenses if its conditions were not met.[396] All of which meant that, under Canadian law, Hydro-Quebec remained free to march forward at its own peril, loading the equities in its favor through contract commitments and sunk costs. It would sink $400 million.[397]

The indirection and caution of the Supreme Court's opinion notwithstanding, Cree III complicated matters enormously for the com-

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[391] *Quebec (Attorney Gen.) II*, 1 S.C.R. at 192.
[392] *Id.* at 195.
[393] *Id.*
[394] *Id.* at 198.
[395] *Id.* at 199.
[396] *Id.*
[397] Clayton, *supra* note 375.

pany. Yet another venue for environmental review, intervention, and delay. Hydro-Quebec tried to put on a brave face, "as long as the Supreme Court hasn't canceled any of our contracts, we are satisfied," said its President Armand Couture,[398] but the interest on its borrowed millions was making its "cheap" electricity more and more expensive.[399] Then, in mid-November of 1994, all three Canadian environmental review boards reported in. Their conclusion: Hydro-Quebec's hastily-assembled environmental assessment was not in compliance with the EARP guidelines.[400] The company would have to go back to square one. That was a very long way back.

The next afternoon, the Premier of Quebec, faced with the loss of his U.S. customers, mounting opposition, and the added obstacle of new environmental reviews, threw in the towel. He announced the abandonment of the Great Whale project.[401] He said he had never been in favor of it anyway.[402]

D. *Another Requiem: The Rupert-Broadback-Nottoway*

> I've fought them for seven years, hand-to-hand combat, every day, week after week, to preserve our river. You can imagine how I feel now.
>
> —*Cree negotiator, 2001*[403]

Stories like this should have an end, but they never do. Enormous amounts of money find their way like water, and there is no holding them back. Perhaps the most destructive phase of all the James Bay projects was yet to come. Phase three planned to divert the flow of the Nottoway and Rupert Rivers, legendary white waters and historic routes of the fur trade, into the Broadback River, storing the water in seven new reservoirs, sending it through eleven powerhouses, and transforming the lower portions of the Nottoway and Rupert

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[398] *Id.*

[399] *Id.*

[400] Grand Council of the Crees, *supra* note 313, at 7.

[401] *Id.*

[402] *Id.*

[403] Boyce Richardson, James Bay Crees Surrender Their Great River Rupert to Industrial Development: Rely on Quebec Promises in Return (Oct. 26, 2001), http://www.ottertooth.com/Reports/ Rupert/News/rupert-surrender3.htm; *see also* McCutcheon, *supra* note 296, at 141.

("one of the most magnificent wild rivers in Canada")[404] into dry rock.[405]

Compared to the impacts of the Great Whale and even the La Grande, these would be far more severe.[406] The shallow reservoirs would flood about twice the area as those proposed on the Great Whale, and they and their associated roads, power lines, dikes, and diversions would destroy more southern and biologically important wildlands.[407] Inundating more vegetation, the reservoirs would also release more toxic methyl mercury downstream. These were prime fisheries and core habitat for moose, caribou, beaver, and other species on which the Cree depended. The access roads would also open more forest for penetration by loggers, miners, trappers, oil, and gas and a host of white-owned development from the south. The majority of the Cree lived in this zone. Most of their villages and hunting grounds were here. The lands along the Rupert and Nottoway were the "veritable heartland of the Cree way of life."[408]

The Cree resisted. When Hydro-Quebec officials came to the mouth of the Rupert River to sell the village of Waskaganish on a joint venture this time, sharing some of the Rupert diversion profits, they were "put into a canoe and hustled out of town."[409] But the money was huge. And the Cree were living with, by their estimate, the loss of $5 billion a year in their own resources from the La Grande and associated projects, for which they were receiving next to nothing in return.[410] The interest on resistance compounded daily.

In October 2001, after more than thirty years of fighting the James Bay projects in total and ten on the Rupert-Broadback-Nottoway, the Cree capitulated.[411] In a deal hauntingly reminiscent of the James Bay Northern Quebec Agreement twenty years earlier that had unleashed the La Grande project and extinguished Cree claims in return for a cash payment, relocation of one dam and joint management authority over wildlife,[412] Quebec and Hydro-Quebec did it again. It is hard, it is indeed impossible, to blame the Cree. Still living

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[404] Richardson, *supra* note 403.

[405] McCutcheon, *supra* note 296, at 141; Verhovek, *supra* note 230.

[406] McCutcheon, *supra* note 296, at 163. The description of phase three that follows is taken from this source.

[407] *Id.*

[408] Richardson, *supra* note 403.

[409] *Id.*

[410] *Id.*

[411] *Id.*

[412] *See* Roslin, *supra* note 293.

on the margins and largely deprived of the assumed benefits of both the earlier Agreement and the hydro development, they were at the end of their tether.[413] The promised community development hadn't happened. Very few Cree had been trained and employed with the companies. The cash payment proved inadequate. Then it ran out. At the same time, more roads, mining, timber cuts, and development kept spilling up from the south, from which the Cree were getting no cut at all. As one of the Cree negotiators explained the settlement, "I feel it is about 51 percent a good idea, and 49 percent bad."[414]

This time the Cree received more autonomy and more money. They assumed authority over wildlife management and community development. And an annual cash payment rising to $70 million for the next fifty years. Cheap for Hydro-Quebec, which, in the end, as a state monopoly, would not have to pay for it anyway. Huge money for an entire people on the brink. Which way did responsibility lie? Other provisions appeared cosmetic. Under the announced forest regime, 25% of Cree traplines would not be cut, and the rest managed by "mosaic" cutting, the kind of habitat fragmentation that dooms deep woods species. In the U.S. experience, once logging roads go in, mining, off road recreation, poaching, and the rest follow like wagon trains. The Cree would get the money. They would lose the land.

Quebec left nothing to chance. The Cree agreed to drop all lawsuits and not to bring any more lawsuits against the province to enforce its obligations under the James Bay Agreement. The Cree not only gave up their heartland, they gave up their law. A Quebec northern expert, Louis-Edmond Hamelin, later commented: "nothing in this document indicates that each side has understood the culture of the other."[415]

IV. Reflections on Rafferty-Alameda, Oldman and the Great Whale

It is difficult at long range, even presumptuous, for an American to draw conclusions about cases in another legal system, another web of cultures, and another set of assumptions about the way things work and ought to work. The task is better done in this case by Canadian

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[413] Richardson, *supra* note 403. The description of the settlement that follows is taken from this source.

[414] *Id.*

[415] *Id.* The author writes: "the Crees have, in a sense, stripped themselves naked before their long-term adversaries, and are now hoping they will keep their promises as they have not done in the past." *Id.*

scholars, and they do it every day. There is some value, nonetheless, in offering a comparative view of these same issues from another system, particularly one largely identical to Canada in language, in economic and social development, and in the same struggle to come to grips with environmental law. The United States experience with water projects goes back more than a century, and with environmental impact review to 1969. This author's personal experience with both, as a litigator and scholar, goes back to 1971. The political shenanigans, evasions of responsibility, and half-hearted compliance noted in this brief history are found throughout American environmental law, never more so than the current day,[416] and the American treatment of its native peoples is one of its greater disgraces. In short, the United States has little to preach or teach here. What this author hopes to offer is a more modest reflection on what these particular cases say about how Canada and the United States approach environmental responsibilities.

(1) Rafferty-Alameda, Oldman and the James Bay Development litigation propelled Canada into modern environmental law and one of its primary mechanisms, environmental impact review. Prior to these cases, Canada had an opaque administrative order of uncertain application and even less certain enforcement, overlaid on a constitutional system which cast serious doubt on whether the federal government could be doing this at all. Starting with Rafferty, these doubts were put to rest, at first in theory and then in practice. As they were put to rest, the public clamor for a greater federal role emboldened an under-nourished Ministry of Environment to intervene, secure the reviews, speak out, and finally act on behalf of environmental protection.[417]

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[416] For a detailed critique of recent U.S. government performance of its impact assessment obligations under NEPA, see generally JAY E. AUSTIN ET AL., ENVTL. L. INST., A 'HARD LOOK' AT JUDICIAL DECISIONMAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (2004); WILLIAM SNAPE III & JOHN M. CARTER II, DEFENDERS OF WILDLIFE, WEAKENING THE NATIONAL ENVIRONMENTAL POLICY ACT: HOW THE BUSH ADMINISTRATION USES THE JUDICIAL SYSTEM TO WEAKEN ENVIRONMENTAL PROTECTIONS, *available at* http://www.defenders.org/publications/nepareport.pdf (last visited Apr. 20, 2006).

[417] The Canadian environmental agency's tentative approach to environmental regulation parallels that of the Council on Environmental Quality (CEQ) in the United States. The National Environmental Policy Act of 1969 (NEPA) set out national goals for environmental protection that were so vague as to, ultimately, be found unenforceable, and an environmental impact review process held, over time, to be purely procedural. *See* 42 U.S.C. § 4331 (West 2006) (establishing goals and policy); 42 U.S.C. § 4332(c) (requiring environmental impact statement requirement); Robertson v. Methow Valley Citizen Council, 490 U.S. 332, 350 (1989) (stating that requirements are purely procedural). It also

At the same time, these cases revealed dysfunctions in the Canadian review system that became so obvious that Parliament could not ignore them. In 1992, it responded with a new Canadian Environmental Assessment Act[418] which, with amendments in 2003,[419] became a stronger vehicle for environmentalists dwarfed by economic interests in a country still so rich in natural resources and undeveloped space that it remains very much in conquest mode. The Canadian environmental impact assessment system, on paper, trumps that of the United States in several ways, most importantly the independent review panels; U.S. environmentalists would kill for them.[420] As important as their mechanisms, however, is the reliance of both systems, U.S. and Canadian, on citizen enforcement, and it is here where the U.S. civil society and its tradition of highly-organized and well-funded groups able to challenge government decisions comes center stage.

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established the CEQ as an advisory body to the President (indeed, it's formal name is the President's Council on Environmental Quality) with few responsibilities other than annual reports to Congress and no hint of authority over other federal agencies. 42 U.S.C. §§ 4342–4344. The early development of NEPA's impact assessment process was left to court decisions, following which, in the early 1970s, CEQ would send out interpretative memoranda recapping the opinion, usually with an affirmative spin. Emboldened by a growing body of court decisions and memoranda, it issued a set of NEPA interpretative guidelines, similar to those of the Canadian Environmental Agency, describing a process for compliance with the statute. Council on Environmental Quality, 36 Fed. Reg. 7724 (Apr. 23, 1971). Not promulgated under the Administrative Procedure Act and lacking statutory basis, these guidelines were viewed as advisory only, although they were looked to by the courts in individual cases for interpretation of the law. *Compare* Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421, 424 (5th Cir. 1973) (finding that guidelines are "merely advisory") *with* Envtl. Def. Fund, Inc. v. Froehlke, 473 F.2d. 346, 350 (8th Cir. 1972) (relying heavily on guidelines). It was not until 1976 and the election of a President with an environmental protection agenda that CEQ was empowered, by Executive Order, to engage in rulemaking and issue NEPA regulations for the impact review process, binding on all federal agencies. Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 24, 1977). For the ensuing thirty years, these regulations have become a central part of the law of NEPA, although, at the time of this writing, both the regulations and the statute were under critical scrutiny by the White House and Congress. *See Activists Fear Upcoming NEPA Bill Could Broaden Piecemeal Rollbacks,* 26 Inside EPA 36 (Sept. 9, 2005). In sum, the U.S. environmental agency and review process, facing similar handicaps, evolved in remarkably similar ways.

[418]Canadian Environmental Assessment Act, 1992 S.C. ch. 37 § 67.

[419] Canadian Environmental Assessment Act, 2003 S.C. ch. 9 et seq.

[420] Particularly so, if the independent review panels were more frequently employed. According to the Canadian Environmental Assessment Agency, 99 percent of projects subject to environmental assessments are not submitted to independent panels for review and mediation. In practice, then, reviews in all but the most controversial projects are conducted by proponent agencies and permit applicants. For a critical view of the Canadian process in action, see generally Andrew Green, *Discretion, Judicial Review and the Canadian Environmental Assessment Act*, 27 Queen's L.J. 785 (2002).

(2) In both systems, but more markedly in the United States, the enforcement of environmental assessment requirements against unwilling and non-disclosing agencies depends on judicial review.[421] This is most obvious at the state or provincial level, where development pressures are highly localized and environmental critics speak out at least at their social peril and at times more. It has become obvious today at the national level as well, as seen in the United States with an administration openly hostile to environmental policy and actively seeking to limit environmental impact review.[422] In such a climate, it comes down to the courts or nobody.

Rafferty-Alameda, Oldman, and the Great Whale cases reveal the great reluctance of Canadian courts to wade into this swamp. U.S. environmental litigation is not a pretty sight, and more than one reviewing court has ended up with years of supervision over national grazing policies, surface mining, and the preservation of the Pacific Salmon. And so when the court in *Canadian Wildlife Federation I* stated, somewhat wistfully, that laws like environmental assessment presume a measure of governmental good faith, it was clearly not seeking to intervene. But when the Canadian Supreme Court finally said, in *Canadian Wildlife Federation II,* that it had to apply environmental law to, above all persons, Ministers of the Crown, one sensed that they were crossing a Rubicon. The crossing is not complete and will in all likelihood remain as contested in Canada as it is here in the States, but most of the army went across and, for the same reasons found in the United States, that is where the Canadian judiciary will likely remain. To do less simply nullifies the will of the people expressed through law.

(3) What the many cases that surround Rafferty-Alameda, Oldman, and the Great Whale also show is the terrible tension of federalism in today's world. The globe *is* smaller. Environmental problems *are* larger, and they are growing. Chemicals from U.S. industries show up in the Arctic, shared species like the caribou and salmon are taking a terrible beating, and no one is immune from deforestation, cli-

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[421] Canadian environmental plaintiffs face significantly higher obstacles than their counterparts in the United States, among them the absence of specific provisions for citizen suits, the prospect of liability for litigation costs in the case of adverse decisions, standing-to-sue challenges and a strong tradition of judicial deference to government agencies. E-mail from Professor Christopher Tollefson, University of Victoria School of Law, B.C., Canada, to author (Aug. 6, 2005, 01:21 CST) (on file with author). *See generally* Deborah Van Nijnatten, *Participation and Environmental Policy in Canada and the United States: Trends Over Time,* 27 POL'Y STUD. J. 267 (1999); Corriveau, *supra* note 47.

[422] *See generally* Robert G. Dreher, *NEPA Under Siege: The Political Assault on the National Environmental Policy Act*, GEO. ENVTL. L. & POL'Y. INST. (2005).

mate change, or acid rain. The notion that the sources of these problems are best controlled by individual states and provinces, or even by individual nations, is increasingly quaint and untenable.[423] Yet these are the premises under which Canada and the United States have organized themselves, and all nations have organized the world.

To expect a state or province, on the eternal hunt to win the prize of economic development over its competitors, to give full shrift to national and international interests, or even to long term sustainability, in projects like Rafferty-Alameda, Oldman, and the Great Whale is to expect the impossible. Political futures are local and produced by short term gains. As for the long term, nobody gets their name put on something that didn't get built.

The United States, circa 2005, is on a rampage to unload federal environmental responsibility, indeed all of the federal social responsibility it can, onto states, half of whom are in deficit and few of whom have the appetite to impose environmental requirements on their own. Canada, never having gone very far at the federal level in the first place, continues to place primary responsibility even for endangered species protection—a matter many would consider of national importance—at the provincial level.[424] Call it "federalism" if one wishes, or call it simply the bushhogging of environmental obstacles, it ends up at the same place.

The Canadian Supreme Court was forced to deal with these issues in all three stories related in this article. One must conclude that its rulings reveal the serious ambiguity of Canadian governance with regards to federalism. One feels the tension in an opinion declaring that "environmental protection has become one of the major challenges of our time," while at the same time straining not to overstep constitutional limits for the federal government to do something about it.[425] The U.S. Supreme Court, for its part as well, has begun to question the interstate commerce rationale underlying federal envi-

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[423] *See generally* James Gustave Speth, *Environmental Law: Can It Deal With The Big Issues?*, 28 VT. L. REV. 779 (2004).

[424] Canada's recently-enacted endangered species law continues to vest primary protection and management responsibilities with the provinces, limiting federal jurisdiction to federal lands, water and migratory species. Candian Species At Risk Act (SARA), 2002 S.C., ch. 29 (Can.). By contrast, sections nine and ten of the United States Endangered Species Act impose federal protections over the entire country, including state and private property. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified at 16 U.S.C. § 1531–1543 (1973)); Babbitt v. Sweet Home Chapter of Cmtys for a Great Oregon, 515 U.S. 687 (1995) (approving ESA protections on private lands).

[425] *See Oldman River II*, 1 S.C.R. at 16.

ronmental law.[426] The fact remains, however, that neither Louisiana nor Alaska is going to place a priority on protecting its wetlands when it comes to oil and gas production. Nor will Quebec see the Canadian Shield as much more than a cash cow. How Canadian and the U.S. commitments to federalism meet the challenge of national environmental policy remains an open question.

(4) One last observation from Rafferty-Alameda, Oldman, and the Great Whale is the most simple. Environmental review, safeguards, and licenses are largely procedural. They lead to negotiated results. With a demanding environmental agency and public support, these efforts will lead to (in addition to a good deal of corporate image advertising) reduced pollution, mitigation measures, and a genuinely-softened footprint. In most cases, however, these measures will be inadequate to offset the impacts. Not even close. The Piikan people may get money to improve their way of life, and the Cree certainly will, and that is a major plus. But their rivers are doomed.

In the cases at hand, the Rafferty-Alameda, Oldman, and La Grande projects were built, the Rupert-Nottoway-Broadback grinds forward and the Great Whale is on hold. Proposals like these never die. Were these same projects proposed today, the provinces would be back in the lists behind them and the federal environmental agencies, be they in Ottawa or Washington, cowering in their tents. It would be up, once again, to the people. Environmental review gives them a shot. Judicial review reinforces the shot. And on the success of that shot, so much depends.

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[426] *See generally supra* notes 42, 43.