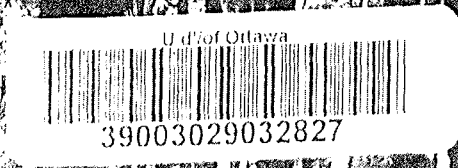




AN INTRODUCTION TO
ENVIRONMENTAL LAW AND POLICY IN CANADA
Second Edition

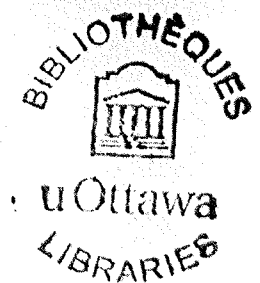


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emond ■ Toronto, Canada ■ 2015

on the edge of Edmonton for the purpose of an energy transmission and utility corridor. The Alberta Court of Appeal ruled that the legislature lacked the jurisdiction to do so because the purposes for restricted development areas in the authorizing statute listed conservation and pollution control; the purposes did not include transportation and utility corridors.

Discretionary Decisions and Policies

The concept of jurisdiction also applies to **discretionary decisions** made by authorized tribunals and government officials under powers conferred by environmental statutes. A discretionary decision-making power offers the decision-maker considerable latitude concerning the basis for a particular decision and the factors that can be taken into account in reaching the decision. In such cases, the clauses in the statute describing the official's decision-making power do not place any specific limitations on the scope of the decision or the relevant factors. Rather, they often state, for example, that the decision must be in the "public interest," or may simply state that the decision-maker "may" decide the issue. With a discretionary decision-making power, no single decision is legally the right one.

Discretionary decisions include key regulatory decisions under environmental statutes, such as whether contaminant discharges should be approved or licensed, or whether forestry, mining, or other public natural resource rights should be granted to private developers. Even if the statutory power includes matters that must be considered in making the decision, these matters may be very broad. As an example, consider how wide a discretion is left to a decision-maker empowered to have regard for economic, social, and environmental effects.

As we will see in Chapter 14, even these discretionary decisions may be challenged through judicial review. Courts assess a decision-maker's jurisdiction using a deferential approach. They consider the relevance and purpose of the factors and (sometimes) the specific information that the decision-maker looked at, and the consistency of the decision-maker's reasoning.

Policy decisions cannot usually be challenged on jurisdictional grounds because they do not involve the exercise of a specific statutory decision-making power. They are exercises in setting objectives and planning, under general powers given to ministers by statutes that establish and define the subjects of their government departments. They are decisions about what actions to take and how to take them. It is putting these policies into operation that requires either legislation or decisions under existing statutory powers. For example, a government policy decision to establish a greenhouse gas emission trading system, expressed in a ministerial statement or a government

discretionary decisions decisions whereby the decision-maker has considerable latitude concerning the basis for a particular decision and the factors that can be taken into account in reaching the decision

policy paper, cannot be challenged for lack of jurisdiction. But a statute to establish this kind of system can be challenged for lack of constitutional jurisdiction. For example, if the trading system requires specific emission limits for a facility, the federal government would have to establish a constitutional basis to impose such limits. If the trading system is established by means of new regulations under an existing statutory power, it can be challenged for lack of jurisdiction under the existing statute. In this instance, the statute has to give clear authority for Cabinet to pass such regulations. The challenge is not a constitutional one; rather, the challenge would be that the provincial legislation did not contemplate this type of initiative being undertaken under the statute. The question in all cases is one that lawyers ask governments with numbing regularity: What is your authority for that? In other words, where is your jurisdiction?

The Concept of Liability

Liability is a legal term that is surprisingly difficult to define with precision, yet it is fundamental to environmental law. It is essentially about obligation. *Black's Law Dictionary* defines **liability** as "every kind of legal obligation, responsibility, or duty."²³ Legal obligations and responsibilities are enforced through the decisions and orders of courts and regulatory tribunals.

Environmental liability arises from obligations imposed by either

- the general law (codes or common law), or
- specific environmental legislation.

A common example is legislation that establishes liability for personal injury or property damage resulting from breach of a requirement of an environmental statute.²⁴ Of particular importance is statutory liability for damage caused by contaminant spills and liability for damage, remediation, and sometimes restoration of contaminated sites.²⁵

Liability can be civil, criminal, or administrative. Civil liability produces obligations to take or cease certain actions and to pay compensation to persons who have suffered harm. Criminal liability is penal, involving public sanction for breach of environmental legislation. Administrative liability is enforced through regulatory bodies and officials; it can impose specific abatement requirements, including compensation obligations in some cases.

Major issues concerning environmental liability include:

- the kinds of environmental damage that result in liability,
- the classes of persons who can be held responsible,