

Pickerel, Pipelines and Pancakes: A Summary of ELC's Green Regs and Ham breakfast discussion

Author : Jason Unger

Pickerel, Pipelines and Pancakes: A Summary of ELC's Green Regs and Ham breakfast discussion

“For too long Alberta has been forced to accept drastically reduced prices for our iconic fish-flavoured flat-cakes due to a lack of access to lucrative Asian breakfast markets.”

With such an introduction and welcome by MLA David Shepherd, the *Pickerel, Pipelines and Pancakes* talk was off to a deliciously tongue-in-cheek start.

On April 24, nearly coinciding with the long awaited start of spring, the Environmental Law Centre hosted its Green Regs and Ham breakfast talk to a crowd of 100 early risers. With pancakes on their plates, the crowd was welcomed by the ELC's Jason Unger and MLA David Shepherd who brought greetings from the Premier and Government of Alberta.

To get everyone situated for the topic of federal environmental regulation, ELC's Jason Unger began by presenting the analogy of federal environmental laws as akin to bagpipes. Odd at first blush (as is his way), federal environmental laws, like bagpipes, expand and contract through time, you can never be sure the noise they will make, and some people will never like them, no matter what. He noted that the interface of federal and provincial laws is particularly relevant right now on topics of greenhouse gas emissions, insolvencies in the oil and gas sector and the impacts on provincial environmental regulation, fisheries, and, of course pipelines.

From there Professor Martin Olszynski, Faculty of Law and Research Fellow, School of Public Policy at the University of Calgary, provided the recipe for the current Bills before Parliament that are reframing the federal role in environmental regulation and its relevance to provinces.

Starting with the *Fisheries Act*, Olszynski gave a timeline of events leading up to the 2018 Bill C-68, starting with the controversial 2012 modification of the prohibition against works and undertakings that result in harmful alteration, disruption or destruction of fish habitat. With Bill C-68, fisheries laws appears to be re-inflating as Olszynski detailed how the proposed *Fisheries Act* addressed some of the concerns from 2012, including:

- A return to the prohibition against harmful alteration, disruption or destruction (HADD) of fish habitat (excision of 2012 “serious harm to fish” regime);
- Greater clarity around what constitutes a HADD, how it may be permitted, and how it applies to a broader definition of “fishery”;

- An online registry/database for authorizations and better reporting of the state of fish habitat; and
- The intention to formally recognize Indigenous involvement in fisheries management.

For more on Professor Olszynski's review of Bill-68 see his blogs [here](#) and [here](#).

Olszynski then reviewed the proposed Bill C-69 *Impact Assessment Act* (IAA) highlighting:

- A single agency will be responsible for all standard Impact Assessments;
- An expanded scope (in both assessment and decision-making) which will look at all impacts (environmental *plus* economic, social, health) along with additional factors such as a project's contribution to sustainability, to environmental commitments, to climate change; and
- More transparency in the decision making process including the requirement for a detailed report on effects created by the assessment agency.

The lens of impact assessment led to the discussion of pipelines. Public participation and the removal of the standing test from CEAA 2012 was noted as significant, however it is not clear how this could impact future pipeline reviews (although it may prove a moot point). It also appears, Olszynski noted, that the reviewability of impact assessment reports by courts may change with the intended reversion to the single agency approach, a change from high levels of deference being granted to the National Energy Board (that was adopted in the case of *Gitxaala Nation v. Canada*, 2016 FCA 187)

With this context, Olszynski then turned to the cacophony of provincial positioning on interprovincial pipelines. Marching through the timeline of the TransMountain Pipeline and incremental constitutional analysis provided by both the NEB and various courts, Prof. Olszynski observed that the NEB regime and the Board's review of the TransMountain project appear quite comprehensive. The near-comprehensive nature of the NEB regime is consistent with the theory that an NEB certificate of public convenience represents a "positive entitlement". This means that provincial laws such as BC's proposed spill regulations may be found inapplicable to the pipeline even if they do not actually conflict with the NEB's certificate on the basis that, by adding additional requirements, they "frustrate the purpose" of the NEB regime. This is the second branch of what is known as the federal paramountcy doctrine.

And so the spring Green Regs and Ham came to an end on a warm Edmonton day. The constitutional wrangling will likely be revisited a spring from now and the spring after that. The event provided some great food for thought and a renewed pipeline of legal analysis has emerged in relation to federal environmental regulation. Is this pipeline of lawyerly perspectives nearing capacity? Time will tell, but we will gladly refine it right here in Alberta.

[Download a copy of Professor Olszynski's presentation](#)

Want to keep the discussion going? We'd love to hear your respectful and thoughtful comments below. (The ELC moderates all commentary and reserves the right to refuse to post comments we deem to be disrespectful.)

We'll be continuing to watch these issues as they unfold and encourage you to subscribe to our blog for further updates and analysis.

Please join us in October in Calgary for our next Green Regs and Ham! (If you subscribe to the blog, you will get notifications when the date, speakers and topics are determined – and if you have suggestions for topics or speakers, please also comment below).

ABOUT THE ENVIRONMENTAL LAW CENTRE:GRH (Olszynski)

The Environmental Law Centre (ELC) has been seeking strong and effective environmental laws since it was founded in 1982. The ELC is dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in Alberta. The ELC's mission is to educate and champion for strong laws and rights so all Albertans can enjoy clean water, clean air and a healthy environment. Our vision is a society where laws secure an environment that sustains current and future generations.

*As a charity, the Environmental Law Centre depends on your financial support. [Help us](#) to continue to educate and champion for strong environmental laws, through tools such as [our blog](#) and all of [our other resources](#), so that all Albertans can enjoy a healthy environment. **Your support makes a difference.** [Donate online today](#)*

Share this: