Evidentiary Challenges Improving Causation and Future Risk in Environmental Litigation and Administrative Decision Making

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I want to address this topic more from a public policy perspective than a legal perspective. Legal Issues with respect to proof of causation and future risk in environmental litigation and administrative decision-making must be addressed in the context of the appropriate role of courts and administrative tribunals particularly where a case raises important public policy issues.

For ten years I was Executive Director and General Counsel of the British Columbia Public Interest Advocacy Centre. In that capacity, I represented consumer and environmental groups before courts and tribunals on a broad range of environmental and related issues. In my present position, I am involved in public policy development, not law. The B.C. Energy Council is mandated by the *Energy Council Act*[1] to advise the Minister of Energy, Mines and Petroleum Resources on energy matters and to develop, with public involvement, a provincial energy strategy based on sustainability principles. The council does not hold formal hearings but encourages input from interested parties and the public in a variety of ways. The council does hold public discussions (which are essentially townhall meetings), it has established various advisory and consultative groups on specific issues and prepares and distributes background materials to facilitate discussion of energy policy issues. It makes its recommendations to the provincial government which has the ultimate responsibility for determining public policy.

In my view, this is where that responsibility should lie. Courts and tribunals should neither attempt to take on that role or allow it to be imposed on them by governments who wish to avoid that responsibility.

To what extent are the traditional roles of the courts and administrative tribunals appropriate for resolving environmental disputes which raise significant public policy issues?

The courts have a number of traditional roles, all of which are applicable to environmental disputes. These include:

- criminal and quasi-criminal (for example, breaches of environmental legislation);

- civil litigation arising from impacts of actual or potential environmental degradation (for example, oil spills, forest practices);

- injunctive - to require or preclude actions involving key environmental issues (for example, enjoining interference with forest or mining activities); and

- judicial review - including judicial review of government decisions and administrative tribunal decisions involving environmental issues.

Administrative tribunals deal with environmental issues in a number of ways, including appeals from decisions of government officials, assessing resource planning and siting decisions and regulating the activities of public utilities.

Traditional judicial and administrative dispute resolution mechanisms include the following:

1. an adversarial process;

2. an established burden of proof (beyond a reasonable doubt; the balance of probabilities, is the activity in the public interest);

3. established rules respecting what information is appropriate for consideration by the tribunal (is the evidence relevant and/or admissible); and

4. clearly defined limitations on who is entitled, or may be permitted, to participate in the process. The "standing" rules are more restrictive in proceedings before courts than they are before most administrative tribunals. However, even where standing is readily obtained, the inability of the tribunal to award costs or some other form of participant assistance, or the tribunal's restrictive interpretation of its

power, can be an effective limitation on participation. This is especially so where the issues are characterized as technical or scientific and effective participation is impossible without expert assistance.

Because of these requirements, environmental issues which involve important public policy issues are often characterized, not as public policy issues but as more narrowly defined issues which allow them to be considered by a court or tribunal. What is in reality a public policy issue is characterized as a dispute between two or more parties to facilitate its resolution by an adjudicative tribunal.

Many cases involve issues which are appropriately determined by a court or tribunal a breach of a legislative or regulatory requirement; individuals adversely affected by an action such as an oil spill. These are appropriately resolved by a court or tribunal in accordance with its procedural and evidentiary rules.

However, there are issues which give rise to litigation before courts or tribunals, because the interests involved see no other, or at least no better, alternative. Maybe governments have failed or refused to act. Maybe interested parties disagree with a governmental decision on public policy grounds. Seeing no alternative, groups or individuals look to the courts to instigate or reverse a public policy decision. The application of the *Canadian Charter of Rights and Freedoms*[2] gives clear examples of this strategy. Issues such as the appropriate age of retirement, employment equity, income tax deductions for nannies or daycare are public policy issues which should be resolved in the political forum. They have instead been imposed upon the judiciary.

There are also cases which initially appear to be disputes between individuals or organizations appropriately resolved in an adjudicative forum which are really disputes about public policy. They raise issues which are not really specific issues between parties, but fundamental trade-offs based on public value judgments. Courts and tribunals should not only be unreceptive to these disputes, they ought to actively discourage them.

Let me give two examples, one of which has come before courts and the other of which involves regulatory tribunals. Both raise important environmental issues.

The first is the issue of the possible health impact of electromagnetic fields (EMF) surrounding transmission and distribution lines of electric utilities. In the past ten years, there has been some evidence (not unlike the initial evidence linking cigarette smoking to cancer and asbestos to respiratory diseases) that close proximity to these lines can cause health effects, most notably, childhood leukaemia.

The evidence is fragmentary, limited and inconclusive. It is based on some epidemiological studies conducted primarily in the United States and Sweden and numerous experimental studies on animals. It is fair to say that there is no agreement on what the relationship between electricity lines and cancer might be; there is agreement that there is no objective standard to measure this relationship, if it exists, and there is no agreement on what steps might be taken to mitigate these adverse health effects other than a major reordering of existing transmission and distribution facilities, which would cost hundreds of billions of dollars.

Nevertheless, there have been a number of cases in the United States[3] and there could well be some in Canada in which people who, or whose children, are suffering from cancer have sued or will sue electric utilities for damages.

Given the present state of the evidence, it is very unlikely that any plaintiff could prove on the balance of probabilities that exposure to electricity lines caused the cancer. However, suppose they could? What would be the impact of a court finding in favour of a plaintiff in such a case? Utilities are already, as a matter of caution, locating new transmission lines away from schools and residential areas to the extent possible. However, there is a limit as to what they can do with respect to direct distribution lines. A decision upholding an EMF claim would probably require the defendant utility (and probably other utilities in the vicinity) to make unreasonable major expenditures. It would certainly also leave them open to other potential litigation.

But consider the appropriateness of bringing such proceedings before courts. Only plaintiffs and defendants with significant resources could afford to pay for the scientific evidence that would be required to meet the burden of proof. Defendants would almost inevitably always have more resources. Other interested parties (including utility ratepayers) would probably not be able to obtain standing to oppose the claim. Even if this is a proved health risk, is it appropriate for a court to decide in a traditional lawsuit that this is a more appropriate expenditure of scarce public resources on health issues? What about alternative issues such as breast cancer or AIDS?

A judge hearing such a case would have to consider all of these issues. They are factors influencing her or his determination of whether or not the plaintiff had met the burden of proof. But that puts the judge in the same inappropriate position as the parties pretending to deal with a fundamental public policy issue as simply a private dispute between parties.

An example more appropriate to administrative tribunals is how to incorporate environmental and social (as a part from pure economic) values into the assessment of environmental decisions. These include resource acquisition decisions by utilities; the development and siting of major resources such as mines or manufacturing plants and similar issues. These decisions tend to be made by administrative tribunals, such as regulatory agencies, environmental assessment tribunals or appeal boards. The tendency has been to characterize these issues in a manner that these boards can understand and to seek their resolution in a traditional adversarial setting.

The prevailing view is that we should attempt to "monetize" these environmental and social values so that they can compete with economic values on the off-cited (but never achieved and indeed unachievable) "level playing field". The result is a battle between "scientific" experts carried out in an adversarial process before administrative tribunals. The issue becomes the appropriate value of a tonne of carbon dioxide, a mile of free flowing river or the creation of ten jobs.

In fact, the argument is not about these co called "objective" values; it is about the public policy issues underlying the debate. Is job creation more important than the environment? Should a hydro electric project be developed rather than a project using natural gas or wood residue? Are recreational values more important then economic values? Is this location a better one than that one?

These are the issues that need to be resolved. These are the issues that cannot easily be resolved by traditional tribunals. What we are talking about are trade-offs and not win-lose situations.[4] The tribunal does not have the public support to make these fundamental decisions nor does it have the resources or mechanisms required to facilitate discussion and decision-making based on trade-offs. It will not have all the interests involved before it; only the interest groups that are identified on the basis of the specific issue as it is characterized. The result will almost always be a debate between experts, not a discussion among the people who are affected.

What should courts and tribunals do when faced with these fundamental public policy issues? They are going to be faced with them, either because governments will allow these issues to be referred to them, or because there will be parties who do not accept the policy decision made by the government of the day, and choose to use the courts or administrative tribunals in an attempt to reverse that policy.

Courts and tribunals should focus on identifying what is the clear issue between the parties before them and limit the decision to that issue. It impacts the parties before you; they are the only ones that have had the opportunity to make their case before you and in that limited framework, they are entitled to a decision from you.

Where the basic issue is an issue of public policy, it is incumbent upon the court or tribunal to identify that issue and to make it clear that it can only be determined through the political process. It is also possible to frame the issue in a way that makes it very difficult for politicians to avoid dealing with it.

A positive example of this is the recent decision of the British Columbia Court of Appeal with respect to First Nations' land claims.[5] The judges in that case clearly identified a framework for political negotiation. The courts dealt with what they could deal with (and there can be and has been significant debate among lawyers and others as to how effectively they have dealt with it). They also effectively defined the area where there is no role for the courts but which can only be susceptible to negotiation between the parties and perhaps gave guidelines as to how those negotiations might proceed.

FOOTNOTES

1. *Energy Council Act*, R.S.B.C. 1992, c. 5.

2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

3. Unsuccessful cases claiming that utility transmission or distributing lines caused cancer have been brought in Florida and California.

4. Indeed not all parties interested in or affected by the trade-offs are likely to be before the tribunal. If they are, the nature of the adversarial judicial or quasi-judicial process makes resolution even more problematic.

5. *Delgamuukw* v. *British Columbia* (15 October 1993), (B.C.C.A.) [unreported].