

Courts and Tribunals Through a Sustainability Lens: New Questions and New Expectations

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“Living a healthy and productive life in harmony with nature.”

In this simple way, John Fraser has driven home this morning, in his usually persuasive way, the essence of sustainability. To this he adds intergenerational equity as a way to remind us that our responsibilities today stretch out from today to tomorrow and he confronts us with a stark word as to what is at stake in our world: “survival.”

It would not be surprising if some were to say, “interesting and important stuff, a little worrisome, but how does this have anything to do with the courts? Sustainability is a nice word in which to bundle some important ideas, but is not a word known to the law.” Perhaps that is so today, but let me boldly suggest that it will not be so tomorrow.

Sustainability challenges us to reconcile how we live and make a living in the natural world. Stating the challenge is easy; the real challenge is how we meet it. This will require us to make decisions of a different nature, and to think in different ways about how we make decisions, and who we should involve in decision-making. No part of the established institutional order will be untouched in building a sustainable future. The implications are permeating across the organizational face of governance. Companies are adjusting how they do business, individuals are changing behaviors, and sustainability is knocking at the Courthouse door.

Do these situations have a ring of judicial familiarity? Consider: environmental contamination from an industrial site leaching through groundwater sources to adjacent waterways; failure to adequately consult with Aboriginal interests affected by a prospective resource project; social

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dislocation in a community impacted by large scale development with growing delinquency and crime.

While not framed in the language of sustainability, issues like these are the heartbeat of sustainability. This is where real people confronted with real problems are struggling to reach real solutions. Sustainability is an “order of magnitude word,” like freedom or democracy or capitalism, that holds within it the complex balancing act as we put together in new ways the economic, social, and environmental building blocks of our world on which we rely to live and make a living. Lying just beneath the veneer of lofty language are people and organizations that are increasingly finding themselves in a swirl of interests, values, and power around difficult issues that touch on their relationship with the natural world.

There are a number of different ways that these issues may arise, and inevitably, there is the possibility of some legal dimension being raised that may surface in a set of pleadings. The simple fact is that the courts are deeply immersed in sustainability. We just have not been referring to or examining these situations through a sustainability lens.

There are other windows on the sustainability challenge which are starting to open. It is a quick download from sustainability to Corporate Social Responsibility (CSR). In the corporate context, CSR is a rising star, whether driven by the high profile corporate scandals of today or the expectations of consumers of tomorrow. Value-based organizations are now part of the executive lexicon, and revulsion at blood diamonds is the language at the counter. Inevitably, this is clawing into the governance structures of the corporation and rebounding from there into the courts.

Let me take you to a different place. Norway House where the Nelson River leaves Lake Winnipeg for its 800 mile rush to Hudson Bay. It is 1974. I am a young lawyer in conversation with a community elder, Harry, about the multi-billion dollar hydro project then unfolding to tap the storage potential of the giant North American water basket centered in the middle of the continent, Lake Winnipeg. I live in Vancouver, but Lake Winnipeg is home, for this is where five generations of my family have lived and made a living from the fish in those waters. I hear Harry, and I feel his agony.

Harry: “Glenn, what will happen if we cannot stop the project?”

Glenn: “That’s a good question Harry. This project is already so far advanced that the chance of stopping it now are not good.”

Harry: "What will happen then?"

Glenn: "We will have to go to Court and prove damages."

Harry: "Damages. Everything is damaged here. Just tell those people in Winnipeg to come here and take a look around."

Glenn: "Well, maybe at some point we will need to do that, but we will also need experts to help us explain to the courts in what specific ways this project has affected you."

Harry: "Tell them about the land. The best land is finished. The land along the shoreline. That's the land us people up here rely on to travel, to hunt and to trap. I want my land back. Tell those guys that."

Glenn: "We cannot get the shoreline back but maybe we can get much more land to replace it; land away from the shore or money for the land."

Harry: "They got guys in Winnipeg who know how valuable this land up here is to us people. I never saw those guys up here."

Glenn: "No, but there are appraisers who are specialists in knowing what land is worth, and we will need to teach them about the North so we can work up here."

Harry: "What about the moss in my nets? They don't fish a damn anymore. Who is going to get rid of the moss?"

Glenn: "Well the courts cannot do that, but they can give money for damages. We will need some other experts."

Harry: "What kind of guys are those?"

Glenn: "I'm not sure, but there must be people who study fishing gear at university, and economists who can say how much fish you are losing from the moss and the effect it is having on your equipment."

Harry: "Those guys have never been around here. I cannot see them knowing anything. Glenn, this situation sounds hopeless. We cannot go down there to Winnipeg. Those guys don't know nothing about us people up here. You got to get these people who are doing all this stuff to us up here to talk to us. That's the only way. We got to tell these people what's going on and find a way to make sure we don't get pushed out of here. This is the only place I

know. I'm worried that these dams are going to break one day and flood us all out, and if not me, my grandchildren."

This conversation has resonated for me many times and places. It set me on a journey that has taken me to a far different place than I could have envisioned. What it drove home to a young lawyer was the need to expand and to rethink what I had learned in law school. It was clear to me that to effectively advance the interests of my clients, I would need a more versatile and flexible set of tools than I had been taught. Without knowing it, Harry was taking me out onto the robust landscape of sustainability. In the twelve years that followed, as counsel to the 12,000 Northern Cree in six communities, first in the 1978 mediated Northern Flood Agreement between the Cree, Manitoba, Manitoba Hydro and Canada, and then in the initial years of its implementation, I would be taught by many very different teachers than those that had given me my training as an economist at the University of Manitoba, and then as a lawyer at Osgoode Hall Law School in Toronto.

That conversation also took me down other pathways of reflection. Courts declare and determine. They operate red and green lights. They give and take away money through the answers they give to legal questions that come before it. Those limited remedial options were not good enough for Harry, and there are a lot of Harry's out in the world that have the same concerns. Deciding is one thing, but delivering what is decided is another. Often what is left unanswered in the decisions are the often far greater challenges involved in giving effect to what has been decided—turning rights into results. What the parties agree upon they own, and what they own they are more likely to do. What someone else decides they do not own, and what they do not own they are more likely to resist.

Over time, I came to understand that much of what our conventional wisdom and structures have us do is to force-fit problems into processes, not build processes for problems. In the last twenty years of my career, I would have evolved from a role as counsel to the "man-in-the-middle." As I traveled that road, I have been arbitrator, vice chair of a labour board, mediator, facilitator, process manager and teacher. When people ask what I do today I often stumble for an answer in a word but soon find myself saying, "I live in the space between A and B and C, D, and E; where each is a group or organization."

My role, and that of my colleagues who work in the arena of complex multi-party public issues and disputes, is to help A, B, C, D and

E “create safe spaces for difficult conversations”—a space in which people have the peace of mind to say what they really mean and want without fear of disrespect or reprisal or interruption. Here is where they can explore where their self interest really lies and test the presumption and positions with which they start. The parties must create that space. Our job is to help them. Our role, I have come to understand, is to give leadership without taking ownership.

You work within judicial space—perhaps better framed as adjudicative space in recognition of the significant decision-making role of tribunals—a prescribed and focused world, where rationality rules. Positions are argued before you, and you make choices. Those who come within judicial space work on your terms.

How does what we (my colleagues and I) do differ from what a Judge does? Judges provide answers. We help others reach their own answers—which usually takes the form of outcomes they can live with because they are better than other alternatives. Judges are given questions. We help others reach agreement on what the questions are that they need to discuss to reach outcomes. The only relevance in our world is the relevance that comes with someone’s need to talk about something for whatever reason may be important to them. Judges work in their way to their solution; with those “standing” before them. We help others agree on “our way” to “our solution.” Who is in the room is whoever needs to be—typically, whoever can help or hurt or frustrate giving effect to whatever may be agreed. In court, fewer parties, fewer issues are better; in our world more players and more issues is often better. In Court, the rules of engagement are fixed. In my world, I work with parties to help them reach agreement on their own rules.

Judges exercise the power which resides within the institutions to which they are appointed, and do so, graciously and predictably while expecting, and if necessary compelling, those before them to do likewise. Power lurks everywhere in our world and who and how and when it is exercised, is always uncertain and unpredictable. Our power is persuasion not coercion.

The values through which Judges see and interpret their world are embedded deeply within institutions. The world views that must find an outcome which will enable them to co-exist in the rooms in which we work come from many places, often many lands, and what is important to one, is sometimes an anathema to another.

My mantra has become “a good way to a good place,” not “justice must be done and seen to be done.” We have come to understand that there are many “right” answers and our response to them is measured in terms of how we feel about the way in which we got there.

The only time piece in a courtroom is judicial time. In our world the parties each bring their own clock, and setting all clocks in the room to the same time is no easy task. Dealing with time is a central challenge that often drills to the core of integrity of the process.

Our world is where the clash of interests, values, and power around difficult decisions, (a policy or a plan, a project, an operation), takes place through the collision of different groups and organizations with a stake—companies, departments and ministries, civil society, First Nations, local governments. What happens internally affects what takes place externally and vice-a-versa. Levels and lines are everywhere and with them come layers of complexity. In the Courtroom, the internal dynamic and struggles for power are of interest only if relevant to the issue at hand. The wider implications and players are sidelined as the legal gladiators go about their job.

Sustainability questions come to the adjudicator’s space in more conventional guises known to the law—litigation around permitting, access, consultation, contamination, and the matter before the Court defines who is in the Court. They present themselves to the Court and administrative tribunal as a genre of known as complex multi-party cases. Within tribunals and courts they often become mired in very difficult and lengthy and costly processes that grow increasingly resistant to anything other than a distant adjudicative outcome, with possibilities for appeals.

Sustainability is also beginning to poke its nose from under the covers of corporate law and bringing into view the zone where new borders are being drawn between what is public and what is private. One of the areas in which this is finding expression is in cases where the duty of corporate directors is being revisited.

What follows are only some basic brush strokes on the canvass taking shape to give a broad sense of the landscape, not as detailed painting of it.

In *People v. Wise*, Supreme Court of Canada, November 2004, the Court considered the responsibility of directors in respect to creditors. Although there was no finding of liability in the disposition of the case, the Court opened up some new and interesting legal ground. The major

national law firm, Blakes, Cassels and Graydon, in their newsletter of November of that year, had the following to say about the decision:

The Supreme Court's decision in Peoples does not absolve directors from the risk of liability to creditors of a corporation in financial difficulty. It states clearly that directors do have duties to creditors. These duties are enforceable both under the oppression remedy and now in tort for failure to meet the statutory duty of care. The Court also noted that creditors' interests increase in relevancy as a corporation's finances deteriorate. As a result, creditors can continue to insist that the directors act in a manner that recognizes the economic reality of whose interests are most at risk when a corporation is in financial trouble.

However, the Supreme Court's decision is a welcome assertion that the Court will respect the good faith business judgment of directors who act honestly and in good faith, who attempt to obtain and consider the relevant information and alternative courses of action, and who consider the interests of the different stakeholders of the corporation, even if the end result of those efforts is unsuccessful.

The language of the decision had this to say in regard to other stakeholders:

“a director must so far as reasonably practical have regard to the interests of employees, supplier, customers, the community and the environment [...]. The basic goal for Directors should be the success of the company for the benefit of its members as a whole; but that, to reach that goal, directors would need to take a properly balanced view of the implications of decisions over time and foster effective relationships with employees, customers, and suppliers, and the community more widely.”

Another major national law firm, Torys, in their newsletter of November 2004, saw the implications of the decision as widening out the scope of potential claimants entitled to bring action directly against directors, as opposed to action by the corporation itself.

In the UK similar developments are emerging in a clearer and crisper way from the shadows. Company Reform in the UK, after more than a decade long wind-up, is now on the legislative march through parliament. With respect to director's duties and corporate stakeholders this important Bill has this to say:

Clause 156 requires a director “to promote the success of the company for the benefit of its members as a whole.” It sets out six factors to which a director must have regards in fulfilling the duty to promote success. These are:

- the likely consequences of any decision in the long term
- the interests of the company’s employees
- the need to foster the company’s business relationships with suppliers, customers and others
- the impact of the company’s operations on the community and the environment
- the desirability of the company maintaining a reputation for high standards of business conduct, and
- the need to act fairly as between members of a company

While there has been considerable frustration by some groups in civil society, especially environmental, that the legislation does not go as far as previously promised in extending the right to bring action to disgruntled stakeholders against directors, (the duty is owed to the corporation), the language of the Bill makes it clear that corporate law has not been immune to new realities around sustainability and corporate responsibility, and is on the move.

The harbinger of new realities across the Atlantic was in the European Union itself. The EU Treaty which created the Union expressly incorporated Sustainability into its Charter, and the policies through which the Treaty is being given effect are replete with the language and instruments of sustainability.

“The times they are a changing”—and the courts will not be immune to these changes. What are the possible ways in which to manage the challenges and capitalize on the opportunities that are coming with these changes?

Which takes me to this simple question: Is the task ahead to make what my colleagues and I do, and what you as Judges do, work more effectively together in delivering fair and effective solutions to critically important public challenges?

What is the potential to create the opportunity for Judges and “those in-the-middle” to enhance each other’s effectiveness, supporting

the efforts of the other to achieve results better than either can do on their own? Where are the links? The danger points? The possibilities? The constraints?

I first started to think deeply about this question in the early 80's. As counsel to the Ojibway people affected by mercury contamination in Northwestern Ontario as a result of mercury released from a pulp mill in Dryden, I was compelled to struggle with the enormous challenges of liability and damages that the case presented, which, amongst other things, involved the potential for intergenerational effects. Others around the counsel table included the now Mr. Justice Robert Blair, his then associate Mr. John Olthius, Mr. Reno Stradiotta, QC and the Honourable Emmett Hall. The preface to the 1986 negotiated agreement, approved in the Supreme Court of Ontario by Mr. Justice David Griffiths, and given legislative effect in both the Legislature of Ontario and the Parliament of Canada said this:

“The complexities, uncertainties, and inevitable costs of litigation as a means to resolve the issues, and concern that the existing legal framework could not as comprehensively and satisfactorily resolve the issues in a manner consistent with the public interest and the interests of the parties has caused the parties to conclude that the issues must be resolved by agreement between them.”

Each word, each phrase is packed with meaning, meaning that resonates deeply into our conversations here today in this room twenty years later—a conversation about our roles and responsibilities in ensuring a sustainable future that reconciles how we live and make a living in harmony with the rest of the natural world.

Implicit within the conclusion expressed as a preface to the agreement was this basic question—“Will the determination of the legal issues bring about a resolution of the differences between the parties?”

Should that be one of the first questions with which Judges greet litigants? And to that I add this question: If lawyers are now obliged to discuss alternatives to Court outcomes with the clients, is there any lesser obligation on the Court to do likewise? Is the duty of the courts, like the lawyers as officers of the Court, to answer specific legal questions or is it to use all the possibilities within their offices to help in the resolution of the problem, directly or indirectly?

Just as the legal context has been evolving and new perspectives and questions have been opening, there have been developments in other

public and professional spheres dealing with disputes and building relationships. There is a growing body of experience where new insights and competencies have been applied to the resolution of complex public disputes and challenges. This is the world of my colleagues and I, and like the Judges in the courts, we continue to struggle with how best to serve the private and public interests of those into whose problems we are invited to enter.

Is it time that we begin to ask, and then try to answer, some important questions together? Such questions may include the following:

- What is the extent of the body of knowledge and experience about reaching resolution of complex multi-party situations in the most efficient, and effective manner that respects the interests, mandates, and rights of the parties?
- What can be learned from a wide range of contexts about the application of negotiation-based efforts in bringing about a resolution of complex challenges of this nature, through the direct efforts of the parties, or assisted by independent third parties in the role of facilitators, mediators, and process leaders in consensus building? What is the experience with negotiated resolution of complex multi-party challenges in different settings?
- What has been the experience in the Court? What do we know of the outcomes for the parties downstream of a judicially assisted resolution, or a Court determination?
- When have such negotiations been “successful” and what are the indicators and measures of success? When have they not been, and why?
- What are the procedures, practices, and tools that we can inventory and draw from?
- Are there clear “gaps” that can be readily identified? Have other gaps surfaced through the course of the discussions?
- When and how are these tools deployed, and is their effectiveness known?
- Are there limitations as to what a Court/tribunal can do to assist the parties to reach non-adjudicated outcomes? What are they?

- Can the Court/tribunal encourage parallel processes involving third parties? If so, what can the Court/tribunal do to facilitate the creation of the space in ways that will enhance the effectiveness of the third party process and the Court/tribunal?
- How far can the Court/tribunal go in initiating and shaping internal and parallel non-adjudicative processes? Where are the “green,” “yellow” and “red” zones?
- Can such initiatives be undertaken once a hearing has begun or only prior to the commencement of a hearing? If there are differences, and if so why?
- What are the range of procedural actions and initiatives, if any, that will need, or be prudent, to support the recommendations?
- What are the competencies required to give effect to the recommendations, and can these be achieved through training? Of what kind?

The point of these questions this morning is only to make the point that there is much that could engage us it would seem.

Meeting this challenge involves probing the experience base and what it teaches. It also involves exploring more fully the respective roles and responsibilities, values and practices of the parties, professionals, and adjudicators working inside tribunals and courts and “those in-the-middle” supporting negotiation-based approaches in a variety of ways.

While this may be an interesting possibility, why bother? Why not have Judges do it all, one-stop shopping? Why do we need “those in-the-middle”? With appropriate safeguards, Judges can and do and should perform ADR roles. But are those roles transportable into very different situations than disputes framed between conventional litigants in the ordinary cases—situations that involve sustainability challenges? For reasons beyond the boundaries of this paper, I think there are some important questions yet to be fully explored as to when and how Judges should carry out an ADR role, and the implications for the ADR process of them doing so even in the ordinary case. I leave that point for another time.

What my experience has made clear to me is that the more complex and nuanced the situation, the less likely that Judges can play

this role appropriately or effectively. I only touch lightly on this point as this invites a far bigger conversation than we can have here. But here are some of the reasons I believe this to be so. The sustainability field of vision is often far bigger than the ground defined by the legal issues. It is richly textured with a wide range of influences—political, social, cultural, emotional—and players. The problem is not conducive to a legal resolution, and often the players who need to be part of the solution are not named in the pleadings as part of the legal problem. Those outside the legal boundaries are typically not represented by counsel.

Participants with a stake in these kinds of sustainability problems are reluctant to give up ownership of their problem to someone else, or to be made voiceless by lawyers. There is even resistance to the use of the word ‘mediator’ in these “sustainability settings” as many worry that they are about to experience the strong arm interventionist approaches that they perceive to be the tool of choice in the kit of the labor mediator. (Which it should be said, is precisely what the parties often ask and expect of the labour mediator they invite into their midst.) The responses vary—public managers worry about losing control, environmental advocates worry about being boxed into a corner, and executives resist someone else determining timelines—but whatever may be the specifics of their resistance, the common concern is giving up ownership of the problem and the solution.

When Judges come into such a setting, on one corner of the field, the danger is that the problem becomes suctioned into a legal definition. Results ostensibly achieved to deal with the legal points may be helpful, but they are as just as likely to be unhelpful rebounding into the wider problem in unpredictable ways, including the abrupt dismantling of the appearance of civility as the parties leave the Courtroom steps.

Should the Court include, within its toolkit of activities, within its judicial space, the potential to create “safe space” for difficult conversations? What tools might they use?

I turn to a final point: power. Courts have power, and can exercise it in many ways, and can use it in ways that help create the space for difficult conversations. They can ask questions and questions can encourage reflection:

- Are there matters in issue that will continue, notwithstanding the legal outcome?
- Will the courts be able to deliver a timely result?

- Will the courts be able to deliver a viable result for the parties through an award of money, a declaration of rights, or injunctive relief?
- Are there parties with a stake in the outcome who are not part to the proceedings?

Courts can do other things to help “create discussion space.” They can make interim rulings. They can express non-binding views on substance, when requested and by agreement, and on their own motion in respect to procedure. And they can set timelines and deadlines.

Sustainability is changing the way we think about how we live and work, and make decisions about how to do so in harmony with the natural world. Sustainability is causing us to look at our world through different lenses—with new questions and new expectations of each other and the roles and responsibilities of our institutional structures, including the courts.