

CARBON CAPTURE AND STORAGE IN ALBERTA: LEARNING FROM THE ACID GAS DISPOSAL ANALOGY

Article by Nigel Bankes and Jenette Poschwatta ♦

There is a growing interest both globally and in western Canada in the capture and geological storage of carbon dioxide. Locally we have seen this reflected in a series of announcements including the formation of the Canada-Alberta ecoEnergy Carbon Capture and Storage Task Force¹ and a possible carbon dioxide pipeline linking oil sands-related emissions in the northern part of the province with enhanced oil recovery projects in the south.²

Carbon capture and storage (CCS) envisages that CO₂ will be captured from large final emitters (LFEs). LFEs include fossil fuel generation units, cement producers, refineries, iron and steel manufacturers, oil sands production and upgrading (including facilities to produce hydrogen from natural gas), petrochemicals and natural gas processing especially where the gas stream includes a high CO₂ content. The recovered gas will be compressed to form a liquid or a supercritical fluid and then transported by pipeline to an injection well.³ The target formation may be a saline aquifer, a depleted oil and gas reservoir, a coal seam or perhaps a salt cavern.⁴ The storage or disposal site will then be managed for the long term (hundreds or thousands of years) to provide assurance of integrity and to prevent CO₂ leakage to the atmosphere.

If adopted on a large scale carbon capture and storage (CCS) represents one of a number of potential technological options⁵ to reduce anthropogenic emissions of carbon

dioxide. As such, CCS may help parties meet the stabilization objective of the Framework Convention on Climate Change and the quantified emission limitations of the Kyoto Protocol.

From a domestic legal perspective CCS poses a number of interesting questions especially with respect to the storage aspects of the cycle. We may categorize these questions as: (1) property issues, (2) regulatory issues, and (3) liability issues.

Since lawyers typically reason by analogy it seems appropriate in puzzling our way through these issues to refer to the closest analogies with which we have some experience. These analogies will likely be: (1) enhanced oil recovery operations (EOR), (2) natural gas storage, and (3) acid gas disposal (AGD). Alberta has extensive experience with all three of these analogies and ought to be a world leader in the implementation of CCS generally but we have fallen behind both Norway and Australia in our implementation. Much of the reason for this is tied to the continuing uncertainty surrounding Kyoto implementation plans (and indeed Canada's commitment to the Protocol) as well as our failure to provide appropriate financial incentives (e.g. a carbon tax). Even if we can resolve these uncertainties, widespread adoption of CCS also requires that we resolve the property, regulatory and liability issues associated with CCS.



RÉSUMÉ

Il existe un intérêt croissant tant au plan mondial que dans l'ouest du Canada envers la capture et le stockage géologique du dioxyde de carbone comme mécanisme pour aider les parties à remplir l'objectif de stabilisation de la Convention-cadre sur les changements climatiques et les limitations quantifiées des émissions de gaz à effet de serre du Protocole de Kyoto. La capture et le stockage du dioxyde de carbone (CSDC) visent à capturer le dioxyde de carbone provenant de grands émetteurs et à l'injecter dans une formation géologique cible. L'adoption généralisée de la CSDC nécessitera la résolution d'incertitudes dans les domaines du droit de propriété, de la réglementation et de la responsabilité. Cet article utilise l'évacuation des gaz corrosifs comme analogie pour explorer les incertitudes liées à la mise en oeuvre de la CSDC. L'article commence par décrire l'évacuation des gaz corrosifs, puis examine les questions de droit de propriété, de réglementation et de responsabilité liées à cette activité. En conclusion, les auteurs offrent quelques remarques préliminaires sur le régime réglementaire de l'Alberta applicable à l'évacuation des gaz corrosifs et s'interrogent sur son efficacité.

This article focuses on Alberta's experience with AGD. While attention in the short term will likely focus on EOR projects (such as the much studied Weyburn project) because of their potential to provide a revenue stream to offset the costs of capture, AGD schemes are also worth studying since CCS and AGD schemes share some similarities that are not present in other analogies. In particular, CCS and AGD share a common concern with the long term secure disposal and segregation of a waste stream.⁶ Furthermore, insofar as public concerns for the safety of CCS projects may pose a barrier to adoption, success in dealing with the far more dangerous gas stream (principally hydrogen sulphide) that is the subject of AGD schemes should help allay those public concerns. The article begins by describing AGD and then moves to consider each of the property, regulatory and liability issues associated with this activity and concludes with some preliminary reflections on the adequacy of Alberta's overall regulatory scheme for AGD.

What is acid gas disposal?

Acid gas disposal or injection refers to the injection and geological disposal of mixed streams of CO₂ and hydrogen sulphide (H₂S). AGD began in Alberta in 1989 as a response to the dual challenge posed by the need to reduce sulphur dioxide emissions from natural gas processing plants and by falling prices for elemental sulphur produced as part of conventional processing. In essence, the idea is to take the sulphur emissions stream and inject it back into the ground.

While the principal emissions target has always been H₂S, the waste stream from the typical processing plant also contains CO₂ as an impurity. The injection ratios for approved injection projects vary between 83% H₂S and 14% CO₂ to 2% H₂S and 95% CO₂. Since 1989, the Energy and Utilities Board (EUB) has approved 48 AGD schemes for a variety of target formations including saline formations (26), depleted oil and gas reservoirs (18) and in four cases into the water leg of a producing oil reservoir.⁷ Those living close to processing plants see AGD schemes as providing significant environmental benefits since such schemes offer the opportunity to cut sulphurous emissions to essentially zero.⁸

Property issues in relation to AGD

We shall simplify the property issues by considering only the most straightforward scenario, namely disposal into a Crown-owned depleted oil or gas reservoir in which there are no outstanding rights.⁹ In this scenario the proponent of an AGD scheme must acquire the consent of the Crown under the *Mines and Minerals Act*. By contrast with other forms of rights acquired under this Act (including storage rights) there is no formal disposition document and no bidding for the acquisition of disposal rights. Instead the relevant section of the Act, section 56, seems to conflate the property right to inject with the regulatory approval of the activity insofar as the section provides that "a person has, as against the Crown in right of Alberta, ... the right to use a well or drill a well for the injection of any substance into an underground formation,



if the person is required by or has the approval of the Alberta Energy and Utilities Board to do so". In practice, however, and as we shall see in the next section, the EUB requires a letter of consent from the Crown as part of an application package for regulatory approval.¹⁰ The Crown has developed a standard form consent letter which states (subject to a series of conditions) that "authorization is granted for acid gas disposal into the xx formation." The authorization has no habendum governing duration; duration is simply understood to be for the duration of the relevant EUB approval.

Regulatory issues in relation to AGD

AGD is regulated in Alberta by the province's oil and gas regulator the Energy and Utilities Board under the terms of the *Oil and Gas Conservation Act*¹¹ (OGCA) and regulations. The purposes of the statute include conservation of the resource, prevention of pollution and the economic development of the resource.¹² The Act itself has very little to say about geological disposal beyond a number of generic sections that require EUB approval before a person may engage in a particular activity. Thus a person requires EUB approval before: (1) drilling a well (including evaluation and injection wells) (s. 11), (2) operating or constructing a facility (including a facility for the disposal of hydrocarbon wastes) (s. 12), (3) proceeding with a scheme for (a) an EOR operation, (b) the processing or underground storage of gas, (c) *the storage or disposal of any fluid or substance to an underground formation through a well*, or (d) the storage treatment or disposal of oilfield waste (s. 39). The italicized language is particularly pertinent to an AGD scheme.

The regulations offer some limited additional guidance as to the content of applications but the EUB provides much more detailed instructions through a series of "Directives" including Directive 51 dealing with "Injection and Disposal Wells" and the more general Directive 65 with the generic title "Resources Applications".¹³ This latter includes a series of units dealing respectively with general disposal schemes, acid gas disposal schemes and gas storage schemes. Directive 65 requires an applicant for AGD approval to provide information on containment of injected substances, reservoir characteristics, hydraulic isolation, equity and safety.¹⁴

Under the heading of *containment* the EUB expects the applicant to be able to show that the injected fluids

will be contained within a defined area and geologic horizon and ensure that there will be no migration to a hydrocarbon-bearing zone or groundwaters. Hence the applicant will be expected to provide a complete and accurate drilling history of offsetting wells within several kilometres as well as information on the permeability of the cap rock and any fracturing. The applicant will also be expected to identify folding and faulting and comment on how this relates to seismic risk – both the effect of seismic activity on the integrity of the project and the effect of disposal schemes on (increased) seismic activity. Under the heading of *reservoir characteristics* the applicant will need to describe and analyse the native reservoir, the composition of the waste stream and phase behaviour as well as migration calculations and proposed bottom hole injection pressures. Board approvals will be limited to 90% of formation fracture pressures. The Board will expect an assessment of the effect of the acid gas on the target zones. Under the heading of *hydraulic isolation* the Board expects the applicant to demonstrate that all potable water bearing zones as well as hydrocarbon bearing zones are hydraulically isolated from the proposed injection wells by cement and/or casing with all injection occurring through tubing appropriately isolated from the casing by packer with casing integrity confirmed by an inspection log.

Many of the *safety* concerns that apply to AGD projects are the same as those that apply to all sour gas wells and facilities including pipelines. These include a requirement for the development of an emergency response plan (ERP) including an emergency planning zone that is the area of land that may be impacted by an H₂S release and may include the processing plant, the injection well and the connecting pipeline. The Board expects to see evidence of broad public consultation on both the ERP and all other matters related to the proposed project. Finally, under *equity* issues the Board expects the applicant to provide evidence that all offsetting mineral rights owners have been contacted as well as details of outstanding objections or concerns.

Perhaps surprisingly, very few AGD applications have triggered a public hearing and formal reasons for decision from the Board approving a project. This suggests that in most cases the applicant has been able to allay possible public concerns through its consultation activities. The following paragraphs discuss some of the issues that have been raised in the few published EUB decisions that relate to AGD.





The concern that seems to have been raised most frequently is the potential for flaring (and therefore acid gas emissions) in the event that the injection facility is shut down for any reason. Past decisions of the EUB dealt with this issue somewhat inconsistently. In some cases the EUB seems to have been content with a commitment from the operator to reduce throughput¹⁵ while in other cases the Board has accepted or required an undertaking from the operator that it will shut down operations in such an event thereby confining any flaring to those small volumes necessary to depressure and render equipment safe.¹⁶

In one case an intervenor has raised concerns as to containment of the acid gas at the disposal site and especially concerns that there was perhaps an unrecorded abandoned well that might affect the integrity of the disposal scheme.¹⁷ The Board assessed these concerns but satisfied itself that: (1) proposed bottomhole pressures would be significantly lower than fracture pressures, (2) the existing data confirmed the hydraulic isolation of the target formation, (3) the proponent would monitor producing wells for any increase in H₂S levels which might indicate problems with acid gas containment, and (4) a review of Board records, interviews with long-time residents as well as the “checks and balances” in the energy sector made it “extremely unlikely for a company to have drilled an unlicensed well in the 1970s.”¹⁸

Other concerns that have been raised include concerns as to whether other operators will know of the existence of an AGD project when carrying out operations many years into the future, and concerns as to contamination of groundwater sources.¹⁹ Another general concern relates to the length of acid gas pipeline – a concern that the Board has generally dealt with by requiring the close co-location of processing and injection facilities.²⁰

In sum, AGD disposal schemes present a range of regulatory challenges that will be similar to those which will have to be faced in the design of a CCS regulatory scheme. In some cases the risks associated with CCS will be lower than those associated with AGD. For example, length of pipeline will be far less of a concern with a CO₂ pipeline than it is with respect to an H₂S pipeline given the significantly more hazardous properties of H₂S.²¹ On the other hand, the sheer scale of CCS projects suggests that lateral migration issues will be far more significant than the migration issues associated with

the disposal of relatively small volumes of acid gas into well defined physical/structural traps.

Liability issues in relation to AGD

The potential liability issues associated with an AGD operation include tort-based liability for the consequences of an escape of acid gas (either to the surface or contaminating potable groundwater or interfering with a producing oil and gas reservoir) and statutory responsibility for future remedial operations that may be required in the event that a problem is detected. The Crown purports to deal with any potential liability that it may have as a result of its ownership of the disposal space by imposing a statutory indemnity as part of the same section that authorizes injection activities. Thus subsection 56(2) of the *Mines and Minerals Act* provides that any person exercising the right to inject “shall indemnify the Crown in right of Alberta for loss or damage suffered by the Crown in respect of any claims or demands made by reason of anything done by that person or any other person on that person’s behalf in the exercise or purported exercise of that right”. The Department’s standard form consent letter reiterates this indemnity.

As for the liability of the operator, it would seem that the usual rules apply and that by contrast with oilfield waste injection projects,²² for which the operator is required to post security, acid gas injection wells are subject to the same rules as other exploratory and production wells. Thus the *Oil and Gas Conservation Act* contemplates that all suspension and abandonment activities are the responsibility of the licensee and that in default thereof the EUB may authorize any person to carry out those operations for the account of the licensee and other working interest owners in the well or facility. In the event that the EUB is unable to recover these suspension, abandonment and related reclamation costs from those persons, the EUB may recover them from the “orphan fund”. The fund is financed by a levy on the industry. The Act does not contemplate that abandonment will serve to transfer any continuing liability to the government. In fact, section 29 states that:

“Abandonment of a well or facility does not relieve the licensee, approval holder or working interest participant from responsibility for the control or further abandonment of the well or facility or from the responsibility for the costs of doing that work.”



This continuing allocation of responsibility is significant in the CCS debate since there is a body of opinion that argues that the long-term nature of CCS projects requires that once injection is completed and the site stabilized and injection wells abandoned, responsibility should be transferred to government.²³ The experience with AGD questions this assumption. Looking to the future in the context of CCS, much may depend upon the availability of insurance to cover the long-term liabilities and the extent to which it is possible to identify the industry that might be responsible for contributing to the equivalent of the current orphan fund.

Some conclusions

AGD projects provide a useful analogy that merits study in the context of implementing CCS. While AGD projects are all small scale by comparison with the projects that will be required if we are to have any significant impact on CO₂ emissions, we can still learn from experiences to date and use those experiences to identify the relevant issues within the property, regulatory and liability baskets.

In the context of the *property* issues we think that the AGD analogy suggests that at least four issues will require further clarification. These are: (1) the nature and duration of the disposal right acquired from the Crown under the MMA, (2) the mode of disposition of the disposal right (after all disposal space is a scarce resource), (3) clarification as to the application of the *Water Act* when disposal occurs into an aquifer, and (4) amendment (expansion) of those sections of the MMA that are designed to clarify ownership of private storage rights in the context of severed mineral estates.

In the context of the *regulatory* issues perhaps the greatest needs are for greater transparency and for more systematic and tailored treatment of the issues. The AGD regulatory scheme seems to have developed in a very *ad hoc* manner – a little tweaking here and there of existing guidelines for gas storage and other related disposal activities. If transparency is a concern it may be important to provide for the explicit treatment of CCS issues in the statute and regulations rather than deferring everything to the much more discretionary guidelines. It will also be necessary to deal explicitly with long-term monitoring. And perhaps projects over a certain size should require a full environmental assessment depending upon the preliminary screening of risks. While the

regulators themselves may be confident that they have exercised their discretionary powers appropriately in the context of AGD one of the concerns identified by commentators and study groups examining obstacles to the introduction of CCS is the need to address public perceptions of risk.²⁴ It is not clear that the current regime will meet this objective given the much greater scale of injection activities and the greater risks of lateral migration.

And finally, in the context of the *liability* issues, further thought will have to be given to the design of a liability scheme. Even if it is proposed to retain a scheme that is similar to that currently in force under the OGCA it seems likely that we will need a different orphan fund if only to identify and tap into the broader range of industries that will be contributing to the CO₂ waste stream. Both fairness and efficiency require that these industries should be required to contribute to (and thereby internalize) these long-run potential liabilities.

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Notes:

1. See press release "Out of the air and into the ground ..." (17 March 2007), online: <http://www.pm.gc.ca/eng/media.asp?id=1564>.
2. David Ebner, "Alberta eyes carbon dioxide pipeline ..." *The Globe and Mail* (6 March 2007), online: <http://www.theglobeandmail.com/servlet/story/RTGAM.20070306.wstelmach0307/BNStory/Business/home>.
3. A key source is IPCC Special Report on *Carbon Dioxide Capture and Storage*, prepared by Working Group III of the Intergovernmental Panel on Climate Change (B. Metz, *et al.*, eds.), (Cambridge: Cambridge University Press, 2005), online: http://arch.rivm.nl/env/int/ipcc/pages_media/SRCCS-finalPCCSpecialReportonCarbonDioxideCaptureandStorage.htm. Another accessible source is Mary Griffiths *et al.*, *Carbon Capture and Storage: An arrow in the quiver or a silver bullet to combat climate change – A Canadian Primer* (Drayton Valley: Pembina Institute, 2005), online: http://www.pembina.org/pdf/publicationsCCS_Primer_Final_Nov15_05.pdf. Another source by a leading Canadian authority on CCS and which emphasises the policy challenges is David W. Keith, *Towards a Strategy for Implementing CO₂ Capture and Storage in Canada* (Ottawa: Environment Canada, 2002), online: <http://www.ucalgary.ca/~keith/papers/46.Keith.2002.StrategyForCCSinCanada.e.pdf>.





4. Salt caverns offer limited storage in terms of volume but Stefan Bachu & Leo Rothenburg, "Carbon Dioxide Sequestration in Salt Caverns: Capacity and Long Term Fate", online: http://www.ags.gov.ab.ca/activities/CO2/abstracts/Mns_NETL_Conf_Bachu_and_Rothenburg.pdf speculate that caverns might be used where there are large emission sources and no alternative storage options (and presumably where there is no developed economic CO₂ pipeline infrastructure). The authors cite the example of the tar sands area of northeastern Alberta.
5. Other options include: (1) reducing energy consumption, (2) switching to less carbon intensive fuels (e.g. coal to gas), (3) increasing use of non-carbon fuels (hydro, renewables and nuclear), and (4) biological sequestration of carbon.
6. In an EOR project the CO₂ stream represents a valuable commodity rather than a waste product.
7. Stefan Bachu & Kristine Haug, "In-Situ Characteristics of Acid-Gas Injection Operations in the Alberta Basin, Western Canada: Demonstration of CO₂ Geological Storage" in Sally Benson, ed., *Carbon Dioxide Capture for Storage in Deep Geologic Formations – Results from the CO₂ Capture Project, Volume 2 – Geologic Storage of Carbon Dioxide with Monitoring and Verification* (St. Louis, MO: Elsevier, 2005) at 867-876.
8. There are several EUB decisions in which intervenors have attempted to have the EUB require operators to adopt AGD in preference to some alternative emissions control technology. See, for example, the discussions in EUB Decision 99-2, Re Petro Canada Oil and Gas, Wilson Creek Sour Gas Processing Facility esp. at s. 5.3.
9. The other scenarios will include: (1) disposal into privately owned petroleum or natural gas reservoirs (with or without severed titles), and (2) disposal into an aquifer. Disposal into an aquifer ought to engage section 3 of Alberta's *Water Act* which declares that: "the property in and the right to the diversion and use of all water in the Province is vested in Her Majesty in right of Alberta ..." In practice, however, it seems that the consent mechanism of section 56 of the *Mines and Minerals Act*, R.S.A. 2000, c.M-17 (MMA) as discussed in the following paragraphs is used regardless of whether disposal is into an oil and gas formation or an aquifer. The problems associated with acquiring rights in severed petroleum/natural gas estates have been dealt with in the context of natural gas storage in Alberta (see MMA, s. 57) but the relevant statutory provisions do not deal with the disposal scenario. For discussion of the legislation see Glen Acorn & Michael Ekelund, "An Overview of Alberta's New Legislation on Natural Gas Royalty Simplification and Storage" (1995) 33 Alta. L. Rev. 342-364 esp. 360-364. See also Robert J. McKinnon, "The Interplay between Production and Underground Storage Rights in Alberta" (1997-1998) 36 Alta. L. Rev. 400-415.
10. EUB Directive 065, Resources Applications for Conventional Oil and Gas Reservoirs, 26 January 2007. The Directives are all available on the Board's website at <http://www.eub.gov.ab.ca/portal/server.pt?>.
11. R.S.A. 2000, c. O-6.
12. OGCA, s. 4. The statement of purposes does not refer to disposal or storage operations.
13. The Directives are all available on the Board's website at <http://www.eub.gov.ab.ca/portal/server.pt?>.
14. In addition to the text of the Directives, there has been some discussion of the EUB's regulatory requirements in the technical literature. See in particular H.L. Longworth, G.C. Dunn & M. Semchuk, "Underground Disposal of Acid Gas in Alberta, Canada: Regulatory Concerns and Case Histories" in Proceedings of the Gas Technology Symposium, 28 April – 1 May 1996, Calgary Alberta, Paper # SPE 35584, at pp.181-192.
15. EUB Decision 2001-43, Duke Energy Midstream Services Canada Ltd., proposed modifications to the Puce Coupe plant. Section 5.1 of the Report refers to Duke's commitment to the effect that if AGI problems could not be resolved within 2 hours, Duke would reduce its inlet rates to one-third. In s. 5.3 the Board expressed some concerns about this but seemed content to monitor the situation.
16. EUB Decision 99-31, Re Northrock Resources, application for a proposed sour gas processing plant in the Pembina field. See also EUB Decision 2000-42, Re Burlington Resources Canada Energy Ltd. application to modify an existing sweet gas processing plant, and especially s. 5.3.
17. EUB Decision 2001-43, Re Duke Energy.
18. *Ibid.*, at s. 6.3.
19. EUB Decision 2000-42, Burlington Resources at 5.3.
20. See EUB Decision 99-31, Northrock Decision, esp. at 8.3.1 and noting in that case that the H₂S pipeline would be installed above grade in a utilidor with H₂S detection equipment every 30 metres.
21. For discussion of the issues associated with the regulation and approval of a long distance (333 km) CO₂ pipeline see the NEB's decision on the Souris Pipeline which is the international pipeline connecting the Weyburn project with the coal gasification facility in North Dakota which provides the source gas: Reasons for Decision, Souris Valley Pipeline Limited MH-1-98, October 1998.
22. *Oil and Gas Conservation Regulations*, Alta.Reg. 151/1971, Part 16.6.
23. [Australia] Ministerial Council on Mineral and Petroleum Resources, Carbon Dioxide Capture and Geological Storage, Australian Regulatory Guiding Principles, 2005 at 42-43, online: http://www.industry.gov.au/assets/documents/itrinternet/Regulatory_Guiding_Principles_for_CCS20051124145652.pdf. By contrast others argue that we should not create a special liability regime for CCS because if we do so we are suggesting that the activity poses unusual risks and that will in turn make it more difficult to secure broad public acceptance of the CCS option. In short, the nascent CCS industry can't have it both ways: it can't argue that CCS is relatively innocuous and yet at the same time seek to argue with any credibility that the public must carry the cost of long term monitoring and potential future remedial operations.
24. See for example, Interstate Oil and Gas Compact Commission, *Carbon Capture and Storage: A Regulatory Framework for States – A Summary of Recommendations*, 2005, at 6 and available online: <http://www.ioGCC.state.ok.us/PDFS/CarbonCaptureandStorageReportandSummary.pdf>.



'SPEAKING TRUTH TO POWER', SOME REFLECTIONS ON THE ROLE OF LAW

Article by Nigel Bankes ♦♦

RÉSUMÉ

Cet article explore deux visions du rapport entre la loi et le pouvoir en utilisant des exemples tirés principalement des relations entre les peuples autochtones et l'état tant en droit interne (national) qu'en droit international. D'un point de vue critique, la loi ne fait qu'encoder, implanter et perpétuer les relations de pouvoir. De ce point de vue, la loi n'est pas capable de dire la vérité au pouvoir. D'un point de vue libéral par contre, la loi a des possibilités d'émancipation et peut déstabiliser et changer le statu quo. L'auteur soutient que ces possibilités peuvent plus vraisemblablement se concrétiser par suite de l'interaction entre différents régimes juridiques et notamment entre les régimes juridiques internes (nationaux) et le régime juridique international.

What follows is the text of a keynote address delivered by Professor Bankes at the Conference on Knowledge and Power in the Arctic, April 16-18th, 2007, University of Lapland, Rovaniemi, Finland.

I would like to congratulate the organizers for choosing an appropriately challenging theme for this conference: knowledge and power. I cannot claim to be a Foucauldian scholar but I have tried to pick a topic for my remarks that will fit with the general theme of the conference and so I have elected to speak about the relationship between law and power. And to locate this within the context of the Arctic I propose to use examples that principally deal with the relationship between law, power and the situation of indigenous peoples.

Law, I will argue, is both a system of knowledge and a system of power. Law is a system of knowledge because it is one of the ways in which we make sense of and construct the world in which we live. Law constantly categorizes both actors and behaviours. And law is a system of power both because of its capacity to make authoritative categorizations but also because behind law stands the power of the state. Power is implicated in both the making of law and the interpretation of law, or, as Robert Cover a leading American academic put it a few years ago "Legal interpretive acts [and Cover would contrast this with other interpretive disciplines] signal and occasion the imposition of violence upon others."¹

But how should I talk about the relationship between law and power? First, I need to say a few introductory words about law and legal systems. Second, I want to acknowledge the existence of two very different perspectives on the relationship between law and

power: one which I shall call a liberal perspective and the other a critical perspective and then I want to try and provide you with a series of concrete examples to illustrate both of these perspectives.

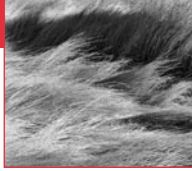
And finally, and by way of conclusion, I need to address the title that I gave the organizers namely, can law "speak truth to power" and under what conditions is this more likely.

So let me begin by staking out some ground. I want to emphasise that law is not monolithic but rather that there are multiple laws and more importantly there are multiple legal systems that interact with each other on a continuing basis. These interacting legal and normative systems include indigenous customary legal systems, national positive legal systems, regional systems (such as that of the European Union), and the system of public international law.

The relationships between these systems are complex and by no means uniform. For example, we think of some of these relationships in very hierarchical terms (such as the relationship between say a constitutional norm and the norms of a local government) but we view other relationships as more discursive (for example the relationship between international law and domestic law). It is possible to imagine a conversation between these different systems, the one informing the other.

I also want to emphasise at the outset that law is not some disembodied artifact. Law is always contingent and its application involves not just law makers but also (as my quotation from Robert Cover suggests) those who must interpret and apply the law, legal practitioners, judges, the police and indeed citizens.





But what of this relationship between law and power? I would like to outline two perspectives on that relationship. Neither can claim the truth and indeed I suspect that most lawyers acknowledge that each perspective contains a version of truth that gives rise to alternating moods of pessimism and optimism.

From one perspective, and I shall label this the critical perspective, law (domestic or international) simply reflects and encodes, in a particularly authoritative way, an historically determined distribution of power. From this perspective there is little to choose between law and politics and the discourse of the courts is little different from the discourse of lawmakers whether elected or self appointed. And from this perspective the claim that law can speak truth to power is a poor joke; or, worse than that the critic will argue, since the mere claim that law can speak truth to power allows power to hide behind the veneer of legitimacy that law may provide.

From another perspective (and I shall label this the liberal perspective) law represents a constraint on the exercise of power. From this perspective law and power are fundamentally different things. From this perspective the concept of the “rule of law” has a real meaning which may be expressed rhetorically in phrases like: “be you (that is the pope, the queen, the president, the army general) ever so high, the law is above you”. Central ideas here in addition to the rule of law include the separation of powers between the judicial, legislative and executive branches of government, an independent criminal defence bar, and, frequently, and perhaps necessarily, an entrenched constitution protecting fundamental rights and freedoms.

So let me now try and provide you with some examples of each of these perspectives considering both law making functions and adjudicative or interpretive functions and both international law and domestic law. Many of my domestic examples will draw on my knowledge of Canadian law but perhaps we can broaden that experience in the discussion that will follow.

And let’s begin with the critical perspective of law as something that simply encodes power or that perhaps creates and is created by power. A particularly celebrated example in international law is Article 23 of the UN Charter which provides for the five permanent members of the Security Council (and their accompanying vetoes) thereby encoding a particular historical distribution of power. Somewhat more subtle

perhaps is Article 34 of the Statute of the International Court which make it plain that only states can be parties before the Court. This provision along with other rules and practices of international law emphasises that others, the non-State actors, while perhaps objects of international law, have only limited roles to play in both law-making and adjudication at the international level.

It also means that these non-state actors such as indigenous peoples must find alternative fora in which to vindicate such rights as the international legal system may afford them even if that means submitting to the domestic legal system of the settler state; a system that has been imposed on indigenous society sometimes by conquest but more often by the stroke of a pen (that is to say, by law). And while there are signs that other non-state actors are gaining access to compulsory and binding dispute resolution mechanisms in international law to vindicate their rights (and here I think of bilateral investment treaty practice and the so-called investor-state arbitrations) it is hardly surprising when seen from this critical perspective that these developments create opportunities and fora for investors and for capital but not for indigenous peoples.

Domestically I suspect that we can all think of various laws in our jurisdictions that have in, overtly discriminatory ways, deprived indigenous people of access to lands and resources and to political and economic power. For example, in Canada I think of laws that historically denied indigenous people the right to vote and denied them as well the right to obtain grants of so-called “public lands” (*i.e.* lands to which the settler state claimed title as a result of its unilateral assertion of sovereignty). Such laws were generally enacted by the settler state when the balance of military and economic power shifted from indigenous communities to the settler society as settlers grew both more numerous and more knowledgeable of their surroundings. Law then was clearly complicit in the project of colonialism whether we are looking at the Americas, British India, Africa or Australasia.

We can identify similar examples if we turn our attention from the law making branch to the adjudicative branch. And to stick with the same types of examples consider how a domestic court would treat an application to consider the legality of the acquisition of sovereignty by a settler society. Domestic courts whether in Australia, the United States or Canada will respond that this question is non-justiciable; it is an act of state, or, to put it more bluntly, the exercise of unrestrained power. There is a certain logic to this position from the perspective of the dominant settler



legal system (which is simply that if a domestic court assumes the authority to question the validity of the acquisition of sovereignty it is also questioning its own judicial authority to hear the matter). But this conclusion, combined with the state-centred dispute resolution system of the World Court simply reinforces the disempowerment of indigenous peoples by both domestic state law and international law.

And even where domestic courts assume jurisdiction over issues involving indigenous peoples it is the law, language and categories of the settler society that control the discourse. This is particularly obvious when we look at older court decisions such as the decisions rendered by Chief Justice Marshall of the Supreme Court of the United States in the first thirty years of the nineteenth century. Those decisions are replete with the language of racism, language in which the tribes are portrayed as “other”, and as inferior, and indeed as savages. But Robert Williams of the University of Arizona has recently reminded us that those decisions and the racist language that they embody are not simply old decisions but because of the binding effect of precedent remain very much part of the law of the United States.² This contrasts according to Williams with the court’s treatment of its earlier decisions dealing with African Americans: while the Court explicitly overruled those decisions (e.g. *Dred Scott*) before it made its famous de-segregation decision in 1954 *Brown v. Board of Education*, it has never done the same with its earlier decisions from the same period but dealing with native Americans. The language and categorizations of those earlier decisions continue to influence the Court’s jurisprudence in this area.

But there are also more subtle and more recent examples of this interplay between law as a system of knowledge and power. Consider for example the much celebrated provision of the Canadian constitution added in 1982 which affords some measure of constitutional protection to the rights of indigenous peoples. The provision is short enough and simple enough to recite:

“The aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

But since that recognition the Supreme Court of Canada has had to decide a series of cases that raise two types of questions: (1) what rights does section 35 protect, and (2) how strong is the protection afforded by section 35? And my general assessment of that case law is that the Court has limited the scope of the protection offered by section 35 in its responses

to both of those questions. That is, in fulfillment of its gatekeeper function it has taken a narrow view of the rights and practices that merit constitutional protection and yet at the same time it has also developed a doctrine of justifiable infringement that unduly limits the degree of constitutional protection accorded by the section by adopting a balancing of the interests of indigenous peoples and settler society.

And let me give you one recent example, the Supreme Court’s 2005 decision in *Marshall and Bernard*.³ In that case the accused sought to argue that a treaty of 1760⁴ afforded them the right to harvest timber on what the Crown regarded as Crown lands and to sell that timber for “moderate livelihood purposes”. Despite evidence that the Mik’maq had used products of the forest to trade with the English and French in the 17th Century and despite the Court’s expressed commitment not to freeze aboriginal and treaty rights in either time or technology the Court held that the modern practice (harvesting logs for timber) was not “a logical extension” of the earlier practice. But if one asks why; or if one asks how we might distinguish between what would qualify as a logical extension and what would not, there is little in the reasoning to suggest an answer. Thus by exercising the judicial power of interpretation and categorization (unlawful activities versus constitutionally protected rights) the Court constructs the other and reinforces the inequitable distribution of resources based upon the Crown’s acquisition of sovereignty and the Crown’s legislative claim that these are state or Crown lands and resources.

But if these are examples of a critical construction of the relationship between law and power I think that we can also refer to other examples that suggest that law can question the exercise of power and speak truth to power and suggest the emancipatory possibilities of law as a highly normative system of knowledge.

And again to begin with law making functions at both the domestic and international levels. Internationally we can refer to the adoption of a series of international human rights instruments including the two 1966 Covenants on Civil and Political Rights and Economic and Social Rights and the Convention on the Elimination of all Forms of Racial Discrimination. By their nature these instruments are designed to protect the disempowered in society and to establish standards against which to measure the exercise of state power but also standards against which to measure the performance of domestic legal systems. And while progress may be painfully slow when it comes to developing instruments that speak more





specifically to the situation of indigenous peoples (and I think here particularly of the UN Declaration and the similar efforts to develop a declaration of the rights of indigenous peoples within the OAS) it does seem to me that the Nordic countries have taken important step here through the conclusion of the text of the Nordic Saami Convention.⁵

At a domestic level one can point to the growing trend of states to offer some level of constitutional protection to the rights of indigenous peoples. This trend is perhaps particularly noticeable in central and south America but even in the circumpolar world we can point to measures protecting the language and cultural rights of indigenous peoples in Norway, Finland, Canada and Russia. And we should not underestimate the importance of such measures since they may have the effect of *flipping* hierarchically structured rules. For example, prior to the 1982 constitutional amendment in Canada aboriginal and treaty rights could be eroded and extinguished by federal legislation; now such rights would ordinarily trump inconsistent federal legislation.

In addition, to formal constitutional changes, we should also emphasise that two of the circumpolar states – but only two – (Norway and Denmark) have elected to ratify ILO 169 and this audience will be well aware that the three Nordic countries have created Saami parliaments.

Turning to the judicial branch several notable cases come to mind. At a domestic level these cases include the two *Mabo* decisions from Australia. In the first case, *Mabo #1*,⁶ the High Court of Australia struck down a law of the State of Queensland that purported to extinguish aboriginal rights in that state and in *Mabo #2*⁷ the Court expunged the racist doctrine of *terra nullius* from Australian law.

It is harder to find international examples from the judicial branch because of the difficulties that indigenous peoples face in obtaining access to international judicial fora. We can of course point to the jurisprudence of the Human Rights Committee on Article 27 of the ICCPR which is the article that provides for the protection of the cultural rights of minorities, including indigenous peoples, but the record here is mixed. While the Committee has provided a progressive and far-reaching general comment on Article 27 in which it has emphasised the need for the State to take positive measures to protect the way of life associated with the use of lands and resources, in its actual decisions (and particularly the *Lansman* decisions involving Sami reindeer herding in Finland) the Committee has emphasised that the threshold for a breach of Article 27 is very high and that the threshold will not be reached unless the Committee is able to conclude that the State actions amount to a denial of the right to culture.

More promising perhaps is the jurisprudence that is emerging from the Inter American Court of Human Rights and the Inter American Commission in cases that include the *Awasi Tigni* decision and the *Maya/Belize* decision. In these cases these two bodies have relied upon a series of general human rights (including the right to property, the right to equal protection of the law, and the right to effective judicial protection all articulated in the relevant regional human rights instruments) to establish important guidance for states in recognizing the land ownership and use rights of indigenous peoples within their traditional territories.

For example, in the *Awasi Tigni* decision the Court held that the State of Nicaragua had the duty to put in place a process for the delimitation, demarcation and titling of the land of indigenous peoples and furthermore that the State should not alienate lands and resources to third parties within this claimed territory unless and until these processes had been carried through to completion.

Both the Commission and the Court have also been at pains to emphasise what they refer to as “the autonomous meaning” of the relevant international instruments. And what they mean by that is that the failure of the state to recognize an aboriginal property right within domestic law will not be authoritative within the international forum. For example, the fact that the courts of the domestic legal system have held that the available evidence supports a conclusion of limited use rights in an area rather than title will not bind the Inter American Court to the same assessment of the evidence when it decides what is protected by the right to property under the Inter American Convention or Declaration.

And now, having offered examples from both a critical and a liberal perspective on the relationship between law and power it is time to turn to the concluding part of my remarks. Can law(s) speak to truth to power and if so when? And what are the conditions that help give voice to this liberal perspective on the relationship between law and power?

As to the first part of that question, my answer is equivocal, (and perhaps therefore deeply unsatisfying) sometimes yes, sometimes no. I can try and be more satisfying by trying to answer the second question. And I will do so with two concluding observations.

First, I want to draw attention to the importance of the interaction between different systems of law if law is to fulfill this role. In particular I want to emphasise the interaction between domestic law and international human rights law because it seems to me that this has created opportunities for speaking truth to power. For example, the



relationship between international domestic law is central to the reasoning in the two Australian *Mabo* decisions that I referred to earlier. Thus in *Mabo #1* the High Court was able to strike down the Queensland legislation that purported to extinguish all aboriginal titles in that state because it was inconsistent with the Australian federal legislation that implemented Australian ratification of the Convention on the Elimination of All Forms of Racial Discrimination. Similarly, in *Mabo #2* the Court referred to the International Covenant on Civil and Political Rights and the Advisory Opinion of the International Court Justice in the *Western Sahara* case in concluding that “a common law doctrine [the doctrine of *terra nullius*] founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.” This interaction is also apparent in the jurisprudence of the Inter-American Court and Commission.

Similarly I would argue that Norway’s ratification of the ICCPR and more importantly its ratification of ILO 169 has transformed the discourse on Sami rights within that jurisdiction. That is evident to me when one looks at the manner in which the Storting responded to Saami claims that the proposed Finnmark Act might breach or fail to fulfil Norway’s international obligations under these two instruments.⁸ But I also think that one sees some spillover effect in the reasoning of the Norwegian courts in more recent Saami rights cases such as the Svartskog title case (2001).⁹

I think that there is a related point to be made here about the role and importance of indigenous legal systems. If you have followed me so far you will no doubt have noticed some weak links in my arguments. One such weakness is particularly obvious to me and it’s this; I began my remarks by emphasising the plurality of laws and especially the plurality of legal systems and I have provided examples of interactions between these systems especially as between domestic law and international law. But I have been silent on the role of indigenous legal systems. And while I have selected examples that have focused on the situation of indigenous peoples all of those examples have dealt with indigenous peoples as objects of the settler or international legal system. My remarks have not recognized or created a role for indigenous legal systems and I have not talked about the interaction, dialogue or conversation between indigenous legal systems and national and international legal systems. That, I think, tells us something the hegemonic nature of these legal systems as systems of knowledge but it also suggests that we need to find ways to give voice to indigenous legal systems, to create or recognize a space within which they can operate and perhaps create an inter societal law much as we have an inter national law.¹⁰

My second observation is directed more at one aspect of law’s substantive content. Now it’s true that the content of law is always contingent but law’s instrumental value in ordering society and its role as a relatively benign social instrument of power in that ordering process (as compared with say the role of a secret service within a police state or the role of the military in a dictatorship) depends in large part on the perceived legitimacy of law. And I would argue in turn that the law’s claim to legitimacy depends in large part on its commitment to the idea of equality, both the formal idea of equal treatment before the law as well as a more substantive conceptualization of equality which recognizes and accounts for difference and recognizes that a history of systemic discrimination may well require that the state take special measures in order to achieve true equality. The Inter American Commission relied on both views of equality in its *Maya/Belize* decision. There the Commission noted that the state accorded formal protection to state granted titles to land and no formal protection to indigenous titles but also noted that special measures might be required to properly protect an indigenous property interest.

This more substantive conception of equality inevitably has a dynamic quality and a destabilizing effect on existing distributions. It cannot serve its purpose and at the same time simply reflect and endorse existing distributions of power and wealth. Adoption of this view of equality inevitably requires law to speak truth to power, however softly. As the Supreme Court of Canada put it in the *Sparrow* decision its first decision on section 35:¹¹

“Our history has shown, unfortunately all too well, that Canada’s aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected.”

◆◆ Nigel Bankes, Professor, Faculty of Law, University of Calgary; ndbankes@ucalgary.ca. I would like to thank Timo Koivurova for the invitation to deliver one of a number of keynote addresses at this conference. Professor Kai Kokko provided a commentary on the address and my colleagues Jennifer Koshan and Jonnette Watson Hamilton gave me comments on an earlier draft.





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Notes

1. Robert M. Cover, "Violence and the Word" (1986), 95 Yale L.J. 1601.
2. Robert A. Williams, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005).
3. [2005] S.C.C. 43. I commented on the title aspects of this decision in Bankes, "Marshall and Bernard: Ignoring the Relevance of Customary Property Laws" (2006), 55 U.N.B.L.J. 120.
4. The treaty in question contained a so-called negative covenant in which the Mik'maq undertook not to trade except at Crown-provided truck houses. In the first *Marshall* case the court interpreted this as conferring a right to harvest (in that case eels) and a right to trade that harvest for "moderate livelihood purposes".
5. An English translation of the text is available online: [http://www.saamicouncil.net/includes/file_download.asp?deptid=2213&fileid=2097&file=Nordic%20Saami%20Convention%20\(Unofficial%20English%20Translation\).doc](http://www.saamicouncil.net/includes/file_download.asp?deptid=2213&fileid=2097&file=Nordic%20Saami%20Convention%20(Unofficial%20English%20Translation).doc).
6. (1988), 166 C.L.R. 186.
7. (1992), 175 C.L.R. 1. Observers of the Australian scene might also draw attention to the legislative reaction to the *Mabo* decisions as yet another example of the critical perspective as the lawmakers simply asserted the power of the settler society to control the terms of any settlement.
8. And I think here particularly of the Storting decision to commission a legal opinion from Graver and Ulfstein, subsequently published in the International Journal on Minority and Group Rights (2004).
9. Available in English online: <http://www.galdu.org/web/index.php?bajitsladja=47&bajitvsladja=69&iel1=eng>.
10. I think that the weakness in the argument goes beyond this insofar as the text throughout emphasises state law and yet the law that may (or may not) speak truth to power needs to embrace both indigenous customary norms as well as positive state law.
11. [1990] 1 S.C.R. 1075; but as suggested above later decisions of the Supreme Court have failed to deliver on this promise of *Sparrow*.

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Resources is the newsletter of the Canadian Institute of Resources law. Published quarterly, the newsletter's purpose is to provide timely comments on current issues in resources law and policy. The opinions presented are those of the authors and do not necessarily reflect the views of the Institute. *Resources* is e-mailed free of charge to subscribers. (ISSN 0714-5918)

Editors: Nancy Money and Sue Parsons

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