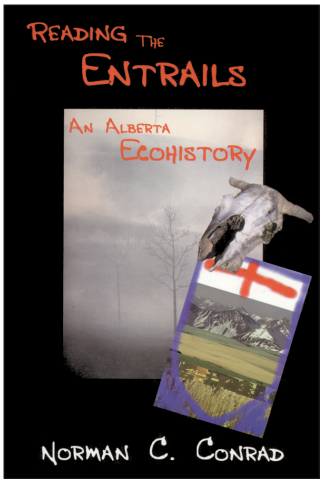

READING THE ENTRAILS: AN ALBERTA ECOHISTORY

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CHAPTER 15

THE SALVATION BAND

GUARDIANS OF EDEN

In these enlightened times when pre-industrial ideologies guide post-industrial economies, when 17th century biology directs 20th century policy, many take from nature's abundance, but few protect it. Who saves Earth for future generations? Alberta's Crown claims to be her local guardian, but is this so?

In September 1989, a document entitled *Action on Environment*[1] slipped out from behind the veil surrounding the Crown, providing a glimpse at regal thoughts. Research in the report indicated that concern for the land might again be getting out of hand:

- 64% of Albertans believe environmental considerations should take precedence over economic development.

- Four out of five Albertans (81%) believe environmental considerations should take precedence over economic considerations when considering energy megaprojects (Environmental Monitor, Winter 1989).

- One in two Albertans (51%) is most concerned about environmental issues due to fears for human health and safety, while 32% are most concerned due to fears about the environment itself.[2]

The green dervish who bedeviled the last Social Credit and the first Lougheed governments seemed ready to blow free again. If the people love the land, can government do other than love it itself?

Action on Environment unveiled government's concern that it might lose its starring role. It implied that if Premier Don Getty's gang acted quickly,

they could seize and control the green fiend, and perform the illusionist's trick of appearing to do something while doing nothing. Their words were:

> In the absence of a coordinated government approach to environmental communications and with largely reactive strategies in individual departments the government is slowly losing control of the environmental communications agenda. Instead, it is being set by environmental activists; special interest groups such as the Alberta Wilderness Association; the opposition parties; and even other levels of government. Their strategies usually are to criticize and oppose provincial policies, forcing the government even further into a reactive stance.
>
> Fortunately, the Alberta government has an opportunity to seize the initiative in environmental communications and effectively position itself as a leader in environmental protection before environmental issues reach the same level of importance in Alberta as they have in other areas of Canada. Oftentimes, it is not so much "new" policies or programs which lead to effective positioning, but proper packaging and promotion of existing programs and initiatives. An excellent example is Ronald Reagan's Strategic Defence Initiative, or Star Wars. Much of the research and development into space-based weapons and defensive systems already existed prior to Reagan's pronouncement of his policy, but by assembling existing programs under the new umbrella, giving it a name and adding a few new wrinkles, the then-President was able to effectively position himself and his administration in his desired "leadership" and "get tough" roles.[3]

Presto, Getty's Government seized "the communication's agenda to (ensure) that public discussion focused on the government's issues, not those of the opposition parties and special interest groups."[4] With kingly muscle the Crown overwhelmed the public agenda, elbowing aside those with genuine interests and inviting in government advocates, naming the Chamber of Commerce, capital's tootsie, as a dear confederate (the most special of special interest groups):

> Special Interest groups – such as the Alberta Wilderness Association, Alberta Fish and Game Association, Canadian Wildlife Federation, etc. While these groups will never be convinced to abdicate their "watchdog" role over government

> policies and actions, their positions can be softened through education and opportunities to participate in two-way communications. Other special interest groups which play an advocate role on behalf of government (i.e., chambers of commerce) may be reinforced through information and communication.[5]

The Crown's choice was to honestly address environmental issues or ignore them by "packaging and promotion" of the status quo with a "few new wrinkles." They chose repackaging and "wrinkles." *Alberta Environmental Protection and Enhancement Act* (AEPEA) was their "Star Wars." Pure Barnum and Bailey, this was "virtual-policy" at its best. Behind the veil it was business as usual for government, and government as usual for business.

The days from 1989 to 1992, with their green plans, round tables, conservation strategies, new boards, commissions and action plans, were busy, risky times for the Crown and capital. Alberta created a new regulatory body under the inspiring but misleading name, Natural Resources Conservation Board, amended the old *Energy Resources Conservation Act*, apparently to provide for the environment and passed its Star Wars bill, the misnamed *Alberta Environmental Enhancement and Protection Act*[6], into law June 26, 1992. The environment would be protected and enhanced through AEPEA's refurbished "environmental impact assessment" (EIA).

Assessing Assessments

As an elixir for environmental ills, EIA presumes that if only decision makers had better information on the effects of certain projects they would make right decisions for the environment, and all would be well. Some are doubtful. Giagnocavo and Goldstein see it this way:

> Whereas before industrial developers had a virtual carte blanche from the state to expand, now they have to submit to such procedures as environmental impact assessments, control orders and monitoring by appropriate environmental officers. While in theory these seem to be progressive developments, in practice they have become nothing more than costly legitimization projects . . . environmental regulation has become nothing more than a licensing system for polluters.[7]

How does EIA work?

EIA selects a few proposed projects or activities for intensive consideration, generally those posing threats to human health and safety, economic interests

or, less certainly, the environment. For a few of those, EIA appears mandatory (but it may not be); in others, discretionary; and in many, exempted. Taken together all the projects subject to EIA form a minuscule part of the activities causing ecosystem and environmental decay in Alberta.

To illustrate EIA's limited application, decision makers for a project under the new regimen, the Natural Resources Conservation Board (NRCB), the Alberta Energy and Utilities Board (EUB) or joint Federal Provincial Review Panels, are to consider the EIAs prepared under AEPEA. AEPEA was proclaimed in effect on September 1, 1993. During the four years following its proclamation, NRCB held public hearings on only three projects that together had capital costs of just in excess of $100 million. All were approved.[8] In the same period, the EUB considered in public hearings only two projects (one, the Cheviot Coal Mine, was a joint review) involving EIAs under AEPEA. Both were approved. Federal-provincial joint reviews considered four projects using AEPEA EIAs (Express Pipeline, Cheviot Coal Mine, Sunshine Ski expansion and Highwood River diversion projects). All were approved. During those four years, the province generated some $300 billion of gross provincial product. During that time only about one-quarter of one percent of that activity has received public consideration using AEPEA EIAs. With modest modifications, all the projects were approved.[9] Also during that period, Alberta chopped its forests (4,000 km^2), drilled oil and gas wells (30,000), grazed its public lands, expanded its cities and built infrastructure that penetrates deep into the land. Not a single project was properly reviewed for its contributions to cumulative or comprehensive effects.

EIA employs the Pollyanna premise. Because EIA is project-triggered, the assumption is that "but for the project everything is fine." Only the project is under scrutiny. If approved, the project is OK; if not approved (statistically remote), then everything is still OK, but it might not have been had the project been approved. Regardless, everything is OK.

A project focus invites a reductionist approach. Squinting at the project makes ignoring the world easy. EIA is effectively blind to large-scale, long-term causes of ecological devastation and environmental degradation. Proper cumulative and comprehensive environmental assessments[10] might ameliorate that in modest ways, but none have been performed in Alberta.[11] Broader kinds of assessments—legislative, trade, policy or technology assessments—would assist because they, more than individual projects, influence the degradation of the whole.

Regulators in the EIA process generally do not commission evidence or produce research on environmental issues. They rely on the participants. The process's adversarial heritage also compromises the kind and quality of

information that is introduced. At the end of the process, the regulators only need to "consider" the evidence arising from the EIA process and they have no legislated values governing them. Some of the best are sceptical of this process. Dr. David Schindler, a world-renowned scientist who sat on the review panel for the proposed Alberta-Pacific Pulp Mill denounces them: "Every one of these things is done as though it were on another planet. There is no learning and most would not pass a scientific peer review."[12]

AEPEA's SCOPE

Are claims that Alberta's petroleum industry is the most environmentally regulated and responsible on the planet gaseous bluster? The EUB's record in granting 200,000 well-drilling licences is that it refused scarcely any (about 11) on environmental protection or public safety grounds after public hearings involving EIAs.[13] Under AEPEA, it is business as usual.

Like oil and gas, most forestry occurs on Crown lands using Crown resources. For that reason what is commonly called "government regulation" of forestry is mostly the management a resource owner might require of an exploiting tenant/manager/operator. A normal shopping mall lease has more stringent and demanding terms than an Alberta Forest Management Agreement. In one case it is good business, in the other, excessive government regulation.

Superficially NRCB appears to have jurisdiction over forestry, but it considers the "facility" not the forest. NRCB reviews pulp or sawmills, but not their demands on forests and FMAs. Forestry practices employ the usual props of round tables, steering committees, public information meetings and such, but decision making occurs elsewhere, behind the veil wrapped around government and industry. Occasionally public statements issue from behind the curtain:

> "One of the things that pleased me most was when I learned that (sic) Daishowa's philosophy: a flower grows and a petal falls and fertilizes the ground so another flower will grow" said Fjordbotten.[14]

Albertans had to listen to the minister's ecological nonsense, but they had no say in grants of Denmark-sized land to Daishowa and Al-Pac, a scale not unlike Charles II. The public will have little input into the upcoming Forest Management Agreements, those proposed for GAP or solicited for the Footner Forest.

Government involves itself deeply in agriculture: developing and operating land and water projects, product development, market promotion and industry stimulation. What in agriculture is subject to EIA? AEPEA's Mandatory Activities list stipulates nothing directly. Indirectly, dams higher than 15 m, water diversions of more than 15 m^3 per second, water reservoirs of greater than 30 million cubic metres, pesticide manufacturing plants and chemical fertilizer manufacturing plants are on the mandatory list. Some agricultural activities may attract AEPEA's attention through associated activities but strictly agricultural activities get no consideration. For public health and safety issues there are volumes of regulations. For environmental matters, it is nearly hands-off. That is the way it was before. Despite recent green initiatives, that is the way it remains.

"Environmental law" is usually little more than an amalgam of public health, safety and resource management legislation. Its purpose is to protect contemporary humans from their own activities.[15] It has little to do with protecting non-humanity or future humans. Assurances that it does so are little more than legislative legerdemain. John A. Livingston sees it this way:

> EIA is a grandiloquent fraud, a hoax, and a con. Others have seen it as both a boondoggle and a subterfuge . . . . EIA may not be good science, and may not be conservation, but it is excellent business.[16]

Those who remember the 1970 *Environment Conservation Act* and the Mackenzie Valley Pipeline Inquiry must marvel at our backward lurches to the future.

WHO REGULATES REGULATORS?

Government delegates some decision-making functions to the regulators, who, they say, decide these matters in the "public interest." Legislatures cloak them in autonomy as unbiased and objective decision makers, but the regulatory body is shaped, guided, moulded and managed by the Crown. They fill it—with purposes, information, resources and people.

Are regulators independent and guided by the public interest? Manipulation occurs in many ways in pliable systems, some subtle, some direct. Regulators review discrete projects. As with EIA, this frames the process to provide little answers that avoid big issues.[17] Information on the project and the regulated industry[18] are composed by the applicant and extruded to regulators through its filters of self-interest.[19] Questions important to

the public interest—public costs and benefits, cumulating socio-economic and environmental impacts, resource and land degradation issues, and the future—are rarely addressed.[20] More frequently now, the regulator's position reduces to this—what is good for the applicant is good for the public, "private interests" displace the "public interest." The "public interest" is an endangered species in the regulatory zoo.

Crown and capital claim that the regulators are without bias because they are independent of government and private interests.[21] The illusion of independence is maintained through careful selection of those who make the decisions. Determining "who" decides the issue approximates the power to determine "what" is decided. To be appointed, a candidate's spiritual, ethical, political and social values ought to be conventional, consistent and shallow. Philosophers, clerics, paleolithic people, socialists, deep ecologists or Jainists, fundamentalists other than from the Chicago School of Economics, need not apply.

Future prospects may ply some regulators' minds while they regulate. If, after a full and illustrious career, government and industry decide a particular regulator has been helpful, he might retire to more distinguished or remunerative jobs in the regulated industry (often hiring himself out to massage his former regulatory body). Sometimes he ascends to the Boards of Directors in regulated companies or consults to "special interest groups" like mining, oil and gas, forestry, banks or others of capital's interests. Few end on boards of the so-called "special interest groups," the organizational gulags who lobby for the poor, the discriminated against, the sick or the land itself.

Within the regulatory matrix, industry has the best and brightest managers and massagers. Their big-firm, big-bill lawyers adroitly bend and ply plastic systems to their client's advantage. Like comfortable courtiers attending in the chambers of a favoured aristocrat, these agents supplicate with the Crown's selected, business-vetted regulator to deliver happy decisions. The rumpled and harried public interest advocate comes late to the process, most often with few resources, filtered information, and no prestige or position. The public interest stands scant chance.

There is little risk to government and capital in this show. First, not much is at stake. Only a few projects are subject to intensive regulatory review. Second, if the project is important to those with influence, there are methods of ensuring it proceeds whether within the regulatory regime, sidestepping it or overstepping it. If the Crown wants the project, it proceeds—as surely as the Oldman River dam dams the Oldman and the Al-Pac pulp mill excretes industrial ooze into the Athabasca River.[22] Both projects were recommended against by federally demanded review panels, panels notable for their independence and integrity, but both projects were

ultimately built. Third, even if regulators deny the application, government and capital (and impressionable environmentalists) parade the decision as proof of regulatory independence. It is conclusive, they say, regulators are not captives.[23]

For the most part, regulators produce the decisions expected of them. Some call this "capture" of the regulator by industry. Captured regulators are as predictable as their education, selection process, employment contracts, institutional information flows and ambitions. Sometimes, government and industry, or industry itself may be divided. In those cases, regulators make hard decisions but they are becoming less frequent as the Crown increasingly submits to capital, leaving the public interest (such as it is) further unattended. It seemed like a natural progression when in February 1996, Alberta farmed out much of its environmental monitoring and regulating power to industry, the target of its regulation.[24]

LAWLORDS

The bedrock of Alberta's law is that of the tribes of England.[25] It is another exotic. This tradition contains the captured memory of millennia of gods, kings, empires and customs. It carries forward the vestiges of Abraham, Moses, Christ, Charlemagne and William the Conqueror. Case and statute capture John Locke's spirit and mind. Its purpose today is as clear as it was last century when the law helped take the west from the Native people. It is the law of capture and exploitation, of the consumption of Earth and the subjection of other tribes. Its entrapped metaphysics—attitudes toward nature, paleolithic peoples and the future—have changed little since then.

Courts remember medieval practices through the complex of costume, hierarchy, discipline, protocol and literate contest. In this jousting, the supplicant's hired courtiers, barristers, thrust and parry to curry favour with the local regent of the Crown, the judge. Courts have a pecking order in which the litigant's power and prestige, the lawyer's reputation and the resources dedicated to litigation aid mightily in establishing the merits of one's case. The Crown appoints judges based on their commitment, excellence in these inherently conservative institutions, often with an eye to their fealty. As courtiers for the sovereign, judges comprise a powerful class of persons who are dutiful to rulers and ancient notions but not really the land or the people.

The rule of law applies equally to all in theory. The inference is that precise and clear law is applied by objective and unbiased judges uniformly and rationally to produce a just result mechanically and predictably. This may nearly be so in some areas and cases—private property law, commercial,

criminal and civil litigation—areas of little concern to the elites or where there is a transcendant consensus. It is not so in those areas that have been historically the purview of the Crown or elites. John Ralston Saul claims that, "Law has become like court etiquette of the late 18th century. Each man goes through the motions of acquiesence. Then those with power of any sort go away and do something quite different."[26] The higher the level and closer to elite interests, the greater law's plasticity seems. In matters of economic development, resource exploitation and nature's conservation, Alberta's courts usually demonstrate little appetite for public participation or land protection.[27] That may be how the process works and it just may be the law.[28] Because law reflects the values, priorities and interests of those who make it, those in political power—as it did during Absolutism, the Squirearchy and the taking of the west—it favours elites.

Courts may not have the regulator's discretion, but it is broad. They find credibility and determine facts, settle procedures, which issues to address or ignore; whether to use broad or narrow based determinations; which procedural, interpretative or substantive tools will deliver which result and how to structure it so it fits neatly together. Courts respond to favoured counsel, firms, parties, demeanours and other tribal messages in ways that may tip their scales. Going to court with non-elite public interest groups is a crapshoot with suspicious dice.

SWORDS AND SHIELDS - ROLE OF THE RULE

The law can be sword, shield or sham. Often the law's power relates positively and directly to the wealth of those employing it. The justice system is adversarial, so the strong overwhelm weak more than the right defeat the wrong. Cynical comments, but what is the record? Did the law come to the rescue of Native people and their claims? Over a century of Indian law suggests that the courts can ignore at will what now appear to be issues of fundamental justice.[29] Narrow, legalistic mechanisms denied remedies to generations of Native people.

Some thought the law might defend the land against the big forestry giveaways announced by the Crown in 1988. Peter Reese, the Sierra Club and Alberta Wilderness Association, took the Minister of Lands, Forestry and Wildlife, Leroy Fjordbotten, to court over Daishowa's FMA and the Forests Act, s. 16 wording that provided for "perpetual sustained yield." In effect, the late Justice McDonald held "perpetual sustained yield" to be whatever the minister decided it was, whether sustainable or not. In that regard, the minister could enter FMAs unless they were such that "'no

sensible person could ever dream that entering into this agreement lay within the minister's power."[30] Baring the law's teeth, court costs were granted against the public interest groups, keeping public-spirited people off balance for months.

The Rafferty-Alameda decision of April 1989 created a small disturbance.[31] This decision required the federal government to comply with its own laws, the Environmental Assessment Review Process (EARP). Its timing made life difficult for Alberta's bushwhackers and the dam builders on the Oldman River. To the Crown's joy, the giant Daishowa project slipped through early and easily but, to their immediate consternation, Al-Pac's mill required federal approval.

The Alberta and federal governments appointed a federal-provincial panel to review aspects of Al-Pac and it unanimously recommended against the project. Not to be bullied, whether by a review panel, a trapped and uncomfortable federal authority or any land lovers, Alberta announced a second expert review of the project. When they refused to approve the project, Alberta engaged yet a third gang of reviewers, this time to study proposed technology that might reduce some of the problems. After long, hard shopping the Crown finally got the answer they wanted, even if they were no longer asking the right question. Forests fall, stacks steam, the river loads up and the Crown gloats.

John McInnis, a former New Democratic Party member of the Legislative Assembly (1989-1993) served Albertans in investigating Alberta's great forest giveaway. Later McInnis took employment at the University of Alberta (U of A) as Associate Director of its Environmental Research and Studies Centre. McInnis claims that Al-Pac threatened to withdraw a $12 million offer of funding to the U of A if U of A continued employing him. The provocation behind these threats involved some rather tame comments that "citizen"' McInnis made in a speech in Japan. Mr. McInnis sued Daishowa-Marubeni and Al-Pac alleging they acted to induce U of A to breach his employment contract. Daishowa and Al-Pac counter-sued the public-spirited former U of A wage earner for defamation.

The SLAPP lawsuit (Strategic Lawsuits Against Public Participation) provides a powerful tool to preoccupy, manipulate, divert and drain public interest groups. Legal expense forms a small, necessary and tax deductible cost of industry doing business and obtaining economic advantage. On the other side, the public interest advocate does not obtain economic advantage, only risk of personal economic loss. A legal action, judgement or even award of costs against a public interest litigant might bankrupt them. The absolute and comparative advantages are clear. With a little inappropriate application, SLAPP provides a fine bludgeon for private interests to pummel the public interest.[32]

ZOO-OLOGY - THE PROTECTION RACKET

If there is little help there, what of Alberta's parks and wilderness areas legislation, its hunting and fishing laws? What of Special Places? Are these legislative regimes not intended to protect the land and non-human nature?

Alberta's fourth-largest industry, recreation and tourism, is founded on the postcard notion of a wild and beautiful land, where bears prowl and wolves howl. Hunting and fishing law and regulation ensure the continued harvest of game animals and fish by sportsmen; certainly an advance over the days of unfettered free enterprise and free markets in wildlife. Provincial parks burst with recreationists and tourists but do they save the land? And what is the value of Special Places? Are they refugia?

To celebrate winning control over its resources, in 1930 Alberta enacted its first *Provincial Parks Act*.[33] Several years after, the first eight provincial parks were established, later numbering approximately 65 parks, significant primarily for recreational values. Legislated protection for land started in 1959 with the *Wilderness Provincial Park Act*, later renamed the *Willmore Wilderness Act*.[34] That gave considerable protection to 5,500 km^2 of Alberta lands just north and east of Jasper National Park. By 1970 that area was chopped to about 4,500 km^2.

In the mid-60s the *Wilderness Areas Act*[35] established three wilderness areas—the Ghost River, Siffleur and White Goat areas. For the first, and likely only time, the legislature recognized that the public interest required that land and non-human nature be conserved and maintained intact, if only in some areas:

> WHEREAS the continuing expansion of industrial development and settlement in Alberta will leave progressively fewer areas in their natural state of wilderness; and
>
> WHEREAS it is in the public interest that certain areas of Alberta be protected and managed for the purpose of preserving their natural beauty and primeval character and influence and safeguarding them from impairment and industrial development and from occupation by man other than as a visitor who does not remain; and
>
> WHEREAS to carry out those purposes it is desirable to establish and maintain certain areas as wilderness areas for the benefit and enjoyment of the present and future generations.

These were welcome steps, particularly for the time, but, like several other historical initiatives, turned out to be a mere hesitation on the path of "industrial development and settlement."

Lougheed's Conservatives found several sections in the *Wilderness Areas Act* offensive and deleted them in 1981, ensuring that wilderness areas might no longer be preserved for their "primeval character and influence" but only for their natural beauty, and not in ways that would safeguard them "from occupation by man other than as a visitor who does not remain."[36] The inference was clear; in wild areas man was coming to stay and to take. Nature was dispensable and aesthetics were in vogue. Of great importance was the beauty most alluring to tourist dollars.

During the last several decades, nature advocates struggled to increase protection for fast disappearing lands—representative ecosystems, habitats for endangered or threatened species or "endangered spaces." Devastation laboured on as well, gaining virtually all the victories. Price-led oil booms gutted more wilderness and the forestry swipe cut more again. Amendment of the *Wilderness Areas Act,* in 1981, by adding *Ecological Reserves and Natural Areas Act* to the title, rekindled hopes for some, but only a little land was protected under that legislation. By 1993, the Alberta Wilderness Association estimated:

> Outside of national parks (federal), the Province of Alberta has designated less than 2% of the provincial land base within protected areas. And, incredibly, we actually have less wilderness protected now than we did in 1965.[37]

Others estimated "a tiny 2.48%—approximately 16,366 km^2"—was protected.[38] This was plainly insufficient.

Some advocates strategized ways to save relic pieces of what formerly was, an ark or zoo of Alberta wild lands. The project "Special Places 2000" sought protection for the best remnants of some 17 subregions having no current protection out of the 20 subregions contained in Alberta's six natural areas. This project suffered the usual zoo and ark problems. Designated areas would be small, isolated islands with varying degrees of protection. None would be large enough to maintain long-term diversity or systemic integrity, but something is better than nothing. Called "postage stamps 2000" by skeptics, these colourful "postage stamps" would decorate development's envelope. Supporters pleaded with the government's Grandees—the Ralph Kleins, Ken Kowalskis and the Ty Lunds—to save these remnants. The public wanted it. Even the oil industry would sacrifice a few places if certain it could suck the oil from the rest.

Government announced its plan of protection in 1995, saying that "Special Places balances the preservation of Alberta's natural heritage with the other three goals or cornerstones: outdoor recreation, heritage appreciation and tourism/economic development." Neither balanced nor a protection plan, it was multiple-use planning in pale green garb. It used currently classified areas—the provincial parks, wilderness areas, natural areas, ecological reserves—and nominated new areas, but "protection" was hardly their purpose.[39] Government's words clarify their intent. "Did You Know," the government proudly asks:

- That hunting is used as a management tool in some provincial parks and ecological reserves . . . . ? These population control programs help minimize conflicts with surrounding landowners.

- That oil and gas wells currently exist in seven provincial parks, three ecological reserves and 22 natural areas? More than two-thirds of the natural areas permit oil and gas activity.

- That livestock grazing is part of the active management plans in four ecological reserves, seven provincial parks and one natural area? Annually, more than 31,000 Animal Unit Months of cattle grazing are available.

- That Alberta's provincial parks serve over eight million visitors each year?[40]

After ravenously consuming 99 pieces of the pie, the glutton demands balanced sharing on the hundredth, the last piece.

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