Disputes and Dispute Resolution in the Offsets System

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RESEARCH QUESTIONS

This legal research attempts to answer the following questions about GHG reductions or removals (particularly agricultural) under the proposed Offset System:

1. What legal procedural fairness requirements, in relation to project proponents, apply to decisions by the Program Authority concerning:

   - Project registration, including ownership and quantification.

   - Project certification based on verification of GHG reductions or removals, and issuance of credits.

   - Compliance decisions, including liability for credit replacement.

2. What rights to participate in these decisions do third parties, including other landowners, other project proponents, agricultural organizations and environmental NGOs have?

3. Is an internal dispute resolution process required, and if so, what should it look like?

4. What are the legal rights of project proponents and other interested parties to initiate judicial review of these decisions by the Program Authority?

Policy Makers' Summary of Conclusions

Procedural Fairness

- The common law gives project proponents (and other persons directly affected) by Program Authority [P.A.] decisions, basic procedural fairness rights to notice of proposed decisions, to make representations, and to receive written reasons for decision. These procedural rights can be specified by regulation. They can also be explicitly excluded by statute.

- In the absence of procedural legislation, these common law rights would require that the P.A. give affected persons notice of issues or concerns raised by applications and an opportunity to make written submissions before making *registration* decisions. At least brief written reasons would also be required, particularly where registration is denied.

- Decisions by the PA on *certification* of projects and on *compliance* matters require even greater attention to procedural rights, including (depending on the particular facts) opportunity for oral representations.

- Opportunity to make oral submissions prior to any of these decisions is required where the personal credibility of individual persons is in issue.

Alternative Dispute Resolution

- Consideration should be given to an offset system internal appeal option that may (with necessary modification) be the Board of Review process that exists under Part 11 of the Canadian Environmental Protection Act.

- The nature of the offset system decisions and potential disputes, as well as experience in analogous decision processes, suggests that there should be an institutional and legal framework that gives clear guidance on the use of alternative dispute resolution. This would promote dispute settlement efficiency and consequent transaction cost avoidance.

- Parties to offset system disputes should be able to choose from a range of ADR options.

Access to Justice – Judicial Review

- A statutory appeal on issues of law and scope of legal authority to the federal court could be provided.

- If there is no statutory appeal, persons directly affected by PA decisions (and potentially other parties who meet a discretionary judicial public interest assessment) can challenge decisions in common law (or judicial review statute-based) judicial review actions.

- The reviewing courts will give considerable deference to the expertise of the PA. However, judicial review will be more intrusive where a court considers that PA decisions involve legal issues or statutory interpretation relevant to legal principles that go beyond the particular facts.

I. INTRODUCTION

A. Kinds of Disputes

Under the proposed Offset System, there is potential for a variety of disputes to arise between project proponents and the Program Authority. Other disputes may be between project proponents and landowners or third parties such as competitors or NGOs. Some of these disputes are most appropriately resolved either by negotiation or, failing agreement, by the courts. But other proponent – third party disputes, such as ownership for the purpose of registration, will have to be decided by the Program Authority.

This research addresses disputes between the Program Authority and project proponents or interested third parties. Focus is on four types of disputes:

1. Disputes about ownership of sequestration potential and sequestered carbon,

2. Disputes about quantification of GHG emission reductions or removals,

3. Disputes about verification of GHG emission reductions or removals (that establishes entitlement to offset credits), and

4. Disputes about liability for non performance of GHG emission reductions or removals on which offset credits are based.

Ownership and quantification issues arise in Registration decisions by the Program Authority. Verification issues are the core of certification decisions by the Program Authority, based on verification reports by independent certified Verification Bodies. Compliance decisions are taken by the Program Authority.

The analysis in section II of this paper investigates, on the basis of common law principles, and relevant legislation, what procedural fairness rights must be accorded by the Program Authority to proponents and other parties affected by its registration, certification and compliance decisions. Section III assesses the potential application of Alternative Dispute Resolution (consensual) techniques to the major types of Offset System disputes. Section IV considers access to justice by parties aggrieved by Program Authority decisions. In particular, potential grounds and standards of review for judicial review of Program Authority decisions are analyzed. Overall conclusions are then drawn about procedural fairness and dispute resolution requirements and options for the Offset System. Findings on the relative likelihood and scope of judicial review of Program Authority decisions are also outlined.

II. PROCEDURAL FAIRNESS REQUIREMENTS

This section assesses the legal transparency and participatory requirements for decisions by the Program Authority on registration of offset projects, certification of projects and issuance of offset credits, and compliance with Offset System requirements. Each of these decisions involves sub-decisions or findings concerning characterization and application of Offset System criteria. For registration, these include[1] whether a proposed project is within the scope of the Offset System, whether reductions/removals are quantifiable, whether reductions/removals will be achieved during the registration period, whether there is a real environmental benefit, whether reductions/removals are surplus – in excess of regulatory requirements or incentive conditions, whether reductions/removals can be verified, whether there is any double counting of reductions, and whether project ownership is established. In the case of certification and credit issuance decisions, the key issue is verification,

[1] Offset System, Technical Background Document, 2005 at 5-9 [“Technical Background Document”].

based on approved quantification methodologies, of clearly identified sources.[2] This process is complicated by the proposal that GHG assertions will be assessed by independent accredited Verification Bodies.[3] The latter will make recommendations to the Program Authority. Compliance will require decisions determining non-performance by parties to whom credits are issued. These liability decisions may prescribe baseline carbon stock recalculation, or credit replacement.[4]

Procedural fairness requirements will be assessed in two ways:

1. By applying established legal principles for determining procedural fairness obligations to the types of decisions that will be made by the Program Authority and Verification Bodies, and

2. By testing the applicability of the procedural fairness provision proposed for ministerial decisions to refuse to issue or cancel credits under the Large Final Emitters Regulations, as a model for the Offset System.[5]

A. General Law Procedural Fairness Requirements

The Supreme Court of Canada has established a general theory and approach to determining procedural fairness requirements for decisions by public officials acting under statutory powers.[6] The theory is that the rule of law and fundamental common law rights (now supported by the Canadian Charter of Rights and Freedoms and Statutory Bills of Rights) impose a general duty to act fairly in relation to persons affected by their decisions.[7] On a different theory, namely implied contract or acquiescence, procedural fairness also applies to private decision makers such as officials of clubs or societies.[8]

1. Threshold for Procedural Fairness

However, this duty to act fairly, though widely applicable, does not apply in all cases. There is a threshold. A set of functional criteria is applied to determine whether the threshold is crossed. These are: (1) the nature of the decision power, (2) the relationship between the decision maker and affected persons, and (3) the effects on persons subject to the decision.[9]

These can be applied to the key decision powers in the proposed Offset System.

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[2] *Ibid.*, at 22 ff.

[3] *Ibid.*

[4] *Ibid.,* at 26-27.

[5] Environment Canada, Greenhouse Gas Reductions Directorate, Drafting Instructions, Cross-Cutting Provisions, Large Final Emitters Regulations, 2005, section 19.

[6] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 ["Baker"]; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 ["Knight"]; *Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners*, [1979] 1 S.C.R. 311 ["Nicholson"].

[7] *Nicholson*, *supra* at 314; *Baker*, *supra* at 818.

[8] See *McInnes v. Onslow-Fane*, [1978] 1 WLR 1520 (Eng. Ch.D).

[9] *Knight*, *supra* at 669-678.

(a) Nature of the Registration Decision

The decision is individual and specific to each project application. However, if a "pre-approved validation protocol" is used, the decision is more administrative – concerned not with whether a project meets broader eligibility criteria, but simply with whether it fits a specific project category. The latter decision is more matter of project classification with minimal discretion and less a deliberation involving application of broader principles to the facts of the proposed project. Key classification information will come from checked responses to structured questions. The greater the deliberative element, and thus the more the decision resembles an adjudication on whether a project meets an established standard, the greater is the need for procedural fairness protection.

In the course of the registration decision it is proposed that the application, with project description, location and ownership, will be posted on the Offset System Registry for public comment.[10] Though a major objective is to identify ownership disputes, the comment process also acknowledges a broader public interest in specific registration decisions. This public disclosure highlights an issue that would sometimes arise even in the absence of such Registry posting, namely claims for protection of confidential business information.[11]

Another issue is the finality of the decision, in view of the registration and subsequent certification and credit issuance steps. Arguably, registration is essentially a project approval decision, while certification corresponds to the licence to operate decision sometimes found in legislation regulating energy projects such as coal mines and pipelines. The latter have been considered to be separate decisions, rather than preliminary project approval/certification leading to a final licence to operate decision.

(b) Relationship

Offset project proponents are initial applicants. They are seeking a benefit. These are factors that in other contexts have weighed against procedural fairness rights.[12] It may be seen as a matter of benefits allocation where the only issue is whether the applicant meets the stated criteria.

But it is not a discretionary decision on general suitability, as in the case of employment hiring decisions.[13] There is assessment to determine whether system criteria are met. It is also an application that is based on investment in planning, and resource acquisition and recruitment of expertise. This detriment creates expectations that assessment of the application will be fair.

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[10]Technical Background Document, at 3.

[11]The Program Authority would have the discretion to address confidentiality issues in establishing procedural guidelines and dealing with specific requests for confidentiality. Procedural fairness rights to disclosure would have to be balanced against private information ownership rights. See *Magnasonic Canada v. Anti-Dumping Tribunal* [1972] FC. 1239 (Fed. C.A.); *Ogilvie Mills v. National Transportation Agency* (1992) 140 NR 278 (Fed. C.A.). If the Offset System is implemented by CEPA regulation, the confidential information disclosure assessment procedure under CEPA ss. 313-321 could be incorporated.

[12]*McInnis v. Onslow-Fane, supra*; *Hutfield v. Board of Fort Saskatchewan General Hospital* (1986, Alta. Q.B.).

[13]See *Knight*, *supra*.

(c) Effects

A decision to deny registration or impose burdensome conditions has an economic impact on applicants. They will have invested resources and incurred opportunity costs.

(d) Balancing Assessment

(i) Registration

All three criteria point toward the application of procedural fairness principles to registration decisions. Decisions will, in a sense, be individual and specific. However, they will contribute to policy development. Each decision will not be unique. Rather, it will depend on how a proposal fits predetermined quantification protocols. Assessment of early project proposals is likely to result in fine tuning of protocols and greater standardization over time.

Applications are not decided on broad discretionary grounds. It is not a mass-justice decision process, such as eligibility for social benefits, that may be unduly burdened by procedural fairness duties. Applicants are affected economically and personally by registration decisions. The conclusion is that the threshold for procedural fairness is crossed.

(ii) Certification and Compliance

There is little doubt that the threshold for procedural fairness is also crossed by certification and compliance decisions. Both are final decisions, the former establishing entitlement to credit issuance and the latter resulting directly in compliance obligations. Both decisions involve proponents who have the status of registrants. They have made explicit commitments. There is potential detriment.

2. Specific Procedural Fairness Requirements

Recognized procedural fairness content includes (1) rights to reasonable notice of decisions to be made, (2) fair hearing, particularly in the sense of opportunity to respond to issues raised against an application, and (3) an impartial and independent decision maker. The latter right may be specific to an individual decision maker and the facts of a particular decision, or may be based on institutional roles and responsibilities.

It is important to recall that these common law procedural rights can be modified or completely removed by legislation.[14] The common law rights apply to the extent they have not been removed. There is however, potential to challenge statutory provisions that modify or remove procedural rights on Canadian Charter of Rights and Freedoms grounds. But economic rights such as those of project proponents have been largely excluded from protection under, section 7, the “fundamental justice” section of the Charter.[15]

Content of procedural fairness is determined by application of a series of functional criteria. As outlined by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*,[16] these are:

(1) The nature of the decision, particularly how closely it resembles judicial decision making.

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[14] *Ocean Port Hotel v. British Columbia* [2001] 2 S.C.R. 781.

[15] *Irwin Toy Ltd. v. Québec (A-G)*, [1989] 1 S.C.R. 927.

[16] *Baker, supra* at 827-829, paras 23-28.

(2) The nature of the statutory scheme and the particular decision power. For example, the Court said that greater procedural protection is required when there is no appeal provision.[17]

(3) The importance of the decision to persons affected. A consideration here is whether some status or benefit is being removed.

(4) The "legitimate expectations" of the party affected by the decision. Generally, this has to be based on promises or regular practices of the decision maker. Legitimate expectation cannot be based merely on individual aspirations or the fact that individuals are within the compass of benefit programs.[18]

(5) The procedural choices made by the decision maker in carrying out its function. This involves assessing the decision maker's expertise in determining what procedures are appropriate in the circumstances.

(6) Other relevant and appropriate factors.

(a) Nature of the Decision

The registration decision resembles a judicial decision only in that it is individual and based on evidence (application information) submitted by the applicant. But it is likely to be based on a pre-approved protocol. It is not adversarial, unless opposition, such as a competing ownership claim, is voiced through the public comment process. It is not discretionary, but must be based on the eligibility criteria, most of which (quantifiable, surplus, real, removals within registration period, surplus, verifiable) involve quantification and expert technical analysis. Outside experts may be retained.[19] However, questions about whether the Offset System eligibility criteria are met, may involve issues of interpretation of legislation (or terms of reference) that could, depending on the circumstances, be questions of law. Ownership issues more clearly involve legal contractual or property principles.

(b) Nature of Statutory Scheme and Decision Power

The overall objective of the Offset System is to achieve reduction or removal of carbon to address the problem of global warming and Canada's international commitments. The Program Authority will be able to request additional information.[20] This goes some way toward addressing "hearing" concerns about rights to respond to issues identified in project assessment. The Supreme Court of Canada's statement in *Baker* underlines that an appeal procedure is a factor likely to support less formal procedural rights.

(c) Importance of Decision to Affected Persons

As indicated above, refusals to register projects are likely to have measurable adverse economic impact for applicants that have invested in resources necessary for their projects.

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[17] *Ibid.*, at 827-828, para. 24.

[18] See *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525; *Mount Sinai Hospital Centre v. Québec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281.

[19] Technical Background Document, at 3.

[20] *Ibid.*

(d) Legitimate Expectations

This factor may become relevant if the Program Authority were to depart materially from advertised or promised procedures. For example, a practice confirmed in a guidance document, of permitting applicants to file written responses to issues raised by members of the public as a result of posting applications in the Registry, is likely to create a legitimate expectation in a particular applicant that this practice would continue to be followed.

(e) The Program Authority's Chosen Procedure

On the assumption that Program Authority members and staff will have relevant disciplinary training, as well as significant expertise in carbon management, considerable deference would be given to the specific decision procedures established by the Authority. Of course, this would depend on the particular issue. For example, less deference is likely to be given by a court, in the event of a judicial review, to ownership findings by the Authority. These are likely to be regarded as, at least largely, matters of property and contract law and interpretation of relevant legislative or guideline ownership rules.

3. Conclusions on Application of the Factors to the Proposed Offset System Registration Process.

(a) "Hearing"

Assuming no appeal is provided, this strengthens the need for procedural protection. Other factors, including the individual, specific nature of the decision, economic effects on parties, and limited discretion point to the need for full and fair consideration of issues, including notice of information deficiencies identified by the Authority, and a right to respond. But this need not be an oral hearing, at least not always. The case for an oral hearing is strongest where explicit issues have been raised against a project proponent, either by the Authority or by third parties, particularly where the credibility of individual project proponents is in issue.

(b) Reasons for Decision

It is likely that written reasons for the decision would also be a legal requirement. The Supreme Court of Canada in *Baker* recognized that "in certain circumstances" procedural fairness requires written reasons.[21] These circumstances include the existence of a statutory right of appeal, great significance of a decision for an individual, and "other circumstances".[22] The court referred generally to the idea that the discipline of writing reasons may be a guarantee of better decisions and to reasons being "invaluable" if a decision is to be challenged by appeal (if one is provided) or by judicial review.[23]

Here, it is likely that reasons would be necessary. The economic importance of registration to project proponents is critical. It is the initial and indispensable step toward credit issuance. Proponents have invested not only financial resources, but time, effort and potentially, personal or corporate credibility, in developing and bringing project proposals forward.

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[21] *Baker*, *supra* at 831, para. 43.

[22] *Ibid.*

[23] *Ibid.*

4. The Certification Decision

In the case of the certification decision, the procedural fairness analysis would be broadly similar. However, there are important differences. In assessing the content of procedural fairness, certification involves technical issues, particularly the application of quantification protocols. These issues are less personal, but no less potentially contentious, requiring full consideration of factual issues and analysis. It is likely that issues about quantification protocol application will be explicitly raised by the Authority so that response is required. This strengthens claims to notice of issues raised and an opportunity to respond, though written technical responses may be sufficient in most cases unless clarification of particularly difficult points is required. Rights to reasons may be stronger (than for registration) because this is the ultimate decision on the offset credits opportunity (or benefit) that is pursued by the proponent. Economic (and perhaps associated personal effects) of denial are significant, and without clear findings and reasoning, challenge will be difficult.

5. Compliance Decisions

Several of the factors from the *Baker* case suggest that procedural fairness obligations for compliance decisions that, for example, require replacement of credits by proponents, will be high. This is a decision that resembles a judicial decision in that it involves a determination of liability. The credit replacement obligation may be viewed as a form of penalty. The fact that this decision is part of the compliance element of the offset scheme suggests that considerable attention should be paid to the established rights of project proponents. Economic impact of credit replacement decisions is significant.

These factors indicate that notice of compliance decisions, including details of sequestration reversal and any issues specific to the particular project proponent, are required, along with an opportunity to respond. The liability and penalty aspects strengthen the case for oral, as opposed to written, representations. Issues personal to a particular proponent would presumptively require an oral hearing.[24] Written reasons for decisions would also be required. This should include key findings and at least outline the Program Authority's reasoning process.

B. Proposed LFE System Procedural Fairness Provision

The proposed requirement for notice and hearing is in relation to ministerial decisions to refuse to issue or to cancel domestic credits under the LFE System. Such refusal or cancellation decisions can be made only if "false or misleading information material to credit entitlement has been submitted by the operator receiving the eligible domestic credits."[25] The draft section reads:

> 19. The Minister shall not refuse to issue, or shall not cancel a domestic credit issued pursuant to these regulations, unless the Minister:
>
> > has provided the operator with written reasons for refusing to issue the domestic credit or for cancelling it; and
> >
> > has allowed that operator a period of at least 30 days after sending the notice in which to make oral or written representations in respect of the refusal or cancellation.

[24]Because credibility, an issue identified as significant by the Supreme Court of Canada in *Singh v. Canada (Minister of Employment and Immigration)* [1985] 1 S.C.R. 177 at 182, is involved.

[25]Environmental Canada, Drafting Instructions, Cross-Cutting Provisions, Large Final Emitters Regulations, 2005, Issuance of Domestic Credits, s.18.

The decision involves[26] a finding of individual responsibility by the Minister. It is analogous to a finding under an administrative penalty provision or strict liability prohibition and penalty provisions. This at least resembles a judicial process. High order procedural protection is required for a decision that involves a finding of personal fraud or negligence that impugns personal integrity. This is particularly the case if no appeal is provided. The personal impact on the individual operator is obvious. The procedural choice here reflects the importance for the integrity and fungibility of credits under the LFE system, of accurate information to support the emission reduction represented by domestic credits. But it also recognizes the critical importance to an operator, of knowing about and being able to respond to serious allegations that amount to negligence or fraud.

Thus, the right provided to receive written reasons (that should detail the nature of the allegations and the specific proposed findings against an operator), and opportunity to make oral or written representations does provide a fair procedure when measured against the *Baker* criteria.

But, is this provision appropriate or necessary for Offset System decisions by the Program Authority? For similar decisions to refuse to issue or cancel credits on the ground that false or misleading information was provided, this kind of procedure would be necessary to ensure fairness. But for other decisions such as registration denials based, for example, on uncertainty about ownership or current situation, or unacceptable leakage, notice of the issue and an opportunity to respond in writing would very likely be adequate. Personal credibility would not be in issue. A fair response would not require a formal draft of proposed reasons, but merely a summary of matters in issue.[27]

The procedural fairness requirements for “normal” certification decisions would be similar – reasonable notice of matters in issue and an opportunity to make representations (usually) in writing. In principle, certification decision participants have a stronger claim to fuller notice of issues and opportunity to respond in writing (and perhaps orally) because at the time of certification decisions, the offset project has been undertaken, completed, and emission reductions or removals measured. Failure to certify would be a serious economic, and arguably personal, deprivation. The significance of these effects alone may be sufficient to support full draft reasons and an oral hearing procedure.[28] In any event, for both registration and certification decisions, personalized issues going to credibility would require an oral hearing.

The LFE system fairness provision may also be appropriate for enforcement decisions, particularly if allegations of misconduct are involved.[29] Even if not, the seriousness of a potential deprivation or penalty (replacement credit obligation) may be sufficient to warrant reasonably full reasons and oral response procedures.

C. Conclusions on Procedural Fairness Rights

- In the case of **registration decisions**, common law procedural fairness principles require at a minimum that the Program Authority provide project proponents with a summary of concerns or problems it considers to be raised by applications, and an opportunity to make written representations, before deciding whether or not to reject an application.

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[26] *Ibid.*, s.19.

[27] *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.

[28] See *Homex Realty v. Village of Wyoming*, [1980] 2 S.C.R. 1110.

[29] *Lazarov v. Secretary of State for Canada*, [1973] F.C. 927 (Fed. C.A.).

- For **certification decisions** the case for full procedural rights including an outline of proposed reasons for decision and an opportunity to respond orally and in writing is strong because the effect of a denial is a deprivation of the benefit of effort and investment already made.

- **Compliance decisions** also demand high order procedural fairness (proposed reasons and oral response) because compliance action involves imposition of a penalty or at least an onerous requirement and may, depending on the facts, include a finding of misconduct. The impact on proponents is significant.

- For all three types of decision, if issues raised are personal, involving the credibility of applicants, a more complete and reasoned set of concerns would be necessary and an opportunity to make oral representations is likely to be required. Written reasons for decision are likely to be required, but the claim is strongest where issues of credibility or personal integrity are involved.

- The procedural provision proposed for decisions to refuse to issue or to cancel credits under the LFE system involves notice of full proposed reasons for decision and an opportunity to make oral representations. This provision is appropriate for refusals to certify and for compliance decisions, but would not necessarily be required for registration decisions, except perhaps where specific personal issues were raised against project proponent applicants.

- Final written reasons for decision should be provided for all of these types of decisions.

D. Rights of Third Parties to Participate

Whether or not other parties, including proponent competitors, non-proponent landowners, industry associations and environmental organizations have participatory procedural fairness rights may depend on the authorizing statute. This is the norm for regulatory schemes, involving activity or facility approvals. It is then a matter of whether, as a matter of interpretation and factual assessment, such parties meet the standard. Common standards are, “directly affected” or “interested.”

If there is no statutory test, then the common law comes into play in the form of the threshold requirements for procedural fairness reviewed above. In this analysis, there would be a large burden on third parties. Decisions do not relate directly to these third parties. Their rights are not likely to be directly in issue, except to the extent that they contest ownership. There is likely to be no established relationship or dealings with the Authority. Direct effects are apparent in ownership disputes.

The proposed system of posting registration applications on the Offset System Registry for public comment would satisfy procedural requirements for a majority of third parties. Ownership claimants may, under the *Baker* criteria, particularly, nature of the decision (a determination of property rights) and effects of the decision, require more, including more complete information and potentially even the right to make oral representations. Other third parties may also be able to claim greater participatory rights on the basis of personal or economic effects. Similar claims by public interest groups or economic associations are weaker. There are no common law rights to a public participation process.[30]

There is little common law basis for third party participation in certification and compliance decisions. Even ownership grounds would carry little weight if there was failure to raise these at the registration stage. But intervention in a certification decision, based on new information, might meet the threshold

[30]See *Canadian Association of Regulated Importers v. Canada (A-G)*, [1994] 2 F.C. (Fed. C.A.).

test. In the apparent absence of public comment opportunities at this stage, limited rights to raise new issues could be provided.

Participation in compliance decisions would require explicit statutory rights. If CEPA is used as a legislative basis, CEPA's citizen request for investigation procedure[31] could be incorporated.

1. Conclusions on Third Party Rights

- There is no general legal right to a public participation process.
- Participatory opportunities for third parties can be specifically provided. This is what the proposed public comment process does. But even in the absence of such a process, a right to participate could be asserted, based primarily on direct personal or economic effects. Ownership challenges may have a particularly strong claim. By contrast, the procedural claim of public or private interest groups would be weak.
- Third party participatory rights are relatively weaker for second stage certification decisions and particularly for compliance decisions. This is likely to be the case even if the public comment process is limited to registration decisions.

III. ASSESSING THE RELEVANCE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) TECHNIQUES

A. Introduction

The Offset System is intended to be market driven.[32] In effect, the Offset System envisages cooperative and contractual dealings among the various participants including project proponents, landowners, government officials and agencies and credit purchasers. It therefore goes without saying that such cooperative and contractual dealings between the various participants in the Offset System hold a strong potential for the emergence of a myriad of disputes.

The need for the Offset System legal framework to provide for quick and efficient mechanisms for dispute resolution cannot be overemphasized. This is essential in order to generate and maintain the confidence of participants. Given the novel nature of the Offset System, the design of its dispute resolution mechanisms, particularly outside traditional judicial dispute settlement, must take into account dispute resolution techniques that have been adopted in analogous situations.[33]

Against the backdrop of the increasing use of ADR processes in the settlement of disputes both nationally (within Canada) and internationally, especially, in the resolution of environmental disputes, this section examines the possibility of adopting ADR procedures in the Offset System.

The section is divided into three parts. Part I examines the justifications that have been advanced for the increasing use of ADR in the settlement of disputes, especially, in the context of environmental conflicts. This part also considers some forms of ADR processes. Part 2 examines the different mechanisms, including ADR techniques that have been used in similar situations, and their relative strengths. In Part 3 conclusions are drawn.

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[31] CEPA, s. 18.

[32] See S. Kennett, A. Kwasniak, and A. Lucas, "Property Rights and the Legal Framework for Carbon Sequestration on Agricultural Land", (2006) Ottawa Law Review (forthcoming) [Kennett].

[33] Primarily environmental conflicts. Significant too, is the fact that the Offset System has a commercial character.

B. Justifications for the Use of ADR

Alternative dispute resolution is an acronym which refers to a wide spectrum of dispute resolution mechanisms which are regarded as supplements to traditional judicial dispute resolution.[34] The term distinguishes between traditional political and judicial dispute resolution techniques and some emerging innovative dispute resolution mechanisms[35] Such ADR processes can be adjudicatory or consensual.[36] Some of the justifications that have been advanced for the increasing popularity of ADR as mechanisms for the resolution of environmental disputes are stated below.

First, it is argued that judges do not have the expertise to adjudicate on some matters of a scientific or technical nature. Hence, such matters are more appropriately resolved through ADR processes.[37]

Secondly, the need to ensure greater public participation in the decision making process has been given to justify the growing use of ADR mechanisms in the resolution of environmental conflicts.[38]

Thirdly, it is argued that judicial review of administrative decisions focuses narrowly on procedural requirements rather than the merits of the substantive issues in dispute between the parties.[39]

Fourthly, it is claimed that the adversarial nature of litigation, and increasingly, of administrative processes, is a strong disincentive to open, frank and sincere discussions among the parties. ADR encourages consensual and collaborative dispute resolution that gives the parties control over the process used.[40]

C. Types of ADR Processes

1. Negotiated Settlement

This refers to a process whereby parties to a dispute hold discussions with a view to arriving at an agreement on issues of common concern to them. It has been described as an indispensable step in any ADR process.[41] Even where the parties fail to reach a final agreement during negotiations, their consensus-based recommendations may have profound influence on another decision maker.[42]

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[34]Chartered Institute of Arbitrators, "Negotiation, Mediation, Conciliation and Hybrid Processes of Alternative Dispute Resolution" Lecture Notes at 14 (in file)[Negotiation, Mediation and Hybrid Processes].

[35]H.I. Rounthwaite, 'Alternative Dispute Resolution in Environmental Law: Uses, Limitations and Potentials' in E. Hughes *et al.* (eds) Environmental Law and Policy, (Toronto: Edmond Montgomery Publications Ltd., 2003) at 563 [Hughes *et al.*].

[36]The paper focuses essentially on consensual ADR processes.

[37]Hughes *et al., supra* at 565.

[38]E. Swanson, *Environmental Conflict and Alternative Dispute Resolution* (Edmonton: Environmental Law Centre, 1995) at 24 [Swanson].

[39]*Ibid.*, at 245.

[40]See generally, W. Tilleman, "Environmental Appeal Boards: A Comparative Look at the United States, Canada, and England" (1996) 21 Colum. J. Envtl. L. 1[Tilleman].

[41]Negotiation, Mediation, and Hybrid Processes *supra* at 14.

[42]Swanson, *supra* at 31.

2. Consensus Building

This form of ADR process focuses on the common interests of the parties as a way of defining and solving the dispute between them. Though the eventual outcome of consensus building may not be a decision or the development of a recommendation, it may improve communication and relationships between opposing persons.[43]

3. Mediation

Mediation is the use of a neutral third party to assist the parties in achieving an agreeable solution. The essential feature of mediation is the neutrality of the third party. A mediator is not an advocate to any of the parties.[44] The mediator assists the parties to identify the issues in dispute, develop options, consider alternatives, and to reach an agreement. There is no decision by the mediator. Rather, the objective is to assist the parties to reach an agreement that ends the dispute as completely as possible. Two major advantages of mediation are that it is procedurally flexible, and gives the parties control over the procedure.[45] The mediator may be chosen by the regulatory agency or by the participants themselves. Where the choice is by the regulatory agency, it should be based on the recommendation of the parties. Alternative dispute resolution through mediation has been widely used in the resolution of environmental disputes, and has received extensive review in the literature.[46]

The next section examines the various dispute resolution techniques that have been adopted in analogous situations to the Offset System

D. The Alberta Energy and Utilities Board (EUB)

The EUB is an independent quasi-judicial agency which has as its core functions adjudicatory and regulatory roles in the Alberta energy and utilities sectors.[47] It has the task of resolving disputes between energy companies and landowners and their neighbours, or industry-to-industry disputes on issues relating to application for approvals, licences, permits and other relief.[48] It is important to note that the Program Authority for the Offset System will also deal with issues relating to application for approval of offset projects, certification, and compliance. These are capable of giving rise to disputes between the landowners and project proponents on the one hand, and project proponent/landowner and the Program Authority on the other hand. Third parties may also have a stake in these issues. Consequently, the mechanisms adopted by the EUB can be a significant guide to the design of dispute resolution mechanisms for the Offset System.

In the discharge of its adjudicatory responsibilities, the EUB conducts hearings, enquiries investigations, and other forms of proceedings. Such administrative hearings are regulated by the Rules of Practice, and usually resemble court proceedings. After conducting a hearing, a decision is rendered, and the reasons for a decision released. An appeal lies to the Alberta Court of Appeal.[49]

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[43]Swanson, *supra* at 30 (citing "The Myth, The Reality, and The Future of Environmental Mediation," 1982).

[44]Hughes *et al., supra* at 570.

[45]*Ibid.*, at 570.

[46]See generally, Hughes *et al.*, *supra*; Tilleman, *supra*; Swanson, *supra.*

[47]Alberta Energy and Utilities Board, "About the EUB" online: EUB home page: http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm [EUB home page].

[48]Alberta Energy and Utilities Board Rules of Practice, Alt. Reg. 101/2001 [Rules of Practice]. The Rules of Practice were made pursuant to s.29 of the Alberta Energy and Utilities Board Act, R.S.A. 2000 [Energy Act].

[49]Rules of Practice, s.26.

1. Use of ADR at the EUB

The EUB has evolved an extensive ADR policy that can be adopted by the parties to a dispute.[50] "ADR" here simply means that the parties can choose which dispute settlement technique they wish to adopt from a spectrum of available options ranging from the EUB administrative hearing procedure, through other mechanisms including mediation, negotiation, facilitation, and arbitration.

The EUB's ADR policy was developed in response to the desires of stakeholders to be more directly involved and have more control in resolving disputes.[51] The goals of the EUB's ADR policy include:

- Improved landowner-industry relations in the interests of all Albertans
- Better use of the EUB's stakeholders' time and other resources.
- More face-to-face discussions between affected landowners and company decision makers, leading to local solutions to local problems.
- Enhanced efficiencies in the effort to meet the needs of stakeholders in the electricity and upstream oil and gas sectors.
- A more effective and efficient hearing, if one is necessary.

Participation in the ADR procedure is highly favoured by the EUB. Such participation does not preclude administrative hearing where it becomes necessary, and the ADR outcome may or may not be binding. The EUB's role in the ADR process is principally facilitative. In furtherance of its facilitative role, it maintains a roster of independent mediators from which the parties can draw if they choose to do so. The EUB evaluates the outcome of the ADR process and implements agreements where they are not contrary to public interest. It also serves as a channel for feedback from those who opt for the ADR process.

***Conclusion*:** The EUB ADR model has considerable relevance for the design of dispute resolution mechanisms under the Offset System. The adjudicatory role of EUB is relatively formal, but is analogous to the Offset System Program Authority's registration, certification and compliance decision functions.

E. Alberta Environmental Appeals Board (Appeals Board)

The Appeals Board is established under Part 4 of the Environmental Protection and Enhancement Act.[52] As the name suggests, the Appeals Board exercises appellate jurisdiction on decisions or orders made by an Alberta Environment Director or by an Inspector.[53] It is therefore, an independent

[50] *Ibid.*, s. 32; EUB, "Appropriate Dispute Resolution (ADR) Program and Guidelines for Energy and Industry Disputes IL 2001-1 online: EUB home page: <http:www.eub.gov.ab.ca/BBS/requirements/ils/ils/il2001-01.htm> [ADR Guidelines]. Under the Rules, parties to a dispute may opt for an ADR process or negotiated settlement.

[51] *Ibid*.

[52] R.S.A. 2000, c. E-12 [Environmental Protection and Enhancement Act].

[53] The Environment Director or the Inspector as the case may be, has the powers to grant or refuse application for registration, approval, or certificate of reclamation, modify or cancel registration, approval, or certificate of reclamation. See generally, *ibid*., ss. 66, 68, 69, 70, 138, & 139.

administrative tribunal.[54] The approval applicant or any person directly affected by a decision of the Director or Inspector may file a notice of appeal with the Appeals Board.[55]

Key functions of the Program Authority under the Offset System are analogous to those of the Alberta Environment Director in respect of decisions on approvals, registration, certification, and compliance (such as replacement of offset credits). This suggests that there is a need to develop mechanisms under the Offset System for the resolution of disputes arising from decisions on such matters. This would encompass landowners, project proponents and other persons affected by such decisions.

1. Appeals Board Administrative Hearing

To hear an appeal, the Appeals Board may convene a panel. A panel is made up of three members selected by the Board Chair. A member of the panel serves as its Chair.[56] Pursuant to section 95(8) of the Environmental Protection and Enhancement Act, the Appeals Board has powers to make rules of practice and procedure for the conduct of its proceedings. Upon hearing an appeal, the Appeals Board has to make a written decision within 30 days after the completion of proceedings.[57] Notice of such decision is given to all persons who filed notices of appeal, and anyone who makes representations to the Appeals Board. This decision is subject to authorization by the Minister.[58] The decision of the Minister is communicated to the Appeals Board, and through the latter to all persons who filed notices of appeal and those who made representations.

An order of the Appeals Board, or the decision of the Minister or the Appeals Board may be filed with the Clerk of the Court of Queens Bench, and it becomes enforceable as an order of the Court.[59] Section 102 of the Environmental Protection Act is a privative clause that purports to oust the jurisdiction of the courts from reviewing any order or decision of the Appeals Board or the Minister.

2. Use of ADR

The Appeals Board may adopt mediation or settlement conferencing in the settlement of appeals filed before it.[60] The recourse to mediation may be at the instance of the parties or the Appeals Board. Mediation process is usually presided over by a member of the Appeals Board, except where the need for a non-member mediator is felt. All the members of the Appeals Board are trained mediators.[61] The mediation process is usually preceded by extensive pre-mediation work conducted by staff members of the Appeals Board.[62]

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[54]Environmental Appeals Board online: EAB home page: http://www.3.gov.ab.ca/env/protenf/legislation/factsheets/envapeal.htm

[55]For a detailed discussion of the circumstances under which the jurisdiction of the Appeals Board can be invoked, see, Tilleman, *supra* at 9.

[56]Environmental Protection Act, s.90(40).

[57]The Board's decision is by way of recommendation to the Minister, and the Minister has powers to affirm, reverse or vary the decision appealed against.

[58]See generally, Environmental Appeals Board Rules of Practice, online: EAB home page: http://www.qp.gov.ab.ca/documents/cts/E12.cfm?frm_isbn=077971877 [Appeals Board Rules of Practice].

[59]Environmental Protection and Enhancement Act, s.104.

[60]Sections 11, 16, & 17 Appeals Board Rules of Practice, *supra*.

[61]Environmental Appeals Board, "10th anniversary report 1993-2003" online: EAB home page: http://www.3.gov.ab.ca/eab/ at 54 [10th anniversary report].

[62]*Ibid.*, at 54 .

Mediation is usually the second stage of the appeal hearing process, after relevant information on the appeal has been filed.[63]Where mediation is successful, the Appeals Board prepares a Report and Resolutions of the parties, and forwards it to the Minister for decision. A member of the Appeals Board who acts as mediator is precluded from sitting as a member of the panel to hear the appeal where mediation fails.

The Appeals Board has guidelines for deciding when mediation would be suitable. The type of mediation adopted is interest-based-mediation.[64] Mediation has been used in about 51% of EAB appeals heard, and 81% of such mediation proceedings have been successful.[65] The result is that ADR is a strategy to "…*avoid the potentially formal, lengthy, and costly process of hearing."*[66]

Conclusion: The dispute resolution mechanisms adopted by the Alberta Environmental Appeals Board, particularly, the environmental mediation technique, is a useful guide to the design of dispute resolution mechanisms for the Offset System.

F. Dispute Resolution Mechanisms under the Canadian Environmental Protection Act (CEPA)

The establishment of a review is one of the strategies for the resolution of disputes provided for under CEPA.[67] The other method is by filing an environmental action in a court of competent jurisdiction.[68]

The Environment Minister, or the Minister of Health as the case may be, has the discretion to set up a review board where any person has filed a notice of objection requesting that a board be established.[69] Review boards consist of not less than three members, who must be knowledgeable about Canadian environment, environmental and human health, or aboriginal ecological matters.[70] The board has the powers of a person appointed under Part 1 of the Inquiries Act.[71] It submits its report to the relevant Minister and the latter must make the report public, subject to the provisions relating to confidential information under section 315, 316, or 317 of CEPA. The power to make rules of practice governing the proceedings of review boards is vested in the relevant Minister.

***Conclusion*:** The use of review boards under CEPA provides little guidance for the design of dispute resolution mechanisms under the Offset System. A key problem is that the Minister is not obliged to set up a review board. The *ad hoc* nature of review boards is a strong disincentive. There is no provision for the use of ADR techniques for the resolution of disputes.

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[63] *Ibid*., at 35.

[64] Environmental Appeals Board, "about mediation" online: EAB home page: http://www3.gov.ab.ca/eab/mediation_about.htm at 1 [about mediation].

[65] 10th anniversary report, *supra,* at 54. The Appeals Board mediation process feedback mechanism has revealed the process is well thought of by the participants.

[66] *Ibid*., at 35 (emphasis added).

[67] S.C. 1999, c. 33 [CEPA].

[68] The discussion will focus on dispute resolution technique using review boards.

[69] *Ibid*., ss. 77(8), 78(1) & 4, 333. These provisions set out the circumstances in which a person may file a notice of objection seeking establishment of a review board.

[70] *Ibid*., s.334.

[71] *Ibid*., s.337.

G. Alberta Securities Commission

The Alberta Securities Commission (ASC) is responsible for the administration of the Alberta Securities Act, including rules and regulations made pursuant to the Act. Hence, it regulates trading in securities. The Offset System is expected to be market driven. It is therefore envisaged that the trading system for offset credits will have the semblance of securities trading, with a regulatory framework to facilitate the market and provide some protection for participants.

The ASC hears and determines disputes between participants in the stock exchange market. The Commission sits in panels[72] to hear disputes brought before it, and the decision of any such panel is deemed to be decision of the ASC. Proceedings before the ASC are usually commenced by its staff, where there is an alleged violation of the Act. Both the staff and the respondent may be represented by counsel in such proceedings. The ASC exercises appellate jurisdiction over the decisions of its Executive Director.[73] The reasons for the decision of the ASC in any proceedings must be stated, and appeal against a decision lies to the Court of Appeal.[74] It appears that there is no provision for the adoption of ADR processes by the ASC.

This is in contrast to the dispute resolution mechanisms adopted by the Ontario Securities Commission (OSC). Apart from the traditional hearing by a tribunal of the OSC, it may direct parties to a dispute to participate in an ADR process if it has made provision for the adoption of ADR in the rules of practice and procedures, and the parties consent to the use of ADR techniques. If the rules provide for the adoption of ADR, the rules must also state the circumstances under which the agreement reached through ADR must be reviewed by the tribunal. The Ontario Act provides that the tribunal's rules of procedure may make participation in ADR mandatory, or mandatory in specified circumstances.[75]

Conclusion: Though securities commissions regulate market trading systems, they have not been consistent in adoption and application of ADR processes.

H. Conclusions on Alternative Dispute Resolution

This section has examined the use of alternative dispute resolution techniques, especially, mediation in the settlement of environmental disputes. One conclusion that emerges from this review of ADR techniques is that the significance attached to the use of ADR processes as mechanisms for dispute resolution depends on the relevant legal, institutional, and policy settings. While in some of our case study examples, high premium is placed on the use of ADR as a supplement to the traditional administrative hearing, others do not pay significant attention or place policy priority on ADR processes.

The EUB and EAB for example have not only evolved extensive and reasonably effective ADR policies, but also provide clear guidance on how the outcome of any adopted ADR process is to be treated. The use of a mediation mechanism for the resolution of disputes by the EAB has become well established. It has also assisted the Board in its adjudicatory role. This is also true of the EUB.

[72] R.S.A. 2000 c. S-23 (Securities Act 2000).

[73] *Ibid*., s.35.

[74] *Ibid*., s.38.

[75] Statutory Powers Procedure Act, R.S.O.1990, s.4.8(4). The Act provides that a tribunal of the OSC has the powers to make its rules of practice and procedure. Section 25.1 of the Act empowers a tribunal of the OSC to make its own rules of practice and procedure.

Specific Conclusions and Recommendations

- The need for and the design of ADR processes for dispute resolution depends on the precise legal, institutional and policy setting.

- An institutional and legal framework that gives clear guidance on the use of ADR in the Offset System should be put in place.

- The regulatory framework for the Offset System should enable the parties to choose from a wide range of ADR options, as is the case with the EUB. This enhances the choice capacity of the parties.

- The strategy of the EUB in maintaining a roster of independent third party facilitators to assist the parties should also be considered. However, if members of the Program Authority are also to preside over ADR processes, there will be the need to afford them specialized training.

- The outcome of an ADR process should be evaluated by the Offset System Program Authority and should be the subject of an explicit decision to approve settlements. However, the Authority should not approve settlements that are either outside its authority or that are not in the public interest having regard to the objectives of the Offset System.

- There are strong fairness and independence grounds for establishment of an Offset System appeal body, analogous to the EAB. An alternative, considering that numbers of appeals are not likely to be high, is a Review Board system like that under CEPA. However, establishment of review boards should not be a matter of ministerial discretion. Provision for ADR processes should explicitly be added.

IV. ACCESS TO JUSTICE

A. Judicial Review of Registration, Quantification and Liability Decisions

Program Authority decisions may be subject to judicial challenge by aggrieved project proponents and possibly by other parties, including competitors and even environmental, agricultural or other industry or public interest organizations. If a statutory appeal were to be established, that would be the appropriate route for legal attack.[76] But even in the absence of a statutory appeal right, judicial review may be available under the common law as structured by the Federal Court Act.[77]

1. Status of the Program Authority

A threshold step would be establishing that the Program Authority is a “federal board, commission or other tribunal”,[78] under the Federal Court Act. Creation of the Authority under new legislation or under appropriate CEPA powers, would make this clear. The less direct authority of a departmental statute

[76] If CEPA regulation making power were used to establish the Offset System, neither the CEPA regulation making power, concerning Boards of Review (s.341), nor the residual power “to carry out the purposes of the Part” (s. 93 (y)) may be clear or broad enough to support incorporation of the Review Board process. In any event, if this could be done (or CEPA amended as necessary), initial resort to the Review Board process (“the Minister may establish a Review Board”: s. 333 (1)) would be required (see *Harelkin v. University of Regina,* [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Board*, [1995] 1 S.C.R. 3. Judicial review could then be a second step.

[77] Federal Court Act, R.S.C. 1985 as am. by S.C. 1990, c. 8, s.18.1.

[78] *Ibid.*, s. 2(1).

such as the Department of the Environment Act[79] may also suffice. An issue in all cases would be whether there was clear enough statutory authority for establishment of the Program Authority.

2. Standing

A further threshold issue would be standing to bring a judicial review action. This becomes relevant where the applicant is not affected by the decision either personally or financially, in a reasonably direct sense.[80] Standing is largely fact-based, depending on the specific status or interest of the judicial review applicant in relation to the challenged decision. However, the Federal Court may, in its discretion, approve public interest standing based on justiciability, interest and representational effectiveness criteria.[81]

3. Standard of Review

Judicial determination of the standard of review for each discrete issue that might be raised in a judicial review of a Program Authority decision is not a matter of intuitive characterization. Rather, the approach is functionalist. A court would use a "pragmatic and functional analysis"[82] to decide whether the appropriate standard is correctness (most intrusive), reasonableness (somewhat deferential), or patent unreasonableness (most deferential). The latter requires a reviewing court to determine whether a decision is "clearly irrational", "evidently not in accordance with reason", or "so patently unreasonable that ... [it] cannot be rationally supported and demands intervention by the court ...".[83] Reasonableness requires an assessment of whether the decision is sufficiently rational to stand up to a "somewhat probing analysis."[84] Correctness permits the court to go beyond the reasons for decision and apply its own legal principles and analysis to essentially legal issues.[85]

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[79] R.S.C. 1985, c. E-10, authorizes the Minister in relation to,

> 4(a) The preservation and enhancement of the quality of the natural environment.... In exercising these powers, the minister shall,
>
> 5(f) The coordination of the policies and programs of the Government of Canada respecting the preservation and enhancement of the quality of the natural environment.
>
> In exercising these powers, the Minister shall:
>
> 5(a) "Initiate, recommend and undertake programs and coordinate programs of the Government of Canada that are designed
>
> (i) to promote the establishment or adoption of objectives or standards relating to environmental quality...."

In principle, these powers could be expressly delegated by the Minister to departmental staff comprising the Program Authority.

[80] See *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607.

[81] *Finlay v. Canada, supra*; *Friends of the Island v. Canada (Minister of Public Works),* [1993] 2 FC 229 (Fed Ct T.D.).

[82] See *Pushpanatham v. Canada (Minister of Citizenship and Immigration),* [1998] 1 S.C.R. 982.

[83] *Toronto (City) v. CUPE Local 79* (2003), 232 D.L.R. 4th 385 at 420 per LeBel J., summing up previous judicial expressions of the standard.

[84] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 [Southam].

[85] *Toronto (City) v. CUPE Local 79*, *supra* at 418-422.

The pragmatic and functional analysis involves consideration of four factors:[86]

(1) the existence of a privative clause (a statutory provision that purports to exclude judicial review) or a statutory appeal,

(2) the expertise (relative to that of the court) of the decision making body in relation to the particular issue,

(3) the purpose of the scheme and the legislative provision that authorizes the decision, and

(4) the nature of the issue – whether it is essentially one of fact or law.

The court then engages in a qualitative exercise, balancing the four factors to reach a conclusion on standard of review.[87]

(a) A Standard of Review Example

If, for example, the Program Authority refused to register a stand alone agricultural soil sequestration project involving conversion of a 20 section area of southern Saskatchewan from crop to grazing and permanent cover, on the grounds (stated in written reasons) that:

1. Insufficient data on extremely varied land forms and soil types within the area make it impossible to completely quantify proposed carbon removals (assuming that a pre-approved quantification protocol could not be used),

2. It is not clear in any event whether certain removals will be achieved during the registration period because crop conversion commitments by some landowners are "best efforts", and

3. Ownership is not completely established because the proponent purchased the business from the original aggregator and notice and consent for the assignment of sequestration contracts was not given to all of the landowners. Some landowners who did not receive notice of the assignments had, in the meantime, sold their land without disclosing the sequestration contracts, because they thought the contracts had lapsed since, apparently, nothing had happened for several years.[88]

On the assumption that mediated negotiation was tried and failed, and that there are no procedural fairness issues, the project proponent has initiated judicial review to challenge the denial of registration. The grounds for review alleged are that the Authority failed to consider relevant data in reaching its

[86] *Pushpanathan*, *supra*.

[87] See *Baker, supra* at 835.

[88] This issue depends on whether sequestration rights can in principle be property rights and, if so, whether the agreements actually grant such a property right so that purchasers of the land will be bound. The sequestration right is very likely an element of the surface land owner's fee simple absolute right that can be granted by clear and explicit contractual language. See S. Kennett, A. Kwasniak and A. Lucas, "Property Rights and the Legal Framework for Carbon Sequestration on Agricultural Land" (2006) ____ Ottawa Law Review (forthcoming). The analogous interest of a leasee under a lease of mineral rights, can be (and in the case of an oil and gas lease normally is) intended by the parties to be an interest in land in the form of a "profit à prendre" (a right to explore, develop, produce and remove mineral resources): *Berkheiser v. Berkheiser*, [1957] S.C.R. 387.

conclusions[89] on quantification of proposed carbon removals during the registration period, and that it erred in concluding that ownership was not established for the lands that had been resold.

(i) Existence of a Privative Clause

The existence of a privative clause may not be a relevant factor. If the Offset System is established by regulation under section 326 of CEPA, there is no privative clause. Nor is there a privative clause in the Department of the Environment Act. An amendment to insert a privative in CEPA is possible, but such an amendment for the Department of the Environment Act is neither likely nor appropriate given the ministerial mandate function of this Act. All of this points toward the likelihood of relatively less deference by the court to the Program Authority.

(ii) Expertise

Assuming that Program Authority officials and staff have a range of economic, technical and scientific expertise relevant to managing the Offset System, the authority's expertise would exceed that of the court, particularly on the failure to consider relevant[90] data question. The ownership issue, on the other hand, appears to be a legal matter on which the court would, at least presumptively, have greater expertise.

(iii) The Scheme and the Authorizing Power

As to the nature of the scheme and the authorization for the decision, the core objective is environmental reduction of GHG emissions with a view to combating global warming. But the means involves an economic approach and marketable credits as an incentive for agricultural practice changes that remove or reduce carbon. Thus, it involves climate and agricultural science, as well as economics.[91] The Program Authority is essentially an implementation and decision making body rather than a policy making authority. The latter function has been regarded as a factor suggesting deference.[92] The result is that on balance this factor indicates deference by the court.

(iv) The Nature of the Problem

The problem concerning failure to consider data relevant to quantification and timing is essentially factual. It is also highly technical, involving climate and soil science and the application of a quantification methodology.[93] On the other hand, ownership suggests legal issues of property and contract law, contract interpretation and analysis of relevant case law.[94]

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[89]As in *Baker, supra* in which it was held (on a standard of reasonableness) that an immigration decision should be set aside because the Minister failed to give adequate consideration to the interests of the applicant's children.

[90]See *Pezim v. British Columbia (Superintendent of Brokers)* [1994] 2 S.C.R. 557, where the court noted the BC Securities Commission's greater expertise and specialization in investigations and audits, among other functions, and *Southam*, *supra* in which the court emphasized the Competition Tribunal's expertise in economics and commerce.

[91]In *Southam, supra*, the Supreme Court of Canada spoke of the aims of the Competition Act being "more economic than they are strictly legal."

[92]The Securities Commission assessed in *Pezim*, *supra* was considered to have a significant policy making function.

[93]In *Atco Electric Limited v. Alberta (Energy and Utilities Board)* 2004 ABCA at para. 62 the Alberta Court of Appeal concluded that the Energy and Utilities Board's function in determining the appropriate methodology for calculating prudent costs of financing a particular part of a public utility's operations, was a question on which the Board had greater expertise than the court, and deference was required.

[94]This is analogous to the Alberta Energy and Utilities Board decision concerning the rights of the owners of interests in natural gas and bitumen to produce their respective resources from the same geological formation. The Alberta Court of Appeal in *Alberta Energy Company v. Goodwell Petroleum Corporation*, 2003 ABCA 277, concluded that the standard of

Conclusion on Standard of Review

On balance, for the issue concerning failure to consider relevant data concerning quantification and timing, all factors, except the absence of a privative clause, point toward deference to the Authority. The result would be a deferential standard of review, very likely the middle, but still deferential, "reasonableness" standard.[95] However, for the ownership issue, a question of law, application of a correctness standard involving no judicial deference is likely.

Should the Offset System be implemented by CEPA regulations (or by new legislation), whether or not relevant data was considered would have to be measured against the specific legislative requirements or standards. This may raise interpretation questions about what factors the legislation intended should be considered.

How, for example, should the idea of a baseline be characterized to determine what particular factors should be considered? In the scenario above, this would very likely still lead to the conclusion that some deference is owed, so that the reasonableness standard would be applied. But courts have also recognized that for this kind of mixed fact and law question in which a statutory standard is applied to a factual matrix, purely legal issues concerning how a statutory standard should be characterized, may be "extricable." This question would be reviewed on a correctness standard.[96]

B. Conclusions on Access to Justice

Access to justice for resolution of disputes between project proponents (and other parties) and the Program Authority can take the form of:

1. A legislated statutory appeal, or
2. Judicial review, which is available even in the absence of a legislated appeal.

In either case a reviewing court will conduct a pragmatic and functional analysis to determine the appropriate standard of review. This involves the relative deference that the court will give to the Program Authority in reviewing decisions.

- If a statutory appeal were to be provided either in new legislation or by legislative amendment, this would suggest an explicit decision role for the court and correspondingly less deference to the Authority. However, consideration of the other relevant factors – relative expertise, purpose of the scheme and the authorizing power, and whether the question is one of fact or law — is still likely to result in a deferential standard. The court will assess the reasonableness of the decision in a "somewhat probing" examination.

- In the case of judicial review, the standard of review is likely to be similar (though a more deferential patent unreasonableness standard is possible) if there is no privative clause that purports to exclude judicial review.

- For both appeals and judicial review, specific legal issues concerning interpretation of, for example, sequestration contracts and ownership of sequestration rights, or the legal appropriateness of particular standards or tests (as to ownership) applied by the Program

review was correctness because the question was purely legal, involving interpretation of contracts and case law.

[95]This was the result in *Construction and General Workers' Union v. Voice Construction Ltd.* (2004), 238 D.L.R. (4th) 218 (S.C.C.), where a privative clause, modified by a right of judicial review if exercised within a specified period, was a major factor in the pragmatic and functional analysis.

[96]*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, para. 36, 37, cited by the Alberta Court of Appeal in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2005 ABCA, para. 55.

Authority, are likely to be characterized as questions of law reviewable on a legal correctness standard.

V. SUMMARY OF CONCLUSIONS

A. Conclusions on Procedural Fairness Rights

- In the case of registration decisions, common law procedural fairness principles require at a minimum that the Program Authority provide project proponents with a summary of concerns or problems it considers to be raised by applications, and an opportunity to make written representations, before deciding whether or not to reject an application.

- For certification decisions the case for full procedural rights including proposed reasons for decision and an opportunity to respond orally and in writing is stronger because the effect of a denial is a deprivation of the benefit of effort and investment already made.

- Compliance decisions also demand high order procedural fairness because compliance action involves imposition of a penalty or at least an onerous requirement and may, depending on the facts, include a finding of misconduct. The impact on proponents is significant.

- For all three types of decisions, if issues raised are personal, involving the credibility of applicants, a more complete and reasoned set of concerns would be necessary and an opportunity to make oral representations is likely to be required. Written reasons for decision are likely to be required, but the claim is strongest where issues of credibility or personal integrity are involved.

- The procedural provision proposed for decisions to refuse to issue or to cancel credits under the LFE system involves notice of full proposed reasons for decision and an opportunity to make oral representations. This provision is appropriate for refusals to certify and for compliance decisions, but would not necessarily be required for registration decisions, except perhaps where specific personal issues were raised against project proponent applicants.

- Final written reasons for decision should be provided for all of these types of decisions.

B. Conclusions on Alternative Dispute Resolution

- The need for and the design of ADR processes for dispute resolution depends on the precise legal, institutional and policy setting.

- An institutional and legal framework that gives clear guidance on the use of ADR in the Offset System should be put in place.

- The regulatory framework for the Offset System should enable the parties to choose from a wide range of ADR options, as is the case with the EUB. This enhances the choice capacity of the parties.

- The strategy of the EUB in maintaining a roster of independent third party facilitators to assist the parties should also be considered. However, if members of the Program Authority are also to preside over ADR processes, there will be the need to afford them specialized training.

- The outcome of an ADR process should be evaluated by the Offset System Program Authority and should be the subject of an explicit decision to approve settlements. However, the Authority should not approve settlements that are either outside its authority or that are not in the public interest having regard to the objectives of the Offset System.

· There are strong fairness and independence grounds for the establishment of an Offset System appeal body, analogous to the EAB. An alternative, considering that numbers of appeals are not likely to be high is a Review Board system like that under CEPA. However, establishment review boards should not be governed by ministerial discretion. Provision for ADR processes should explicitly be added.

C. Conclusions on Access to Justice

· Access to justice for resolution of disputes between project proponents (and other parties) and the Program Authority can take the form of:

1. A legislated statutory appeal, or

2. Judicial review, which is available even in the absence of a legislated appeal.

   In either case a reviewing court will conduct a pragmatic and functional analysis to determine the appropriate standard of review. This involves the relative deference that the court will give to the Program Authority in reviewing decisions.

· If a statutory appeal were to be provided either in new legislation or by legislative amendment, this would suggest an explicit decision role for the court and correspondingly less deference to the Authority. However, consideration of the other relevant factors – relative expertise, purpose of the scheme and the authorizing power, and whether the question is one of fact or law — is still likely to result in a deferential standard.

· In the case of judicial review, the standard of review is likely to be similar (though a more deferential patent unreasonableness standard is possible) if there is no privative clause that purports to exclude judicial review.

· For both appeals and judicial review, specific legal issues concerning interpretation of, for example, sequestration contracts and ownership of sequestration rights, or the legal appropriateness of particular standards or tests (as to ownership) applied by the Program Authority, are likely to be characterized as questions of law reviewable on a legal correctness standard.