

2010

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Citation Details

Natasha A Affolder, "Rethinking Environmental Contracting" (2010) 21 J Envtl L & Prac 155.

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Rethinking Environmental Contracting

Natasha A. Affolder*

Environmental contracts occupy an ill-defined middle ground between command and control regulation and voluntary initiatives. These agreements have captured the imagination of policymakers and scholars in the U.S. and Europe in particular. They are heralded as promising examples of “new governance.” This Article explores a little known example of environmental contracting which emerged in the context of a Canadian diamond mine — the Ekati Environmental Agreement. Through a fine-grained case study of the Ekati Agreement, this article challenges some of the assumptions that shape the “environmental contracting literature as well as the wider literature on “new governance.” By debunking the myths about contracting that pervade this theoretical literature, we can deepen our analysis of the complex interplay between regulating and contracting for environmental protection.

Les ententes environnementales constituent une solution mitoyenne mal définie entre les règlements contraignants et les projets volontaires. Ces ententes suscitent beaucoup d'intérêt de la part des décideurs et des intellectuels aux États-Unis et plus particulièrement en Europe. Elles sont vues comme des exemples prometteurs d'une « nouvelle gouvernance ». Le présent article traite d'une entente environnementale méconnue relative à une mine de diamants canadienne : l'entente Ekati. Par une analyse détaillée du cas d'Ekati, l'article présente un examen de certaines des hypothèses qui ont été dégagées de la documentation portant sur les ententes environnementales, et de façon plus générale, sur « la nouvelle gouvernance ». La démystification des mythes entretenus par les écrits théoriques relatifs aux ententes permettra d'approfondir notre analyse sur l'interaction complexe entre la réglementation et les ententes sur la protection de l'environnement.

1. INTRODUCTION

Are you searching for “innovations in environmental policy”?¹ Flexibility? Worried about the calcified nature of regulation? Shocked by the gaps in legislative regimes? Troubled by the lack of coordination between dispersed environmental

* Assistant Professor, Faculty of Law, University of British Columbia. I thank Jacqueline Kotyk and Julie Desbrisay for excellent research assistance. I am also grateful to the Social Sciences and Humanities Research Council of Canada and the Law Foundation of British Columbia for the funding that supported this research.

¹ David A. Dana, “Symposium: Innovations in Environmental Policy: The New ‘Contractarian’ Paradigm in Environmental Regulation” (2000) U. Ill. L. Rev. 35.

policy tools? Are you unable to trust government bureaucrats? Searching for more localized forms of environmental regulation? If so, look no further than the “contractarian paradigm” of environmental governance, that is being advanced in the U.S. and European legal literature with near missionary zeal. Although environmental contracts may not be entirely familiar to many Canadian audiences it may be time for Canada, a country previously condemned as “unimaginative”² in its environmental instrument choice, to examine this “innovative” and “increasingly popular”³ tool. As criticism of command and control forms of environmental regulation mounts, contracts are heralded as part of a promising “new generation” of environmental governance.⁴

Environmental agreements occupy an amorphous and ill-defined space between command and control regulation and voluntary initiatives. Broadly defined, environmental contracts are negotiated and enforceable agreements addressing environmental issues. Agreements may be between companies and regulators, companies and community groups, or companies and indigenous peoples. They may transcend the individual company unit and involve entire industries. An environmental contract can supplement existing regulation or it can offer an alternative to an otherwise applicable regulatory regime. Given the wide diversity of forms of and parties to environmental contracts, it is not surprising that there is confusion in the literature about what contracts can achieve.

In 1997, an environmental contract was concluded as part of a package of agreements and regulation to govern the Ekati Mine, Canada’s first diamond mine.⁵ The parties to the agreement are the Government of Canada, the Government of the Northwest Territories (GNWT) and the project proponent, BHP Billiton Diamonds Inc. (BHPB). Four Aboriginal groups, the Kitikmeot Inuit Association, the Dogrib Treaty 11 Council, the Akaitcho Treaty 8, and the North Slave Metis Alliance, were actively involved in the contract negotiation. These groups were not included as parties to the contract. Instead, they became signatories to an implementation protocol; a side agreement that involved the Aboriginal organizations in the establishment of a monitoring agency for the mine.

² Mark S. Winfield, “An Unimaginative People: Instrument Choice in Canadian Environmental Law and Policy” (2008) 7 Sask. L. Rev. 79.

³ The Environmental Law Network International, *Environmental Agreements: The Role and Effect of Environmental Agreements in Environmental Policies* (London: Cameron, May, 1998).

⁴ See Richard B. Stewart, “A New Generation of *Environmental Regulation*” (2001) 29 Capital U.L. Rev. 21 [Stewart]; Daniel J. Fiorino, *The New Environmental Regulation* (Cambridge: MIT Press, 2006).

⁵ Environmental Agreement dated as of 6 January 1997 between Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development and the Government of the Northwest Territories as represented by the Minister of Resources, Wildlife and Economic Development, and BHP Diamonds Inc. [Ekati Environmental Agreement], online: <http://www.monitoringagency.net/Portals/0/pdf/key_documents/BHP%20Environmental%20Agreement1997.pdf>. The other agreements included a Socio-Economic Agreement between the company and the Government of the Northwest Territories, and Impact and Benefit Agreements with each of the four affected Aboriginal groups.

The significance of the Ekati Environmental Agreement extends beyond the context of a single mine because this agreement has served as the prototype for agreements for other large Canadian mining projects. Major developments in the Canadian North, such as the Mackenzie Gas Pipeline, are now accompanied by calls for project-specific agreements building on this template.⁶ Given the ongoing demands for environmental agreements in new projects, and given interest at policy levels in “new governance” approaches,⁷ this article examines contracting as a form of environmental governance through the lens of a case study of the Ekati Agreement.

A growing body of largely theoretical literature now expounds on the promise of environmental contracting.⁸ But empirical studies of actual environmental contracts largely document the failure of such agreements to uphold this theoretical promise.⁹ The Ekati Environmental Agreement appears to buck this trend. In many respects this Agreement has succeeded in achieving its aims. Although the experience of the Ekati Agreement tells us much about what contracts can achieve, it also offers a corrective to a narrow framing of both contracts and regulation.

This article proceeds in four parts. Part One introduces the concept of an environmental contract. Part Two sets out a detailed discussion of the Ekati Agreement. Why did it emerge? What does it provide? What promise and pitfalls are revealed by the experience? This discussion is informed by a series of interviews of key actors, conducted in the Northwest Territories and British Columbia.¹⁰ The choice

⁶ See *e.g.* Mackenzie Gas Project, Joint Review Panel, Round 1, Information Request: CARC_R1-02 (Canadian Arctic Resources Committee Information Request asking whether various government departments would enter into an Environmental Agreement with the Proponent and Aboriginal governments).

⁷ See Bradley C. Karkkainen, “‘New Governance’ in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping” (2004-2005) 89 *Minn. L. Rev.* 471 at 496. (“New Governance is not a single model, but a loosely related family of alternative approaches to governance, each advanced as a corrective to the perceived pathologies of conventional forms of regulation.”)

⁸ See Stewart, *supra* note 4; Daniel C. Esty, “Preface” to Eric W. Orts & Kurt Deketelaere, eds., *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (London: Kluwer Law International, 2001) xiii; *supra* note 1.

⁹ See *e.g.* Rena I. Steinzor, “Reinventing Environmental Regulation: The Dangerous Journey From Command to Self-Control” (1998) 22 *Harv. Envtl. L. Rev.* 103 at 136; Jennifer Jeser, “Habitat Conservation Plans Under Section 10 of the *Endangered Species Act*: The Alabama Beach Mouse and the Unfulfilled Mandate of Species Recovery” (1998) 26 *B.C. Envtl. Aff. L. Rev.* 131 at 182.

¹⁰ This article draws on interviews and document analysis conducted through field research by the author in the Northwest Territories and British Columbia between 2004 and 2009. During this time, data was collected on the Agreement’s negotiation and implementation using semi-structured interviews of key actors and analysis of agreement texts, company documents, reports, and correspondence. The interviews involved individuals with leadership positions in mining companies, their legal counsel, federal and territorial governments, monitoring agencies for the Ekati mine, and the neighbouring Snap Lake and Diavik mines, and members of the affected communities. These interviews were carried out with ethical approval from the University of British Colum-

of an interview-based methodology for this study reflects the context-specific nature of environmental contracting and the need to understand, in a finely textured way, the cultural and political dimensions of the negotiating history of this agreement. The Ekati case study exemplifies the potential of contracts to fill regulatory gaps, involve traditionally non-contracting parties, and introduce innovative monitoring institutions. However, the experience does not confirm that these gains could only be realized through a contractual instrument.

Close attention to what happened at Ekati allows one to critically engage with the wider literature on environmental agreements. This is the objective of Part Three wherein the Ekati experience is used to highlight eight assumptions that underlie the current literature on environmental contracting. These assumptions remain both unacknowledged and largely unchallenged in the literature on environmental contracts. Nonetheless, they reveal key questions that must be addressed in order to evaluate any claim that environmental contracts are a superior, or preferred tool, to regulation. Highlighting the assumptions that surround the contractual form is a way of unpacking the terrain of political struggle that surrounds this form of governance. Indeed, Part Four concludes by drawing attention to the political dimensions of this legal tool.

The ongoing assault on command and control forms of environmental regulation from multiple directions has created a market opportunity for “new,” “innovative,” and “collaborative” forms of environmental governance.¹¹ It is, therefore, unsurprising that scholars of “new governance” in certain Western democracies have claimed environmental contracts as yet another example of a transformation from regulation to governance. But, there comes a time when it’s useful to look beyond the sales pitch language of newness, of innovation, of cooperation, and of deliberation. While environmental contracts can thus be framed as indicative of a preferred form of governance, they can also be analyzed, quite simply, as agreements between parties. This article proceeds on both levels of analysis.

2. CONCEPTUALIZING ENVIRONMENTAL CONTRACTS

Environmental Agreements have now emerged in various jurisdictions in both Canada and a number of other countries.¹² The practice of environmental con-

bia’s Behavioural Research Ethics Board. All interviews were conducted with the written consent of the participants. To protect the identities of those interviewees who requested anonymity, subjects are assigned simply a letter reference and the interview date — the location of individual interviews is not provided. Full transcripts of the interviews are on file with the author.

¹¹ On the “shifting architecture” of environmental law and governance, see Neil Gunningham, “Environmental Law, Regulation and Governance: Shifting Architectures” (2009) 21 J. Envtl. L. 179.

¹² On agreements in Canada, see Ciaran O’Faircheallaigh, *Environmental Agreements in Canada: Aboriginal Participation, EIA Follow-up and Environmental Management of Major Projects* (Calgary: Canadian Institute of Resources Law, 2006) [O’Faircheallaigh]; Meinhard Doelle, “Regulating the Environment by Mediation and Contract Negotiation: A Case Study of the Dona Lake Agreement” 2 J.E.L.P. 189 [Doelle]. For Europe and the United States, see Eric W. Orts & Kurt Deketelaere, eds.,

tracting encompasses a tremendous diversity of agreements. Despite differences, contracts share the characteristic of offering a highly contextualized response to project-specific, firm-specific, or industry-specific environmental governance issues.

In Canada, the federal ministry of Indian and Northern Affairs Canada (INAC)¹³ explains the scope and justification of environmental agreements in this way:

Environmental Agreements are legally binding contracts between two or more parties that may address oversight mitigation measures identified in the Report of Environmental Assessment and/or monitoring provisions for a development project with the objective to prevent any adverse environmental effects. The purpose of Environmental Agreements may be to establish, in a public document, the legally binding roles and responsibilities of INAC, the proponent, other governments, and affected parties with regard to interactive environmental management practices during the construction, operation, reclamation, and post-closure phases of a specific project. The contents of Environmental Agreements are project-specific. Environmental Agreements are not required under legislation and are not required for all projects.¹⁴

INAC indicated in a 2002 statement that it had developed six environmental agreements over the past 20 years to deal with the significant adverse environmental impacts of large-scale development projects.¹⁵ These Canadian agreements have attracted the attention of environmental managers, mining engineers, and geographers, but they have received less attention from legal scholars.¹⁶ In part, this may be because legal scholars appear reluctant to embrace transactional documents as fodder for legal scholarship.¹⁷ This may be due to the one-off nature of these docu-

Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe (London: Kluwer Law International, 2001) [Orts & Dekete-laere]; and *supra* note 3. On Japan, see *e.g.* Eckhard Reh binder, “Ecological Contracts: Agreements between Polluters and Local Communities” in G. Teubner, L. Farmer & D. Murphy, eds., *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization* (New York: John Wiley & Sons, 1994) 147 at 151 [Rehbinder].

¹³ INAC is also referred to in this article as the Department of Indian Affairs and Northern Development (DIAND).

¹⁴ Mackenzie Valley Environmental Impact Review Board, Paramount Cameron Hills Extension Environmental Assessment (EA03-005), Indian and Northern Affairs Canada’s Response Dated 19 January 2004 (Response IR Number 1.2.31 to Fort Providence Metis Council, MVEIRB Information Request 1.1.34) (on file with author).

¹⁵ Mackenzie Valley Environmental Impact Review Board, Information Request #1.1.70, Snap Lake Diamond Project Environmental Assessment, INAC’s Response dated 3 June 2002 (on file with author).

¹⁶ But see Doelle, *supra* note 12; Steven A. Kennett, *Project-Specific Environmental Agreements in the NWT: Review of Issues and Options* (2001) (unpublished draft report on file with author) [Kennett].

¹⁷ But see Michael P. Vandenbergh, “The Private Life of Public Law” (2005) 105 Colum. L. Rev. 2029.

ments and the challenges associated with identifying and obtaining such agreements. It may also be explained by the reluctance of many legal scholars to move beyond the usual diet of statutory research sources and judicial opinion.

But, a rich source of thoughtful theoretical work on environmental contracts does exist for Canadian researchers. Pioneering work on environmental contracts undertaken by Andrew R. Thompson, Barry Barton, and their colleagues at the University of British Columbia in the early 1980s highlights the potential for environmental agreements to respond to regulatory inadequacies in the environmental area. As actual contracts were not yet in existence, these researchers theorized models for contracting as an alternative to criminal law mechanisms for pollution control,¹⁸ and as a form of environmental governance particularly well-suited to the Canadian North.¹⁹ The Thompson Report identified northern resource development as an ideal testing ground for contractual approaches given the small number of parties and well-defined interests. Now, with over a decade of experience of these agreements, it is an opportune time to revisit this early theoretical work to test the hypotheses advanced over two decades ago.

The use of environmental agreements is often framed in the literature as a response to implementation and enforcement deficits in environmental law.²⁰ In Canada, the inadequacies of environmental assessment processes, and, particularly, the lack of environmental assessment follow-up, are identified as factors motivating the adoption of project-specific environmental agreements.²¹ But this is not a complete explanation. Canadian agreements are fuelled by a legacy of colonialism, a historic exclusion of Aboriginal groups, and a mistrust of government. Federal and territorial governments are key environmental overseers in the North, but they are also tasked with attracting mining investment and participating in mining projects as tax collectors, equity participants, and dividend receivers. These multiple (and conflicting) roles can undermine government's ability to operate as an effective environmental regulator. In the face of legislative and regulatory inaction, non-state actors have turned to environmental agreements as a form of "social self-help."²² Further, in the case of agreements such as the Ekati Agreement, institutions have been created to serve as environmental "watchdogs" on both companies and governments.

The Thompson Report cites a number of anticipated advantages of contracts over exclusively regulatory approaches. These include the ability of contracts to deliver certainty and structure, to promote a consensual approach to environmental management, to offer a mechanism to coordinate regulatory efforts, to fill gaps in regulation, to be tailored to specific circumstances, and to be introduced in a grad-

¹⁸ See Barry J. Barton, Robert T. Franson & Andrew R. Thompson, *A Contract Model for Pollution Control* (Vancouver: Westwater Research Centre, 1984).

¹⁹ Andrew R. Thompson & Harriet I. Rueggeberg, "Contracts in Environmental Management and Conservation in the North, Final Report, 1986" [Thompson Report].

²⁰ Reh binder, *supra* note 12 at 148.

²¹ Lindsay Galbraith, Ben Bradshaw & Murray B Rutherford, "Towards a New Supra-Regulatory Approach to Environmental Assessment in Northern Canada", (March 2007) 25(1) *Impact Assessment and Project Appraisal* 27.

²² Reh binder, *supra* note 12 at 148.

ual manner.²³ The concerns anticipated in that same report include the threat that contracts will impair the regulatory system by reducing discretion, undermining public accountability and encouraging greater interdepartmental conflict. Will contracts be implemented? Will the public perceive that their interests are excluded? Without clear mechanisms for public input, will unambitious public authorities fail to negotiate robust contractual regimes? Will contracts ever be enforced given the contractual rule of privity?²⁴ These are all questions to revisit in Section Three after we examine what happened at Ekati.

3. THE EKATI MINE, NORTHWEST TERRITORIES

(a) Project Background

The location and political and legal context of the Ekati mine are significant in explaining the Environmental Agreement. Ekati is Canada's first diamond mine. It is located near Lac de Gras in the Northwest Territories, 200 kilometres from the Arctic Circle. In 1997, the region had little recent experience with large-scale industrial development. The mine officially opened in October 1998 and now produces approximately six per cent of current world rough diamond supply by value.²⁵ The Ekati project was set against a backdrop of unsettled land claims and a legal regime that contemplated the North as a "colony."²⁶ The key "environmental" regulator of the project was the leaseholder — the federal Department of Indian Affairs and Northern Development (DIAND). In addition to DIAND, multiple government departments at the federal and territorial levels held jurisdiction over various elements of the project.

(b) The Environmental Agreement

As Ekati was the first mine to be developed in the area in over a decade, regulatory and negotiation processes had to catch up with the evolving expectations of local Aboriginal peoples. Neither a prototype legal agreement, monitoring institution model nor a defined regulatory path for a project of this magnitude were available. As a result, the process of project approval was marked by innovations in project governance, and a central role emerged for negotiated agreements as a key element of the regulatory and benefits package for the mine.²⁷ The Environmental

²³ Thompson Report, *supra* note 19 at 7.

²⁴ "Proceedings of the Workshop Held March 25-26, 1986 in Yellowknife, Northwest Territories," included in the Thompson Report, *supra* note 19 at 4.

²⁵ BHP Billiton, Ekati Mine, online: <<http://www.bhpbilliton.com/bb/ourBusinesses/diamondsSpecialtyProducts/ekatiDiamondMine.jsp>>.

²⁶ Interview with subject G (22 August 2009).

²⁷ For a discussion of the Impact and Benefit agreements and the Socio-Economic Agreement, see Canadian Institute of Resources Law, *Independent Review of the BHP Diamond Mine Process* (Calgary: Canadian Institute of Resources Law, 1997) [Independent Review]; Irene Sosa & Karyn Keenan, *Impact and Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada* (Toronto: Canadian Environmental Law Association, 2001) [Sosa & Keenan].

Agreement grew out of concerns about the inadequacy of existing statutory frameworks to deal with a large-scale project of this nature, and a lack of trust by Aboriginal and non-governmental participants that the government would rigorously monitor the environmental impacts of the mine.

During the public review hearings, participants questioned whether BHPB's adaptive environmental management strategy would sufficiently address their concerns about the project's impact on caribou, water, and fish, among other resources.²⁸ Perceived gaps in the regulatory regime included effective governance of impacts on wildlife, air quality, and the socio-economic impacts of the mine.²⁹ The fact that DIAND was tasked with both attracting economic development and protecting the environment led to fear that a less than rigorous approach to environmental protection and monitoring would result.

A particular dissatisfaction with the environmental assessment (EA) process also spurred the creation of the Environmental Agreement.³⁰ While the Mackenzie Valley EA processes have been cited as examples of "best practices" of EA in Canada,³¹ dissatisfaction with the Ekati EA was loudly expressed. Aboriginal communities and environmental groups felt that the process was undermined by tight timeframes and the limited scope of assessment.³² They were concerned about the lack of mechanisms to ensure that BHPB would implement the verbal promises it made during the hearings. The legacy of exclusion of Aboriginal communities and failure to value their vast knowledge of the northern environment led to a "cynicism and even hostility" towards the entire EA process.³³

Other factors further contributed to create impetus for something beyond the project specific deliverables of the EA process. These included: the newness of diamond mining to the North; the perceived failure of previous efforts to regulate mines properly; the absence of a comprehensive environmental regime governing wildlife protection and air quality effects; concerns about protected areas raised by the World Wildlife Fund;³⁴ the need for financial security to back-up environmen-

²⁸ Kevin O'Reilly, *The BHP Independent Environmental Monitoring Agency as a Management Tool* (Yellowknife: Canadian Arctic Resources Committee, 1998).

²⁹ Kennett, *supra* note 16 at 11.

³⁰ The EA process was initiated before the new *Canadian Environmental Assessment Act* (CEAA) became law. Although the form and content of the new CEAA was known at the time, the project proponents decided to file under the existing Environmental Assessment and Review Guidelines Order to avoid being the first project to be assessed under new legislation. Interview with subject B (16 July 2009).

³¹ Sarah Njoki Macharia, "A Framework For Best Practice Environmental Impact Assessment Follow-up: A Case Study of the Ekati Diamond Mine, Canada" (M.A. Thesis, University of Saskatchewan, 2005) [unpublished].

³² *Supra* note 28.

³³ Ciaran O'Faircheallaigh, "Making Social Impact Assessment Count: A Negotiation-Based Approach for Indigenous Peoples" (1999) 12(1) *Society and Natural Resources* 63 at 64.

³⁴ In 1996, the World Wildlife Fund (WWF) of Canada initiated a lawsuit for judicial review of the EA Panel Report based on the government's failure to adequately consider the issue of protected areas designation. The application for judicial review was withdrawn when the federal government promised to develop a plan for protected areas

tal promises;³⁵ and the determination of Aboriginal communities to secure monitoring of both the company and government.

Two months after the environmental review panel filed its report, those involved with the project awaited the imminent project approval by the Minister. Instead, on August 8, 1996, the DIAND Minister Ron Irwin announced that before granting final approval, he would need to see “significant progress,” within 60 days, on the negotiation of a suite of agreements including impact and benefit agreements, a socio-economic agreement, and an environmental agreement. On the subject of the environmental agreement, he stated:

To ensure all 29 recommendations and the commitments made by BHP are applied during the management of the project, the federal government will negotiate a binding environmental agreement with the company. This agreement will cover all those issues which are not normally part of license terms and conditions. It will provide a visible record of the commitments of the company to carry out environmental monitoring, monitoring programs, and to prevent and mitigate environmental impacts. . . . I will be assessing progress on the environmental and benefits agreements before signing the water license for the project.³⁶

Prior to this statement, there had been no warning (or even a hint) that an environmental agreement was being contemplated, let alone required. In the words of one of BHPB’s lawyers: “Having done everything the law required, BHP is now faced with these additional discretionary items which had to be completed within 60 days, failing which the minister had threatened not to sign the badly-needed water license.”³⁷ The Minister used his leverage over the water license to secure these additional agreements for which there was no legal basis.³⁸

Once the negotiation began, the process quickly moved “well beyond what the government and BHPB had ever anticipated.”³⁹ This was particularly the case with respect to Aboriginal participation in the negotiations. The first negotiation session for the agreement was terminated early by DIAND who had been instructed to ensure that the Aboriginal groups would be involved. At the second negotiation session, the Aboriginal groups took a seat at the table and assumed a leadership role in

in the region. “Deal Reached to Protect Arctic Wilderness Sites” *Globe and Mail* (14 January 1997) A4.

³⁵ The failure by government to ensure that earlier projects had posted sufficient funds to guarantee reclamation, such as the Colomac and Giant Mine, made an environmental agreement attractive for the opportunity it offered to secure adequate security deposits before the mining operation would be allowed to proceed. David H. Searle, John M. Olynyk & Kathryn Vennand, “Doing Business In Canada’s North: the Yukon, the Northwest Territories, and Nunavut” (2000) 46 *Proceedings of Rocky Mountain Mineral Law Institute* 4-1 at 4-16 [Searle].

³⁶ Reproduced in Searle, *ibid.* at 4-38.

³⁷ *Ibid.* These agreements included the Environmental Agreement, impact and benefit agreements and a socio-economic agreement with the Government of the Northwest Territories. Each of these agreements went beyond the existing regulatory requirements for the project.

³⁸ Independent Review, *supra* note 27 at 16-17.

³⁹ *Supra* note 28.

the negotiations while the government negotiators took a seat at the back of the room.⁴⁰

The Minister's statement had not specified the content of the agreement. One item that moved far beyond the EA Panel Report was the creation of an independent monitoring agency.⁴¹ The company, in its Environmental Impact Statement, had advanced the idea of community involvement in monitoring, citing the example of the 1972 agreement for the Island Copper mine on Vancouver Island. The community around Ekati wanted something more "robust" and "with teeth."⁴² The Monitoring Agency created under the Environmental Agreement thus went beyond both the company's proposal and the recommendations of the EA Panel Report.

Why did this agreement happen at Ekati? Local Aboriginal groups were effective negotiators, with the legal and technical capacity to negotiate the agreements. One company official described the Aboriginal negotiators involved as "the best negotiators in the world" given their decades-long experience with land claims negotiations.⁴³ A government minister also was willing to use his discretion and the leverage afforded by an unsigned license to create pressure on the company to sign the agreement. In addition, project economics were favourable. At Ekati, there was timing pressure on BHPB to be the first company to mine the high-quality Canadian diamonds.⁴⁴ Further, BHPB had to work hard to keep its parent company's interest in the project through a long and expensive permitting phase. Agreements with aboriginal groups and innovative mechanisms for environmental protection were translated for the parent company as aspects of "sustainable development":

We had to keep it sexy and interesting for BHP [the parent company]. We were in competition with the iron ore division for the company's attention. We used words like "sustainable development." They liked that stuff.⁴⁵

One negotiator likened the process of negotiating the Environmental Agreement to "a butcher making hamburger."⁴⁶ Every obligation that did not have another home was put in the Agreement. The Agreement attempts to fill gaps in the regulatory regime, formalizing commitments made by BHPB during the EA process that weren't otherwise legalized. The Agreement also provides a basis for monitoring that exceeds statutory requirements. It establishes comprehensive mechanisms for governing and reporting on environmental impacts. Finally, it provides for the participation of Aboriginal groups.

⁴⁰ Interview with subject B (16 July 2009).

⁴¹ William J. Couch, "Strategic Resolution of Policy, Environmental, and Socio-Economic Impacts in Canadian Arctic Diamond Mining: BHP's NWT Diamond Project" (2002) 20(4) *Impact Assessment and Project Appraisal* 265 at 275.

⁴² Interview with subject E (22 July 2009).

⁴³ Interview with subject A (20 May 2004).

⁴⁴ Ekati diamonds in 2000 fetched an average carat price of US\$168/carat while worldwide production yielded an average price of US\$60/carat. "Dia Met Minerals Announces First Quarter Results From Ekati Diamond Mine, Net Earnings of \$13.2 Million or \$0.43 per Share" *Business Wire* (26 June 2000).

⁴⁵ Interview with subject A (20 May 2004).

⁴⁶ Interview with subject B (16 July 2009).

The major environmental concerns associated with the mine included its impacts on wildlife (particularly the Bathurst caribou herd which is the largest herd in Canada) and on aquatic ecosystems, the problems caused by mine waste, and the cumulative impacts of the mine combined with other human impacts in the region.⁴⁷ The Environmental Agreement addresses these concerns through:

- *The Creation of the Monitoring Agency.* The Agency provides expert evaluation and monitoring of both company and government and ensures the exchange of information between community members and the company, with particular attention to Aboriginal participation and oversight.⁴⁸ The Monitoring Agency has a seven member Board of Directors, four of whom are appointed directly by the Aboriginal organizations. The remaining three directors are appointed jointly by the federal and territorial governments and BHPB in consultation with the Aboriginal organizations;⁴⁹
- *Environmental Management Plans.*⁵⁰ The content of the plans is to be provided by BHPB and is not contained in the Agreement;
- *Environmental Reporting.* The Company must submit detailed annual reports containing summaries of compliance and monitoring information and a discussion of company responses to compliance problems. The parties have an opportunity to comment on these reports.⁵¹ The federal and territorial governments and BHPB are required to respond in writing to any recommendations from the Monitoring Agency that they will not implement;
- *Environmental Monitoring Obligations for Air and Water Quality and Wildlife.*⁵² The monitoring programs are not set out in the Agreement but are approved in conjunction with the Environmental Management Plans;
- *A Security Deposit* in the amount of \$11.075 million for land impacts and a guarantee of \$20 million for potential water impacts are required.⁵³ These funds may also be drawn upon if BHPB does not comply with other requirements in the Agreement including non-compliance with reporting requirements or failure to rectify faulty management plans;
- *A Closure and Reclamation Plan.*⁵⁴ Reclamation of the project is to be undertaken progressively during the life of the project. Failure to restore the project site will lead to use of the security deposit for this purpose;

⁴⁷ William A. Ross, "The Independent Environmental Watchdog: A Canadian Experiment in EIA Follow-up" in Angus Morrison-Saunders & Jos Arts, eds., *Assessing Impact: Handbook of EIA and SEA Follow-up* (London: Earthscan, 2004) 178 at 185.

⁴⁸ Ekati Environmental Agreement, *supra* note 5 at Article IV.

⁴⁹ *Ibid.* at Article IV.

⁵⁰ *Ibid.* at Article VI.

⁵¹ *Ibid.* at Article V.

⁵² *Ibid.* at Article VII.

⁵³ *Ibid.* at Article XIII.

⁵⁴ *Ibid.* at Article VIII.

- *Dispute Resolution Mechanisms* include discussions, mediation, and binding arbitration that shall be open to the public;⁵⁵
- *Traditional Knowledge* is to be given “full consideration along with other scientific knowledge” and incorporated into all environmental plans and programs.⁵⁶

The Agreement thus seeks to address the issues of greatest concern to the surrounding communities. Absent the Environmental Agreement, there is no legislation providing for mine site-specific monitoring of migratory wildlife like the caribou. There is also a desire to address monitoring at the ecosystem level, rather than according to legal and jurisdictional divides that make little sense from an environmental point of view. For example, jurisdiction over water issues is traditionally divided between water licenses for water quality,⁵⁷ and the *Fisheries Act* for fish habitat protection.⁵⁸ Having a monitoring agency willing to focus on what is happening to the environment as a whole is a departure from conventional monitoring approaches.

(c) Defining Success and Failure

The Ekati Environmental Agreement is feted as a success story.⁵⁹ But how do we define its success or failure? One approach common to the study of environmental agreements is to determine an agreement’s success by whether “it reaches its own environmental targets.”⁶⁰ Although this is a rather unambitious approach and weak agreements may be defined as “successful” simply because they attempt so little, it is one place to start.

The purposes of the Environmental Agreement are fivefold:

- (a) to respect and protect land, water and wildlife and the land-based economy, essential to the way of life and well-being of the Aboriginal peoples;
- (b) to facilitate the use of holistic and ecosystem-based approaches for the monitoring, management and regulation of the Project;
- (c) to provide advice to BHP to assist BHP in managing the Project consistent with these purposes;
- (d) to maximize the effectiveness and coordination of environmental monitoring and regulation of the Project; and
- (e) to facilitate effective participation of Aboriginal Peoples and the general public in the achievement of the above purposes.⁶¹

⁵⁵ *Ibid.* at Article XIV.

⁵⁶ *Ibid.* at Article XI.

⁵⁷ *Northwest Territories Water Act*, S.C. 1992, s. 14.

⁵⁸ *Fisheries Act*, S.C. 1985, s. 5(f).

⁵⁹ See *supra* note 41. For a positive assessment of the Monitoring Agency, in particular, see Macleod Institute, *Independent Environmental Monitoring Agency: Evaluation Report* (Calgary: Macleod Institute, 2000) [Macleod Institute].

⁶⁰ Environmental Law Network International, *supra* note 3.

⁶¹ Ekati Environmental Agreement, *supra* note 5 at Article 2.1.

If success in achieving these purposes is measured against a counterfactual scenario in which there was no environmental agreement, the vast majority of those interviewed suggest the Agreement is a success. The Monitoring Agency, in particular, is singled out as an example of the difference the Environmental Agreement has made. The strengths and weaknesses of the Monitoring Agency have been assessed in a number of articles and reports⁶² and graduate student theses.⁶³ These studies conclude that the Agency is widely perceived to be an effective mechanism for technical review and management of environmental impacts at the mine.⁶⁴ BHPB did not support the idea of creating (or having to fund) an independent watchdog. The company suggests that the Monitoring Agency adds complexity and confusion to the environmental management regime and allows government agencies to avoid the responsibility they would normally bear under conventional regulatory regimes.⁶⁵

Company complaints that the Monitoring Agency is at times “a pain in the neck” are perhaps the best acknowledgement that the Agency is doing its job.⁶⁶ Less effective is the integration of local knowledge by BHPB and by regulators into environmental management and monitoring.⁶⁷ The integration of traditional knowledge is “simply not happening.”⁶⁸ Aboriginal groups indicate a desire to be more involved in monitoring, and to have youth trained to be monitors. They continue to request and be denied separate capacity funding for this purpose.⁶⁹ Aboriginal groups were informed that they can use the funds they have obtained already from the project (from impact and benefit agreement payments) for capacity building.⁷⁰

Funding has also posed problems for the Monitoring Agency.⁷¹ Pursuant to the dispute resolution clauses of the Agreement, two mediations have taken place based on differences of opinion with respect to the Monitoring Agency’s independence and budget work plan. These mediations highlight the problem of contractual

⁶² See *supra* note 47.

⁶³ See *supra* note 31; Lindsay Galbraith, “Understanding the Need for *Supra*Regulatory Agreements in Environmental Assessment: An Evaluation From the Northwest Territories, Canada” (M.A. Thesis, Simon Fraser University, 2005) [unpublished].

⁶⁴ O’Faircheallaigh, *supra* note 12 at 16-17; Macleod Institute, *supra* note 59 at 9. According to interviews conducted as part of an Independent Review of the Ekati Mine regulatory process, most participants in the process believe that it was effective in achieving an acceptable end product. Independent Review, *supra* note 27 at 44.

⁶⁵ O’Faircheallaigh, *supra* note 12 at 18.

⁶⁶ Interview with subject B (16 July 2009).

⁶⁷ Independent Environmental Monitoring Agency, *Agency Annual Report 2002-2003* (Yellowknife: Independent Environmental Monitoring Agency, 2003) at 7.

⁶⁸ Interview with subject C (22 July 2009).

⁶⁹ *Ibid.*

⁷⁰ Interview with subject C (22 July 2009).

⁷¹ The funding for the Monitoring Agency for the first two years was \$450,000 each year with BHPB contributing \$350,000 and the remaining amount split between the federal and territorial governments. Subsequent funding (approx. \$500,000) is to be provided directly by BHPB in consultation with the Monitoring Agency, based on work plans and budgets. Ekati Environmental Agreement, *supra* note 5 at Article 5.6.

privity. Only the parties to the Agreement can invoke the dispute resolution provisions. The Monitoring Agency is not a party. As parties to the agreement must themselves fund any dispute resolution proceedings, it took a very long time to get the government parties to call for mediation. This reveals an accountability deficit in the Agreement as the agency tasked with monitoring the government and the company is unable to invoke the dispute resolution clauses under the Agreement.

Tension around funding and a changing, more negative economic climate have led to further fears that the company's approach to the Agreement will become less cooperative. In the words of one interviewee, the:

Environmental agreement works well as long as everyone wants to cooperate . . . Until the economic downturn, BHP and [the neighbouring mine] Diavik were reasonable. They just paid the bills. When money got tighter, things became more challenging. This is due to the companies' perception that they aren't gaining much through the agencies they fund.⁷²

BHPB's cooperation is essential to the functioning of the Agreement. However, a major challenge in instilling a culture of cooperation between Aboriginal groups, government officials, and BHPB arises from the huge and ongoing turnover of personnel in the North. One interviewee was of the view that on both the company side and the government side, almost no one involved in negotiating the Environmental Agreement was still around.⁷³

In the event that BHPB fails to comply with the Agreement, a number of mechanisms can be used to force compliance. One such mechanism is a Minister's Report which can be issued to compel the company to correct a deficiency or proceed to dispute resolution. Two Minister's Reports have been issued so far at the initiative of the GNWT. Both involved cases in which the GNWT expressed concern that the BHPB's reports were unsatisfactory due to unsubstantiated claims that the effects of the project on air quality and wildlife monitoring were minor.⁷⁴ Despite the fact that the company responded to the Minister's Reports, one regulator suggests that an environmental contract is not an effective tool for compelling a company to do "something it doesn't want to do."⁷⁵ Arguably, a government agency such as the Land and Water Board would be much more effective in such circumstances because it can stop work or withdraw licenses, and in so doing quickly force companies to cooperate. This is the power of regulation.

(d) Beyond Ekati: the Diavik and Snap Lake Environmental Agreements

The Ekati Environmental Agreement has led to innovations not only at the Ekati mine but also for the major mining projects that followed in the Canadian

⁷² Interview with subject G (26 August 2009).

⁷³ Interview with subject C (22 July 2009).

⁷⁴ See Independent Environmental Monitoring Agency, *2006-07 Technical Annual Report* (Yellowknife: Independent Environmental Monitoring Agency, 2007) at 36.

⁷⁵ Interview with subject G (22 August 2009).

North.⁷⁶ This agreement crystallized expectations about the degree of Aboriginal participation in environmental agreements for major Canadian projects: opening up the process of negotiating the Environmental Agreement to affected Aboriginal communities meant it would be virtually impossible to return to a process of closed negotiations between governments and project proponents in this region.

The Ekati Environmental Agreement provided a precedent and springboard for the negotiation of environmental agreements for two other neighbouring diamond mines, Diavik and Snap Lake. Unlike the case at Ekati, the affected Aboriginal groups are parties to these two agreements.⁷⁷ The environmental agreements concluded for these two mines did not replicate the Ekati Monitoring Agency, but each introduced a different form of monitoring agency. This change reflected the concern that the Ekati model, while effective as a technical monitoring body, failed to incorporate the local knowledge of Aboriginal groups and to act as a conduit for communication between the company and the community.

In contrast with the Ekati model, the Diavik Environmental Monitoring Advisory Board (EMAB) operates more as a community liaison group than as an independent watchdog. Members of the Diavik EMAB sit as representatives of the parties that appointed them. The company also has a place at the table.

The Snap Lake Agreement introduced a third variant on the theme of an independent monitoring agency — reflecting a desire to forge some sort of middle ground between the “expert evaluation” approach of the IEMA and the “community oriented” focus of EMAB.⁷⁸ The Snap Lake Environmental Monitoring Agency (SLEMA) employs only Aboriginal group representatives.

The Snap Lake Agreement expressly contemplated the merging of the three monitoring agencies.⁷⁹ This was an acknowledgement of the cumulative impacts of the three mines, and the possible cost and workload efficiencies that could be achieved. The lack of interest from the three companies in a joint approach means that a proposed agency appears unlikely to materialize. This has created problems

⁷⁶ For example, the Voisey Bay Nickel Mine’s Environmental Management Agreement was also at least partially based on the Ekati model. See *Environmental Management Agreement by and between the Government of Newfoundland and Labrador, the Government of Canada, Labrador Inuit Association, the Innu Nation* (22 July 2002), online: <<http://www.nr.gov.nl.ca/voiseys/pdf/envmanagement.pdf>>.

⁷⁷ See *Snap Lake Diamond Project Environmental Agreement by and between the Government of Canada, Government of Northwest Territories, De Beers Canada Mining Inc. and the Dogrib Treaty 11 Council, Lutsel K’E Dene Band, Yellowknives Dene First Nation and North Slave Métis Alliance* (31 May 2004) [Snap Lake Environmental Agreement], online: <http://www.slema.ca/documents_.php?page=SLEMA/Misc%20Documents/2004>; *Diavik Environmental Agreement by and between the Government of Canada, Government of Northwest Territories, Diavik Diamond Mines Inc, Dogrib Treaty 11 Council, Lutsel K’E Dene Band, Yellowknives Dene First Nation and North Slave Métis Alliance, and Kitikmeot Inuit Association* (8 March 2000), [Diavik Environmental Agreement], online: <http://www.diavik.ca/documents/Diavik_Environmental_Agreement.pdf>.

⁷⁸ Interview with subject D (22 July 2009).

⁷⁹ Snap Lake Environmental Agreement, *supra* note 77 at Article 8.1.

for SLEMA which was only contemplated by the Snap Lake Agreement to be an interim solution, leaving a budget shortfall that no one is willing to fill.

Canadian non-profit groups have also worked to disseminate the experience of the Ekati mine internationally. The Canadian Environmental Law Association held a workshop in Lima, Peru reviewing agreements between mining companies and Aboriginal communities in Canada. This workshop included a discussion of environmental agreements, and, in particular, the Monitoring Agency.⁸⁰ The North-South Institute in Canada has published a case study documenting the experiences of one First Nation, the Lutsel K'e Dene, in negotiating with mining companies, including their experience with the Ekati Mine.⁸¹ The Lutsel K'e Dene have shared their experiences at Ekati with other communities facing the prospect of negotiations with BHPB and other global mining companies over mines in their communities.⁸² BHPB has also used the Ekati model as evidence that it successfully incorporates indigenous peoples in its mining operations. Thus, in a conflict in Botswana over claims of the displacement of Kalahari Bushmen, BHPB cited the Ekati example as a model of their successful relationship with indigenous peoples and their desire to negotiate with the Bushmen.⁸³

4. RE-THINKING ENVIRONMENTAL CONTRACTING

In this section, I use the experience of the Ekati Agreement just discussed to shed some empirical light on a number of assumptions that currently shape the literature on environmental contracting. A dominant theme that pervades the environmental contracting literature (as well as the wider literature on "new governance" approaches to environmental law) is that contracting belongs to that sphere of governance that is innovative, cooperative, negotiated, creative, customized and new.⁸⁴ Regulation then becomes cast as traditional, confrontational, imposed, "business as usual," and a "one-size-fits-all" model.⁸⁵ The tendency to frame contracting in this binary way (contractual vs. regulatory, private law vs. public law, interventionist vs. deregulatory) imports an unnecessarily narrow vision of both contracting and regulating, which this article seeks to correct. As the Ekati experi-

⁸⁰ Sosa & Keenan, *supra* note 27.

⁸¹ Viviane Weitzner, *Dealing Full Force: Lutsel K'e Dene First Nation's Experience Negotiating with Mining Companies* (2006), online: <http://www.nsi-ins.ca/english/pdf/Full_Force_Eng.pdf>.

⁸² See the Panel Presentation on Suriname and the Lutsel K'e Dene First Nation in "Mining in or Near Ancestral Lands in the Americas: Summary Report" (Ottawa: The North-South Institute & The Assembly of First Nations, 2005), online: <http://www.nsi-ins.ca/english/pdf/Summary_Report_Oct5_Eng.pdf>.

⁸³ Tom Price, "Kalahari Bushmen Take on Mining Titan Over Right to Land" *Business Day* (8 October 2004).

⁸⁴ See Bradley C. Karkkainen, "Information-Forcing *Environmental Regulation*" (2005-2006) 33 Fla. St. U.L. Rev. 861; Jody Freeman & Daniel A. Farber, "Modular *Environmental Regulation*" (2005) 54 Duke L.J. 795.

⁸⁵ For a thoughtful discussion of the social construction of regulation, see Timothy F. Malloy, "The Social Construction of Regulation: Lessons from the War Against Command and Control" (2010) 58 Buffalo L. Rev. 267.

ence reveals, the line between “regulating” and “contracting” becomes blurred as contracting occurs against a backdrop of the regulatory state, and as regulators enter into contracts. As Geoffrey Hazard and Eric Orts suggest, the differences between contract and regulation are real and important, but they are largely differences of degree rather than kind.⁸⁶

While the Ekati Agreement introduced institutional novelties by way of contract, the contractual form is not necessary to achieve much of what this Agreement delivered. Indeed, contracts and regulation are not bound in some zero sum relationship. Contracts may be used to fill regulatory gaps. But the promise of environmental contracting is not purely about the pitfalls of regulating. Moreover, the contractual form is not a neutral governance choice. This form of governance may signal wider cultural and discursive transformations at work, and a shift in governing practices.

I am attentive in this section to the dangers of lumping together a range of contracts, and literatures, that differ significantly. Project-specific “microcontracts”, industry-wide “macrocontracts,” contracts which do or do not involve government regulators, all exhibit important distinctions.⁸⁷ Yet, there is utility in examining these agreements, and this emerging body of literature, together to understand the claims that are being made about the contractual form and its promise. A collective approach to this scholarship also sheds light on the assumptions that underlie claims about both regulation and contracting. The exercise of identifying eight assumptions that shape the literature on environmental contracting reveals the need to move away from preconceived and knee-jerk notions of what contracts can and cannot do towards a more critical and grounded reflection of the promise, and pitfalls, of environmental contracts.

(a) Eight Assumptions of the Environmental Contracting Literature

(i) The Assumption of Voluntarism

One assumption that pervades the literature is that companies choose to enter into environmental agreements with regulators. As rational actors, companies weigh the costs and benefits of contracting against the “default rules” of regulation and make an informed choice whether to contract or not. Indeed, the law and economics literature on environmental contracting relies heavily on the default rule paradigm to explain where contracting will be an optimal approach.⁸⁸ Underlying such an approach is an assumption that contracts are voluntary, and that companies are at liberty to choose whether to contract, or not. This is the myth of choice.

⁸⁶ Geoffrey C. Hazard, Jr. & Eric W. Orts, “Environmental Contracts in the United States” in Eric W. Orts & Kurt Deketelaere, eds., *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (London: Kluwer Law International, 2001) 71 at 77.

⁸⁷ The terms “microcontracts” and “macrocontracts” belong to Richard Stewart. See Stewart, *supra* note 4 at 60.

⁸⁸ See e.g. Jason Scott Johnston, “The Law and Economics of Environmental Contracts” in Eric W. Orts & Kurt Deketelaere, eds., *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (London: Kluwer Law International, 2001) 271.

The negotiating history of the Ekati Agreement reveals how such an assumption may be misplaced. The company negotiators felt they had little choice but to enter into the Agreement, as contracting was imposed as a prerequisite for getting an essential permit, the water license. Given the lack of legal basis for this contract, the company's lawyers contemplated challenging the agreement requirement through judicial review proceedings but they ultimately chose to enter into negotiations instead. It is hardly appropriate to categorize this as a "voluntary" decision. While the Ekati example may be an extreme example in terms of lack of choice,⁸⁹ it allows us to query the illusory nature of voluntarism, particularly when one party to an agreement is the government.

The second way in which contracts have been framed as voluntary in both the scholarly and popular literature is through the equally misleading packaging of these agreements as corporate initiatives, corporate self-regulation, and corporate social responsibility.⁹⁰ Environmental agreements are increasingly colonized by the energetic corporate social responsibility movement and are framed as corporate initiatives in academic treatises,⁹¹ corporate public relations materials,⁹² and as an aspect of investor relations and marketing by mining companies. While the language differs, the underlying message is the same: these agreements are evidence of corporate goodwill, rather than binding law. Such packaging serves to undermine the essential legal nature of the contract. Framing environmental agreements as corporate social responsibility⁹³ or as corporate initiatives⁹⁴ also allows mining companies to claim responsibility for these agreements. It obscures the community groups, Aboriginal peoples, and government agencies responsible for this form of regulation, and misleadingly repackages binding contracts as voluntary initiatives.

(ii) *The Assumption of "Softness"*

Closely intertwined with the assumption of voluntarism is the categorization of environmental contracting as exhibiting "softness." Softness alternatively refers to many things: "flexibility, non-coerciveness, informality, less rigid procedural requirements, and nonenforcement or nonenforceability."⁹⁵ The designation or di-

⁸⁹ The claim of voluntarism, in contrast, is often made with respect to a negotiated agreement that explicitly modifies or replaces the regulatory requirements that would apply in the absence of such an agreement. For examples, see Stewart, *supra* note 4 at 60–94.

⁹⁰ See Peter D. Cameron & Ernesto Correa, "Towards the Contractual Management of Public-Participation Issues: A Review of Corporate Initiatives" in Donald Zillman, Alastair Lucas & George (Rock) Pring, eds., *Human Rights in Natural Resource Development* (Oxford: Oxford University Press, 2002) 215 [Cameron & Correa].

⁹¹ See e.g. Natalia Yakovleva, *Corporate Social Responsibility in the Mining Industries* (London: Ashgate, 2005) at 90–91.

⁹² See Jim Excell (President and CEO, Ekati Diamond Mine), "The Ekati Diamond Mine: Success in Canada's North," Speech to the Empire Club, in Edward P. Badovinac, ed., *The Empire Club of Canada Speeches 2002-2003* (2004) 351–371.

⁹³ See e.g. *supra* note 91.

⁹⁴ Cameron & Correa, *supra* note 90 at 11.

⁹⁵ Karkkainen, *supra* note 7 at 485.

agnosis of “softness” in the literature is particularly directed to issues of contractual enforcement absent the penalty-driven back-up of command regulation.

There is little evidence that parties to environmental contracts use the courts to enforce these agreements.⁹⁶ In the Ekati case study, however, it is difficult to conclude that enforcement challenges derive from any “softness” of the Agreement. To the contrary, the highly formalized nature of the Ekati Agreement has posed problems for the Monitoring Agency in seeking to enforce the terms of its mandate. As a non-party, the Monitoring Agency is unable to access the dispute resolution provisions under the Agreement, or to sue for breach of contract. Indeed, the experience of the Agreement has been that due to its formal contractual nature and the legalized nature of dispute resolution under the Agreement, only issues that are “really big deals” are brought forward for dispute resolution.⁹⁷

In terms of day to day issues of non-compliance with the Agreement, a number of those interviewed expressed the view that a statutory body, such as the Land and Water Board, with the power to revoke licenses and issue stop-work orders, was a more effective tool to force a company to do something they didn’t want to do than the Ekati Environmental Agreement, which was lacking in both specificity, and penalties for issues of minor non-compliance.⁹⁸ While the Agreement offered “big sticks” in terms of Ministerial Reports for significant inadequacies, these remedies were neither routinely used nor designed for routine use.

(iii) *The Assumption of Collaboration*

The ideal of an environmental contract is one where bargaining approaches “can lead to more sensible, less burdensome, and perhaps even environmentally more beneficial results, *while dispelling the curse of adversarialism that hangs over the regulatory order.*”⁹⁹ Contracts offer “a more *consensual approach* to dealing with the high levels of uncertainty that are characteristic of environmental issues.”¹⁰⁰ But, contracting may not erase or even alleviate adversarial relationships. Some sceptics interviewed in the course of this research suggest that contracts are not about collaborative problem solving, rather, for companies, contracting is a

⁹⁶ René Seerden, “Legal Aspects of Environmental Agreements in the Netherlands, in Particular the Agreement on Packaging and Packaging Waste” in Eric W. Orts & Kurt Deketelaere, *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (The Hague: Kluwer Law International, 2001) 179 at 193 (“to my knowledge there have been so far no court actions concerning the implementation of environmental agreements. The paucity of litigation may owe in part to the fact that many agreements, though formally written as private law contracts, function also as an expression of internalized behavior.”).

⁹⁷ Interview with subject C (22 July 2009).

⁹⁸ *Ibid.*

⁹⁹ Jon Cannon, “Bargaining, Politics, and Law in *Environmental Regulation*” in Eric W. Orts & Kurt Deketelaere, *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (The Hague: Kluwer Law International, 2001) 39 at 39 (emphasis mine).

¹⁰⁰ Thompson Report, *supra* note 19 at 16 (emphasis mine).

form of “buying off resistance.”¹⁰¹ For aboriginal groups, contractual negotiations may be one of the few opportunities available for agenda-setting and exercising leverage in project-specific negotiations. Contracts may deliver a transformation of traditionally antagonistic relationships between citizens and experts into “partnerships for environmental protection.”¹⁰² But, this is not necessarily the case.

So while the literature cites one advantage of the “contracts model of regulation” as being the opportunity it affords the parties to build relationships,¹⁰³ this relationship-building will not always happen. In the Ekati experience, the high turnover of personnel in a remote mining centre works against the establishment of cooperative working relationships. Moreover, mining projects tend to be surrounded by mistrust and adversarial relationships that are not easily erased through negotiations.¹⁰⁴

(iv) The Assumption of “Regulatory Design”

The contracting literature frames contracting as an intentional and predetermined aspect of regulatory strategy. In other words, contracts are well-considered pieces of a larger, carefully designed framework of environmental governance. Such a picture of intentional regulatory design differs sharply from the Ekati experience. At Ekati, the Environmental Agreement evolved in an experimental, haphazard, and totally unplanned way. There was no advance planning as to the appropriateness of an environmental agreement as the most suitable regulatory tool, nor was the content of such an agreement even prescribed for the parties whose task was to make “substantial progress” in negotiating such an agreement in 60 days. The lack of a legislative base for this agreement further debunks the myth of regulatory design.

Closely intertwined with the idea of “regulatory design” is a related assumption of creativity. The “underlying premise” of the Thompson Report is that “contracts offer greater opportunity for *creative solutions* to environmental and social problems than does conventional government regulation backed by criminal law.”¹⁰⁵ Creative is a term with multiple meanings. In the contracting literature, it typically denotes an imaginative or innovative development. So defined, there is nothing necessarily creative about the contractual form. While contracts are often project-specific and can thus be tailored to individual projects, they can also rely heavily on earlier precedents rather than introducing new context-based innovations. There is equally little reason why regulation cannot provide for creative environmental governance.

¹⁰¹ Interview with subject B (16 July 2009).

¹⁰² Charles Sabel, Archon Fung & Bradley Karkkainen, *Beyond Backyard Environmentalism* (Boston: Beacon Press, 2000) 6.

¹⁰³ See Doelle, *supra* note 12 at 210.

¹⁰⁴ Interview subjects noted that the lack of trust marked not only relationships between aboriginal groups and the government and company, but that lack of trust also characterized the relationship between departments of the federal and territorial governments. See, for example, interview with subject G (26 August 2009).

¹⁰⁵ Thompson Report, *supra* note 19 at 2 (emphasis mine).

(v) The Assumption of Deregulation

Is contracting a form of government contracting out? The literature that posits contracts and regulation as fixed in a binary either/or relationship suggests that the advance of contracts will mean the retreat of the state. In Canada, concerns have been expressed that the federal and provincial governments are withdrawing from the tasks of environmental monitoring and enforcement in favour of self-regulation by mining companies.¹⁰⁶ In the wider literature, a move towards consensus-based decision-making raises concerns about the decentering of the state and the shift to promote private interests.¹⁰⁷

The Ekati Environmental Agreement, and the Monitoring Agency which it creates, marks a shift in the role of governments in mine regulation and monitoring. With the creation of the Monitoring Agency, governments are no longer solely responsible for ensuring effective monitoring during the life of the mine. As the authors of a report on the approval process acknowledge: “one is tempted to refer to what occurred as a ‘privatization’ of certain government functions, although this term is not entirely accurate to the extent that Aboriginal groups’ involvement in the BHP process reflects a quasi-governmental status.”¹⁰⁸ But, contracts do not necessarily push in the direction of corporate self-regulation, or of less government. They are not necessarily deregulatory.¹⁰⁹ Contracts can provide for an increased role of the state in environmental management, if the political will is there.¹¹⁰

(vi) The Assumption of Certainty

An often-cited rationale for contracts is that they can replace vague understandings and arbitrary actions with “certainty.”¹¹¹ Contracts, of course, differ in respect of their specificity. The Ekati Agreement, for example, provides little detail of the substantive environmental regime that will govern mine operations. Instead, much of the substance of waste management, water management, and monitoring regimes, for example, is left to be described in environmental management plans to be produced by the company.¹¹² Aside from the creation of the Monitoring

¹⁰⁶ Joseph F. Castrilli, “Environmental Regulation of the Mining Industry in Canada: An Update of Legal and Regulatory Requirements” (2000) 34 U.B.C. L. Rev. 91 at para. 118 (noting that “in conjunction with deregulation and downloading efforts by government, there has been a corresponding rise in voluntary initiatives by industry, including the mining industry”).

¹⁰⁷ See *e.g.* Cary Coglianese, “Is Consensus an Appropriate Basis for Regulatory Policy” in Orts & Dekeletaere, *supra* note 12 at 93.

¹⁰⁸ Independent Review, *supra* note 27 at 39.

¹⁰⁹ Braithwaite and Ayres acknowledge that in western democracies we are in a period not simply of “deregulation” but also of re-regulation and regulatory shifts. Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992) at 7.

¹¹⁰ The requirement of additional security deposits mandated by the Ekati Environmental Agreement is one example of a greater state presence imposed on the company by this Agreement.

¹¹¹ Thompson Report, *supra* note 19 at 7.

¹¹² Ekati Environmental Agreement, *supra* note 5 at Article 7.1.

Agency, and the provisions on Aboriginal involvement, it would be difficult to say from a textual analysis of the Agreement that environmental management standards would differ from levels otherwise applicable under existing regulation. The substantive elements of management and monitoring regimes are left to be worked out outside the Agreement text. Further, the “untested” nature of the contractual regime created considerable uncertainty for the parties. One could argue that the use of environmental contracts in the Canadian North has created a situation of significant uncertainty as it is unclear whether or not such agreements will be required for future large projects.

(vii) *The Assumption that Contract Law is Apolitical*

While the public/private divide has so effectively been dismantled in other areas, this distinction emerges in the contracting sphere where contract law is characterized as belonging to the private law family, while regulation is situated in the public law fields of public or administrative law. This distinction serves to de-emphasize the political nature of contract law.¹¹³

The description in this article of the negotiating process leading up to the Ekati Agreement effectively debunks the myth of contract as apolitical. Political reasons provide the context for understanding the existing gaps in legislation, and, specifically, why wildlife and air quality monitoring regimes were not already in place. In the case of air regulation, the problem was one of “getting the attention of Environmental Canada in Ottawa.”¹¹⁴ Federal legislation was cited as extremely unlikely to emerge because this was a “local issue” and “the Northwest Territories only has two seats in the House of Commons.”¹¹⁵

Legislation addressing wildlife monitoring was suggested to be equally unlikely due to the jurisdictional infighting between the federal government, territorial government, and aboriginal groups with unsettled land claims. The likelihood of the federal government handing authority to the territorial government to do more than “manage game” was thought to be improbable given that handing over authority would involve handing over funds. Equally doubtful was the prospect of aboriginal groups agreeing to the territorial government taking on greater jurisdiction in this area given that wildlife was a key issue in land claims negotiations.¹¹⁶

Indeed, one regulator expressed the view that environmental agreements are not a good means of ensuring appropriate wildlife management because “they are not designed on the basis of what needs to be done and have substantial *political baggage*.”¹¹⁷ Negotiated processes are highly subject to political forces. In the case of the Snap Lake Environmental Agreement negotiations, one participant recounted that the federal government had given clear marching orders to get the project

¹¹³ See Stepan Wood’s thoughtful challenge to the tendency to depoliticize environmental management. Stepan Wood, “Environmental Management Systems and Public Authority in Canada: Rethinking Environmental Governance” (2002) 10 *Buff. Env’tl. L. J.* 129.

¹¹⁴ Interview with subject E (22 July 2009).

¹¹⁵ *Ibid.*

¹¹⁶ Interview with subject G (26 August 2009).

¹¹⁷ *Ibid.*

open.¹¹⁸ As a result, they were instructed to choose between getting detailed protection of wildlife or air into the Agreement. Contractual negotiations, like regulatory approaches, are the products of political compromise.

(viii) *The Assumption of the Discrete Agreement*

Environmental contracts are often analyzed as though they exist in an airtight bubble. The advantages and disadvantages of the agreement text are discussed in a way that obscures the complexities of the wider world from intruding on the analysis. Contractual regimes, however, are deeply embedded in regulatory frameworks. They are rarely complete, contained, or isolated. This is quickly evident from the interaction between the environmental assessment (EA) regime and the Environmental Agreement at Ekati. A simple analysis of this relationship is that the EA process was perceived to be inadequate, thus necessitating the creation of the Agreement. But the relationship between the Agreement and the EA is more nuanced. Rather than operating competitively, these two regimes are interdependent. The Environmental Agreement sought to ensure that the 29 issues identified in the course of the EA were addressed. A vigorous EA process was thus a prerequisite to the creation of a robust environmental agreement. The EA provides the essential information on which such an agreement will be based. Moreover, in the case of the Diavik mine, the Environmental Agreement emerged out of the EA process, as a recommendation of the Diavik Comprehensive Study and was required to ensure implementation of mitigation measures under the *Canadian Environmental Assessment Act*.¹¹⁹

The wider regulatory backdrop to the Ekati Agreement was also critical as the Minister's discretion over the signing of the water license provided the necessary leverage to get the company to negotiate an agreement in the first place. The conclusion that emerges here, that contracts and regulation can work well in tandem, is consistent with the emerging literature on "responsive regulation" or "smart regulation."¹²⁰ The best way to complement or facilitate negotiated agreements through regulation is an issue of ongoing research.¹²¹

The literature on contracts tends to explore each contract in isolation as a static and fixed instrument rather than mapping out webs of interrelated contracts, and contemplating contractual renegotiation. This leads to an impoverished vision of the environmental regulatory landscape. For the Ekati mine, the emergence of two subsequent environmental agreements to govern neighbouring mines has highlighted the reality that change is part of contractual relationships. The Snap Lake Environmental Agreement thus proposed a common monitoring agency for the three mines, a condition that would significantly alter the monitoring regime under

¹¹⁸ *Ibid.*

¹¹⁹ See Diavik Environmental Agreement, *supra* note 77 at Recital D.

¹²⁰ Neil Gunningham & Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford: Oxford University Press, 1998) at 15.

¹²¹ See John Moffet, Bryan David & Burkhard Mausberg, "Supporting Negotiated Environmental Agreements with Statutory and Regulatory Provisions: an Overview for Ontario" (Environmental Defence Canada, 17 October 2002).

the Ekati Agreement.¹²² The three companies would not renegotiate their original agreements to provide for a new collective deal on monitoring. The failure to conclude a renegotiated agreement on a collective monitoring regime points to a real limitation of individual contracts as a mechanism for addressing multi-party issues and the cumulative impacts of multiple projects.

(b) Environmental Contracts: of Form and Substance

It is admittedly difficult to determine if environmental contracting can produce results that regulation cannot, based on a single case study. But, the Ekati experience is informative. This case study reminds us that differences in legal form are real and significant, but not as entrenched as the literature often assumes. What the Agreement managed to achieve (an independent environmental monitoring body with a track record of diligence in monitoring) and what the Agreement failed to achieve (transformational levels of aboriginal participation in environmental management and monitoring and substantive attention to cumulative effects) may not be tied to the form of the agreement (a contract). But, form is not irrelevant to substance.

The substantive innovations introduced in this agreement (marking real departures from the *status quo ante*) may have been possible in part due to the one-off, project-specific, and experimental form of the contract. But, the success of contracts in introducing more robust elements of environmental management and monitoring does not mean that these improvements would not also be possible through regulatory change. In other words, the success of contracts does not undermine the utility of regulation. While the contracting literature presents contracts as a unique and attractive model, the Ekati experience confirms that contracting on the ground is far more complex than any model acknowledges, and that contracting and regulating are often intertwined.

Indeed, several ironies are evident in the Ekati experience with environmental contracting. The first is that the contract was only possible because of the threat of regulatory power. The Minister's leverage used to secure the contract was the unsigned water license. The second irony is that to be effective, environmental agreements require cooperative and open-minded companies. Yet, as one regulator noted, "if the company you are working with is integrating ISO 14001 and being an environmental leader, you probably don't need an environmental agreement as much."¹²³

Those observations aside, the contractual form still carries with it certain political baggage. When the process of contracting is understood within the wider context of neoliberalism and a retreating state, environmental contracting may signal a paradigm shift in governing practices and ideologies.

¹²² See Snap Lake Environmental Agreement, *supra* note 77 at s. 8.1(c) (requiring the proponent, De Beers, to "use its best efforts to collaborate with Diavik Diamond Mines [and] BHP Diamonds").

¹²³ Interview with subject G (22 August 2009).

5. CONCLUSION

The Ekati Environmental Agreement experience merits exploration for at least two reasons. First, it highlights the importance of project-specific governance, an often-neglected element of Canadian environmental law. Second, it allows us to unpack and indeed challenge many key assumptions in the environmental contracting literature. The Ekati case study reveals that contracts hold promise as a mechanism of project-specific governance that responds to the unique demands of local communities and Aboriginal groups. But, the development of environmental contracts does not excuse or justify government inaction and inadequate legislation.

A closely focussed examination of the Ekati Environmental Agreement brings to light a number of assumptions that currently shape the literature on contracting, and, more widely, on new governance. The enthusiastic embrace of environmental contracts by legal scholars reveals an understandable enthusiasm for alternative modes of environmental governance capable of precisely targeting the inadequacies of environmental regulatory regimes. A close look at this scholarship reveals that some of the assumed benefits and limitations of contracting may not stand up to closer scrutiny. For example, the much-touted flexible nature of environmental contracts may, in practice, be limited by the fact that precedents are heavily relied upon; the “voluntary” nature of agreements entered into with regulators can be queried; the collaborative nature of these agreements may prove illusory; and environmental agreements may exacerbate, rather than reduce, uncertainty.

A concern around contracting that is not well highlighted by the Ekati experience is the challenge of the exclusion of the larger public from the “behind closed doors” negotiations that characterize contractual deals. An environmental agreement was particularly suited to the Ekati Mine setting as the affected community was small, consisting of defined Aboriginal groups. In other situations, defining the parties to the negotiation, and the parties to the agreement may be a more difficult task. Who the parties are is of huge significance given the issue of contractual priority, but narrowing the interests represented at the bargaining table can exclude important voices. As environmental agreements are negotiated, they may aggravate the existing marginalization of certain voices within communities, or even within negotiating groups. For example, women have only been marginally involved in at least the formal aspects of the negotiation of impact and benefit agreements between mining companies and First Nations.¹²⁴ A further risk lies in the parties privileging short-term, local gains over wider, long-term benefits.

Ultimately, reciting strengths and weaknesses of environmental agreements fails to answer the fundamental question as to whether private environmental contracting can produce certain results that government regulation cannot. A definitive answer to this question will only emerge from more extensive, comparative research. The Ekati experience may suggest that contracts can achieve results that regulation will not. But, the power and possibilities of contracts appears to be more about political realities, and less about legal ones.

¹²⁴ See Linda Archibald & Mary Crnkovich, *If Gender Mattered: A Case Study of Inuit Women, Land Claims and the Voisey's Bay Nickel Project* (Ottawa: Status of Women Canada, 1999) at 2.

It is difficult to assert that there is an innate legal reason why a contract may provide a better environmental outcome for a project than a regulatory approach. However, there are political reasons why certain legislated solutions are unlikely to happen and why gaps in the regulations are likely to endure, rather than be “fixed.” Part of the attraction of a contract is to initiate a “fix” in small, bite-sized chunks. The pragmatic use of contracts reflects the gap between what is possible through regulation, and what is likely.

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