

The Constitution of the Environmental Emergency

Jocelyn Stacey



• H A R T •

OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

Table of Contents

<i>Acknowledgements</i>	v
<i>List of Acronyms</i>	xi
<i>Table of Legislation and Cases</i>	xiii
Introduction	1
I. Methodology, Terminology and Context	5
II. Outline of the Book	9
Part I: The Environmental Emergency	
1. The Concept of the Environmental Emergency	15
I. The Environmental Emergency	17
A. Schmittian Emergencies	17
B. The Environmental Emergency	20
II. Failing Schmitt's Challenge	26
A. The Extra-Legal Approach to Emergency Powers	27
B. The Accommodation Approach to Emergency Powers	29
III. The Formal Conception of the Rule of Law	34
IV. Conclusion	38
2. Environmental Reform: The Problem of Discretion in Environmental Law	39
I. The Environmental Reform Position	41
II. Black and Grey Holes in Canadian Environmental Law	45
A. Legal Black Holes: Environmental Regulations	47
B. Legal Grey Holes: Ineffective Substantive Constraints	52
III. Impoverished Environmental Reform Solutions	54
A. Environmental Rules	55
B. Independent Expert Decision-Makers	56
IV. Conclusion	60
3. Environmental Governance: The Problem of Law in Environmental Law	62
I. Old and New Governance	65
A. The Environmental Emergency and Legal Formalism	65
B. The Law/Governance Distinction	69
II. Three Examples of Environmental Governance	70
A. Results-Based Regulation	71

B. Ecosystem-Based Management	75
C. Transnational Certification.....	79
D. Conclusion	84
III. Reclaiming the Rule of Law	85
IV. Conclusion	88

Part II: Responding to the Environmental Emergency

4. The Requirement of Public Justification	93
I. Responding to Schmitt's Challenge	95
A. Public Justification in Canadian Administrative Law.....	96
B. Public Justification During Emergencies	100
II. Public Justification: A Democratic Conception of the Rule of Law.....	104
III. Conclusion	111
5. Institutional Design: Reforming Forest Practices	113
I. The Institutional Dimensions of Public Justification	114
II. The Forest Practices Board and the Mountain Pine Beetle Response	116
A. The Limitations of Adjudication	117
B. Ensuring a Publicly Justified Emergency Response	121
III. The Forest Practices Board and Its Governance Response	125
A. The Role of the Forest Practices Board Under the FRPA	125
B. Democratic Experimentalism	129
C. Ensuring Public Justification of Forest Stewardship Plans	131
i. Constitutive Law	132
ii. Substantive Law	133
iii. Transitive Law	135
IV. Conclusion	136
6. Pipelines and Principles: Reasonableness and Fairness in Environmental Law	137
I. The Pipelines, the NEB and Their Problems	138
A. Fairness.....	142
B. Reasonableness	144
C. Independence	146
II. In Defence of Environmental Principles	149
A. Sustainable Development	151
B. The Precautionary Principle	157
C. Environmental Principles and the Common Law.....	165
III. Publicly Justifying the Pipelines	167
A. Fairness.....	169
i. Written Hearing.....	169
ii. Restricted Public Participation.....	172

B.	Reasonableness	175
i.	Scope of Assessment	175
ii.	Disaster Planning	177
C.	Independence	179
i.	Regulatory Capture	179
ii.	Independence from Government	181
IV.	Conclusion	182
7.	Reasoning Adequately: Wind Turbine Risks and Benefits	184
I.	The Confluence of Environmental Factors in Wind Turbine Development	185
II.	The Method and Purpose of Reasonableness	188
III.	Reasoning Adequately about Wind Turbine Approvals	192
A.	Plain Meaning and the Precautionary Principle	193
B.	Precautionary Reasoning	195
C.	Reasoning Adequately and Earning Deference	202
IV.	Conclusion	205
8.	The Rule of Law and the Right to a Healthy Environment	207
I.	The Case for a Charter Right to a Healthy Environment	210
A.	The Claims	211
B.	The Dichotomies	214
i.	The Process/Substance Dichotomy and Environmental Rights Adjudication	215
ii.	The Positive/Negative Rights Dichotomy in Environmental Rights Enforcement	218
II.	Environmental Protection and Section 7 Adjudication	221
A.	Section 7 of the Charter	222
B.	The Process/Substance Dichotomy in Section 7 Jurisprudence	223
C.	The Positive/Negative Rights Dichotomy in Section 7 Jurisprudence	226
III.	Common Law Constitutional Rights Adjudication	229
A.	Bright Lines and the Rule of Law	229
B.	The Right to Public Justification and the Right to a Healthy Environment	235
IV.	Conclusion	240
	<i>Bibliography</i>	245
	<i>Index</i>	265