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on Science, Society and Technology

**Differing Views of Uncertainty  
in Environmental Controversies:  
the Kearn Oil Sands Case, 2003-2008 in Canada.**

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**Abstract**

Canada's oil industry is thriving thanks to the recent and continuously increasing interest for the Albertan oil sands. While for some the oil sands are a success story others consider them one of Canada's greatest social and environmental threats. Recently, a major controversy has evolved around the Kearl Oil Sands project regarding what level of environmental uncertainties was acceptable or not and how to deal with them. In this thesis, the negotiation processes between the different social groups involved in this controversy will be analysed through a social constructivist perspective. Since the debate revolves around uncertainties, the groups' discourses and approaches to uncertainties will be contrasted. In the end, this study shows that there are two main positions about uncertainties. While the environmentalist groups regard them as unspecified and stable and undertake a precautionary approach to developments, the oil industry and the government consider them as specified and temporary, thus advocating more expertise and adaptive management. This analysis provides an insight on the social construction of environmental problems and how they are legally dealt with.

## Table of Contents

|  |      |
|--|------|
| 1. Introduction.....   | p.7  |
| 1.1 Problematic and relevance to the field of STS.....           | p.7  |
| 1.2 The Albertan Oil Sands.....                                  | p.9  |
| Technological context.....                                       | p.9  |
| Environmental concerns.....                                      | p.11 |
| 2. Challenges in the Oil Sands developments.....                 | p.15 |
| 2.1 The Emergence of Uncertainties.....                          | p.15 |
| 2.2 Dimensions of Uncertainties.....                             | p.20 |
| 2.3 Ways to deal with Uncertainties and their Limits.....        | p.22 |
| 2.3.1 Expertise.....   | p.23 |
| 2.3.2 The Precautionary Principle.....                           | p.24 |
| 2.3.3 Adaptive Management.....                                   | p.26 |
| 3. Methods.....  | p.28 |
| 4. Case Study: The Kearl Oil Sands Controversy.....              | p.30 |
| 4.1 The Kearl Story in Context.....                              | p.30 |
| 4.1.1 The Kearl Oil Sands Project, how a controversy arose.....  | p.30 |
| 4.1.2 Canada’s legal environmental landscape.....                | p.32 |
| 4.1.2.1 The Regulatory Process.....                              | p.32 |
| 4.1.2.2 The Legal Background: EPEA and CEAA.....                 | p.33 |
| 4.2 The Actors.....  | p.35 |
| 4.2.1 The Operator: Imperial Oil.....                            | p.35 |
| 4.2.2 The Regulator: Different Governmental Bodies Involved..... | p.36 |
| Independent actors nominated by the Government.....              | p.37 |
| 4.2.3 The Resistance: OSEC and the Coalition.....                | p.38 |
| Before the judicial review.....                                  | p.38 |
| During the judicial review.....                                  | p.39 |
| 4.3 The Negotiations of Uncertainties.....                       | p.41 |
| 4.3.1 Conflicting views before the trial.....                    | p.41 |
| 4.3.1.1 Terms of References.....                                 | p.41 |

|   |      |
|---|------|
| 4.3.1.2 Environmental Impacts Assessment.....                               | p.44 |
| 4.3.1.3 Initial Exchanges between OSEC and Imperial Oil.....                | p.52 |
| 4.3.1.4 Official Submissions to the Panel.....                              | p.55 |
| OSEC.....   | p.55 |
| The Government.....   | p.57 |
| 4.3.1.5 Panel Report and Decision.....                                      | p.58 |
| 4.3.2 Differing views of Uncertainties settled in the trial.....            | p.60 |
| 4.3.2.1 The Coalition’s Affidavit.....                                      | p.60 |
| 4.3.2.2 The Ruling.....   | p.61 |
| 4.3.2.3 Panel’s Addendum.....   | p.64 |
| Epilogue.....   | p.65 |
| 5. Conclusion.....  | p.66 |
| References.....   | p.70 |
| Primary sources.....  | p.70 |
| Secondary sources.....  | p.73 |
| Appendix A: Main Documents from the CEAA Registry Website.....              | p.81 |
| Appendix B: List of conducted interviews and exchanges.....                 | p.83 |
| Appendix C: Excerpt from OSEC’s official submission to the Joint Panel..... | p.84 |

### **List of Figures**

|  |      |
|--|------|
| Figure 1.1 Oil Sands Extraction processes.....                 | p.9  |
| Figure 1.2 Map of the oil sands fields in Alberta, Canada..... | p.11 |
| Figure 2.1 Wehling’s dimensions of ignorance.....              | p.21 |

**Commonly used abbreviations and short forms**

|             |  |
|-------------|--|
| <b>AENV</b> | Alberta Environment                        |
| <b>AM</b>   | Adaptive Management                        |
| <b>AUC</b>  | Alberta Utilities Commission               |
| <b>CEAA</b> | Canadian Environmental Assessment Act      |
| <b>CEMA</b> | Cumulative Effects Management Association  |
| <b>DFO</b>  | Department of Fisheries and Oceans         |
| <b>EC</b>   | Environment Canada                         |
| <b>EIA</b>  | Environmental Impact Assessment            |
| <b>EPEA</b> | Environment Protection and Enhancement Act |
| <b>ERCB</b> | Energy Resources Conservation Board        |
| <b>EUB</b>  | Energy and Utilities Board                 |
| <b>FMEA</b> | Fort McMurray Environmental Association    |
| <b>GHG</b>  | Greenhouse gases                           |
| <b>HC</b>   | Health Canada                              |
| <b>KOS</b>  | Kearl Oil Sands                            |
| <b>NRBS</b> | Northern River Basin Study                 |
| <b>OSEC</b> | Oil Sands Environmental Coalition          |
| <b>PARC</b> | Prairie Acid Rain Coalition                |
| <b>PP</b>   | Precautionary Principle                    |
| <b>TOR</b>  | Terms of Reference                         |
| <b>TWSA</b> | Toxic Watch Society of Alberta             |
| <b>WPP</b>  | Western Prairie Provinces                  |

*Short Forms*

|                          |   |
|--------------------------|---|
| <b>Imperial Oil</b>      | Imperial Oil Resources Limited                |
| <b>Pembina Institute</b> | Pembina Institute for Appropriate Development |
| <b>The Agency</b>        | Canadian Environmental Assessment Agency      |

## 1. Introduction

### 1.1 Problematic and relevance to the field of STS

In the province of Alberta, Canada, lie the second largest oil reserves in the world after Saudi Arabia: the Albertan oil sands. In the last decade, with the international geo-political tensions, decreasing crude oil reserves, and rising oil prices it has become profitable to invest in the oil sands. In 1995 the report *The Oil Sands: A New Energy Vision for Canada* laid out an exploitation strategy over the next 25 years and in 1997, the Albertan provincial and the Canadian federal governments implemented tax breaks to facilitate the development of oil sands mines. This resulted in intensive industrial development in the oil sands leading to more than \$52 billion injected in 81 oil sands projects since 2000.

Needless to say, such an intensive industry affects surrounding ecosystems and goes not without environmental problems. Among other things the mining processes involves heavy landscape modifications, important water intakes, the creation of toxic tailings ponds and a significant contribution to greenhouse gases emissions. Instead of assuming that environmental problems reveal themselves through their objective conditions, however, I will endorse a constructivist perspective that views environmental problems as contingent outcomes of negotiation processes. A central stage for those negotiation processes in the oil sands case is the regulatory approval process of new mining projects. The Canadian government instated a strong environmental assessment process, which involves all social groups affected and interested and evaluates the level of uncertainties implied by a project before approval is granted. I will study this assessment process in the particular case of the Kearl Oil Sands (KOS) project whose environmental assessment ended up in front of a court, accused of being unlawful. In the

KOS controversy I will look at the negotiations between the industry, government and environmentalist groups involved in this debate with a specific focus on how environmental uncertainties are dealt with. This will allow me to study the making of environmental problems in a symmetrical and dynamic way (cf. Martin and Richards, 1995).

In the light of this controversy, my key questions are: How do the different parties involved deal with uncertainties? Do they use comparable approaches and are their approaches internally consistent with themselves? Moreover, why and how does the legal negotiation process participate in the social construction of an environmental risk (cf. Hannigan, 2006)? I postulate the following thesis: in the social construction of environmental problems around the KOS controversy, the ways uncertainties were addressed differed between the parties involved. Moreover, each party referred to uncertainties ambiguously for its own purposes.

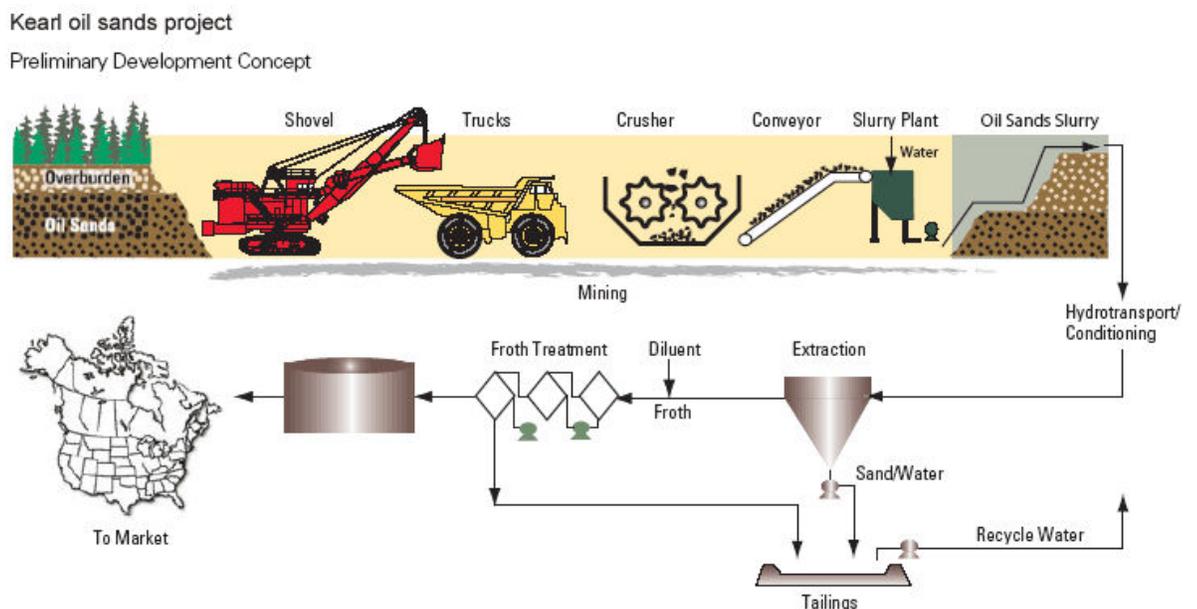
Before starting answering those questions, I will set the Albertan oil sands system in context by first introducing a brief overview of the technology used and the history of the scientific claims that have been made about the Albertan oil sands. Subsequently, I will review what has been said in the *Science and Technology Studies* literature regarding uncertainties and thereby develop the notions that will be useful in analysing the KOS case. Then, I will describe the methods I have used to answer my questions, i.e. principally discourse analysis. This will be followed by the analysis of the KOS story in depth, starting from the beginning of its environmental assessment process until the resolution of its legal case. Linking the concepts and the case study, I aim at using a

constructivist perspective on environmental controversies, bringing in a modest contribution to the field of social construction of environmental problems.

## 1.2 The Albertan Oil Sands

### Technological context

Oil from oil sands, contrarily to crude oil, cannot simply be pumped from the ground. Oil sands were also called tar sands and contain a heavier form of oil called bitumen. The commonly used technique in the current oil sands exploitation projects is open-pit mining. Figure 1 describes how the process is carried out. The oil sands are located closely under the surface of the earth. After the forest is cut, giant trucks dig out the overburden to uncover the oil sands, which will be also dug out to undergo a simple process of extraction, which requires important amounts of water and a number of toxic chemicals. Tailing ponds result from digging and are filled with toxic water and sand remaining from the separation process.



**Figure 1.1:** Oil sands extraction processes (Imperial Oil's Kearl website)

Other technologies exist, like *in-situ* recovery. *In-situ* recovery entails technologies like cyclic steam stimulation or steam assisted gravity drainage. However, open-pit mining is the oldest and most commonly used technology for the biggest oil sands projects. Although this technology seems the most straightforward, it was not always the preferred one. Marsden (2007) traces the history of the Albertan oil sands' exploitation. Sydney Ells, a federal mining engineer and surveyor, designed open-pit mining in Canada in 1917, at the same time where he assessed the extent of the reserves in the Albertan oil sands. Although this is the technology used today, Marsden states that American investors and the Canadian government had nonetheless entertained and supported the idea to use the atomic bomb in oil sands fields in order to extract the oil from the tar in the 1950s. This idea was nonetheless taken up by the Soviets in the Ural and resulting contaminated waters thereby halted the nuclear projects in Canada.

The exploitation of oil sands had been taking place at an exploratory phase since the mid 1960s. Consistent exploitation only started at the beginning of the 1990s, when oil barrel prices reached a high and open-pit mining became a viable technology. Until that point, no other technology had proven efficient enough. Currently, there are about 80 oil sands projects taking place or being prepared in the province of Alberta. There are three main oil sands fields: Athabasca, Cold Lake and Peace River. The Athabasca oil sands fields, located around the city of Fort McMurray, are the most abundant in resources and also are the ones hosting the largest oil sands open-pit mines<sup>1</sup> although

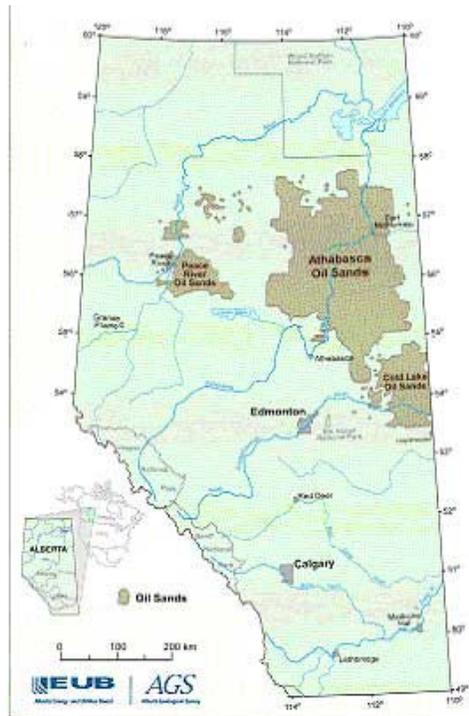
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<sup>1</sup> The main proposed projects in the Athabasca oil sands are:

- Fort Hills (ran by Petro-Canada/UTS Energy Corp. / Teck Cominco),
- Northern lights (ran by SynEnCo Energy Inc. / SinoCanada Petroleum Corp.) and
- Kearl (ran by Imperial Oil Resources / ExxonMobil Canada)

One major project is currently under construction:

other kind of technologies are also used there. Seeing the extent of the Albertan oil sands industry (see Figure 1.2), I will now trace a brief history of the environmental problems claims.



**Figure 1.2:** Map of oil sands fields in Alberta, Canada (Alberta Geological Survey)

### **Environmental concerns**

A first phase took place between the 1990 and 1996, where the emergence of environmental degradation started to raise concerns. Secondly, from 1997-2005, the risk

- 
- Jackpine (ran by Albian Sands Energy Ltd. (Royal Dutch Shell / Chevron Canada / Marathon Oil Corp.))

And 3 major projects are currently producing:

- Muskeg River (ran by Albian Sands Energy Ltd. (Royal Dutch Shell / Chevron Canada / Marathon Oil Corp.))
- Suncor Steepbank/Millennium (ran by Suncor)
- Syncrude's original mine, Aurora North and Aurora South (ran by Syncrude)

claims seemed to be solidified by more conclusive and independent studies as well as the creation of a Cumulative Effects Management Association (CEMA) especially for Albertan Oil sands (Spaling et al., 2000). The third phase started in 2006, where scientist finally succeeded in voicing their concern in a less marginal fashion within the scientific community.

### *The first phase*

In the 1990s the biological community voiced its concerns regarding the potential degradation of particular Canadian ecosystems like the boreal forest<sup>2</sup> and the northern rivers basin. A study called AQUAMIN was conducted in 1996, investigating the impact of mining on the environment and significant impacts on water quality, sediment quality and on fish and benthic invertebrate communities<sup>3</sup> were established<sup>4</sup> (Simon Fraser University think-tank, 2002, p.307). In 1996 as well, another publicly funded project: the Northern River Basins Study (NRBS) closed a five-year research effort with a series of recommendations for provincial and federal governments. In a teamwork uniting expert and lay-experts<sup>5</sup>, like First Nation people, an environmental assessment of the area was conducted. In their lengthy report, they expressed concerns over the oil sands near Fort McMurray and the land disturbance that their exploitation caused. Furthermore, worries

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<sup>2</sup> The boreal forest is an old-growth forest.

<sup>3</sup> Benthic communities are the ones that live at the bottom of an aquatic system. They are usually good indicators of ecosystem health since they do not have a very high trophic level, which means that many other animals feed on them.

<sup>4</sup>What is noticeable about ecosystem literature is that although the systems studied are very broad and complex, scientists will often focus on a very particular organism or parameter of the ecosystem. This is why review panels like AQUAMIN are more useful to get the general picture than searching for specific literature in sporadic journals.

<sup>5</sup> Aboriginal leaders, government officials, municipal representatives, members of the environmental, health, agricultural, industrial and public sectors designed projects. Private companies, individuals, government agencies and educational institutions conducted the scientific work.

about the efficiency and safety of tailing ponds were also voiced regarding potential leaks and contamination. (NRBS Website).

*The second phase*

In 1998, the Northern River Basin Initiative set out to make a follow up on the NRBS recommendations under the form of policies and further research. The follow up on previous governmental projects shows the growing concerns in answer to the concerns raised a few years beforehand.

More publications came out with a more specific focus on the problems created by oil sands exploitation. Bendell-Young et al. (2000) published a study looking at how oil companies were reclaiming sites and creating tailing ponds, which by gradual<sup>6</sup> seeping transformed the surrounding areas as wetlands<sup>7</sup>. Selecting a series of ecological parameters to measure and comparing them to those of already existing wetlands, they tried to determine whether those newly created wetlands were stable on their own. The result of their study suggested that at least fish would not be able to live in such environments and that it could also have consequences for migratory birds. The intention of oil companies to use these wetlands as reclaimed areas would then not be quite successful.

On top of independent studies such as this one, the Environment Canada required an assessment for the cumulative effects resulting from oil sands developments in Alberta. In this report, they set out a list of objectives and priorities in the cumulative effects assessments and the role of the CEMA, a non-profit and non-governmental organisation, in managing the 17 oil sands exploitation projects up to date. CEMA does

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<sup>6</sup> This is another characteristic of ecological studies; they usually occur a while after a disturbance has occurred since ecosystem processes are often not spontaneously noticeable.

<sup>7</sup> Lands mostly saturated with water and welcoming particular species to that habitat

not only assemble scientific knowledge for monitoring and setting environmental threshold but it reproduces what the NRBS did by including different communities and particularly the industries exploiting the oil sands: “Economic reality is as embedded in CEMA as are its principles of multi-stakeholder partnership and consensus decision making.” (Spaling et al., 2000)

*The third phase*

An important step in the assembly of the environmental problem claim in the scientific community was the publication of the inaugural article (May issue 2006) in the Proceedings of the National Academy of Science of the United States of America (PNAS) by Dr. David Schindler, a renowned ecologist in the field of aquatic ecosystems, and WF Donahue. In this paper, Schindler and Donahue were able to link empirically the threat of oil sands exploitation not only to local ecological threats, as it had been the focus of regional studies, but also on a wider scale. Their focus was on the water availability and quality throughout the Western Prairie Provinces (WPP) in Canada. They suggested that, “if the trends described above continue, the combination of climate warming, increases in human populations and industry, and historic drought is likely to cause an unprecedented water crisis in the WPP. The resulting decrease in water quantity will contribute to declining water quality, as described below. This decline will exacerbate the water crisis in the WPP.” (Schindler and Donahue, 2006). They also particularly underline the ecological and societal disaster that will be brought about by the current regime of oil sands exploitation<sup>8</sup>.

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<sup>8</sup> They write, “Currently, the oil sands consume three to six barrels of water per barrel of oil produced. Unless future water use is curtailed, oil-sands development will require {approx}45 m<sup>3</sup>·s<sup>-1</sup> of water supply by 2020, based on recent estimates. This is the equivalent of nearly half of the Athabasca River's low winter flow during eight of the years since 1980 and in every year since 1999. The Athabasca and Peace

## 2. Challenges in the oil sands developments

This chapter will draw attention to the theoretical debates that are involved in the KOS story. Firstly, the aim of environmental assessment is to determine whether a project is in the public interest and whether it comprises dangerous risks or high uncertainties. Therefore the first part of this chapter will deal with the notions of risk and uncertainties with a focus on uncertainties since they were the point of legal debate in the KOS case. Secondly, different actors have different views and approaches to uncertainties, which were also confronted to each other in the legal dispute. To study these different views, dimensions of uncertainties will be explained to elucidate each group's views. Then, the judge recognizes different ways of dealing with uncertainties like expertise, the precautionary principle/approach and adaptive management, which salient features will be highlighted in the third part.

### 2.1 The Emergence of Uncertainties

Since the 1970s-80s, public and sociological awareness for the phenomena of risk, uncertainty and ignorance increased significantly. This development was the result of increasing political conflicts about technological development and environmental issues and their theoretical reflection in many fields of the social sciences. Threats of pollution, Rachel Carson's *Silent Spring*, energy crises and a global awareness of Earth's limited resources can be seen as the main preoccupation in the 60s-70s. Also, major events like the Three Mile Island accident in 1979, the Bhopal disaster in 1984 and the Chernobyl catastrophe in 1986 contributed to expansion of environmental movements on the global

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rivers are critical for ecological sustenance of the Peace-Athabasca Delta World Heritage Site at the rivers' confluence, which is home to several thousand aboriginal people. The vast Delta wetlands are already exhibiting negative effects of declining water supply from climate change and the Bennett Dam on the Peace, but large industrial oil-sands projects in the Athabasca drainage and reservoirs on the Peace River continue to be proposed and approved." (Schindler and Donahue, 2006.)

scene (Jasanoff, 2001, p.310; for a brief historical overview of environmentalist movements see Jamison, date 1996, p.225-226). At the same time, constructivist approaches to risk, uncertainties and ignorance emerged, often replacing functionalist approaches that had widely dominated the academic discussion of the 1940s, 50s and 60s (cf. Wehling, 2006, p.83; Hannigan, 2006, p.63, 108ff).

The new debates of the 1970s and 80s first started under the heading of 'risk' drawing on existing terminologies in economics, psychology or technology studies (Douglas & Wildavsky, 1982; Slovic, 1979 [in Tierney, 1999, p.218]; Beck, 1992; cf. Wehling, 2006, p.85). It soon became clear, however, that the classical risk term could not quite capture what seemed to be particularly interesting about the new social and political conflicts concerning technological development and environmental issues. In the field of risk assessment or decision-making theory the term risk had usually been referred to as the objective probability of an event to occur (Hannigan, 2006, p.109). Objectivizing risks only works, however, when risky events can be compared and probabilities calculated (cf. Ewald, 1991).

The new conflicts about technology and the environment have stimulated criticism of the classical objective approach. Particularly, two points have been addressed: first the shortcomings of its notion of objectivity and second the nature of the 'new risks'. While the discussion of the first point remained under the headline of risk, the discussion of the second point shifted away from risk and brought in notions of uncertainties and ignorance.

From an anthropological standpoint, Douglas and Wildasvsky (1982) argued that risks are not only objective statistics but are also strongly embedded in culture. They

endorse a relativist perspective through which scientific evidence or the likelihood of danger has little to do with actual risks. Rather risks can be considered as ‘collective constructs’ subject to cultural and group values (Douglas and Wildasvsky, 1982) negotiated through competing claims about risks. Although Douglas and Wildasvsky have been criticized for their cultural relativism (Hannigan, 2006, p.110f), their book played an important role in challenging the objectivity of the notion of risk.

Also, research in psychology and social psychology about the perception of risk revealed that most people have problems understanding risk information and looked for explanations with regards to discrepancies between calculated and perceived risks (Slovic et al. 1979; McDaniels et al. 1995; Slovic 1992; Tverski and Kahneman., 1973 [in Tierney, 1999]). Moreover, it has been found out that perceived risks could undergo amplification through several social processes also questioning its independence from social factors (Kasperson, 1992).

For other authors, there exists reconciliation between a so-called objective approach, also referred to as technical risk assessment (Renn, 1992) and more relative approaches that take culture and perception into account. For instance, Renn acknowledges that risks are not only objectively defined through its classification of risk. For him, technical risk assessment is necessary but narrow. However, its narrowness can be completed with risk analyses from the social sciences (Renn, 1992, p60-61). The concept of risk can therefore be considered as having multiple dimensions and its definition is therefore not as straightforward as an objective measure.

In the academic discussions about the new technological and environmental problems, it soon became clear that the term ‘risk’ did not capture the issue. Beck’s Risk

Society, first published in German in 1986 opened the debate about the new risks. The increasing complexity of systems brought about by modernity creates a risk society where risks are unintentional, unseen and compulsive and are the result of technological latent side effects.

From then on, the considerations about the nature of risks took off. It became apparent to many scholars that using the term risk led to the tendency of overlooking essential differences concerning the knowledge about possible side effects and the ability to control them (Wynne, 1992). Many authors have argued that the nature of the new problems was different (cf. Weinberg, 1985; cf. Collingridge, 1980; cf. Wehling, 2006, cf. Beck, 1992; cf. Krohn and Krücken, 1993). For example, the perils of nuclear technologies and gene engineering did not fit the classical criteria for objective risk assessment. In cases like these it is hardly possible to assess probabilities and the amount of damage. Moreover, the scope of the side effects is barely knowable. The new risk are no longer comparable (cf. Weinberg, 1985) calculable and predictable. Also, in the classical sense, the risks would be on those who *take* them, whereas in the new sense, a large part of risks are on those who did not participate but are subject to the consequences (cf. Krohn and Krücken, 1993). Today, new risks often threaten a larger number of people in an unpredictable way (Beck, 1992; Perrow, 1984).

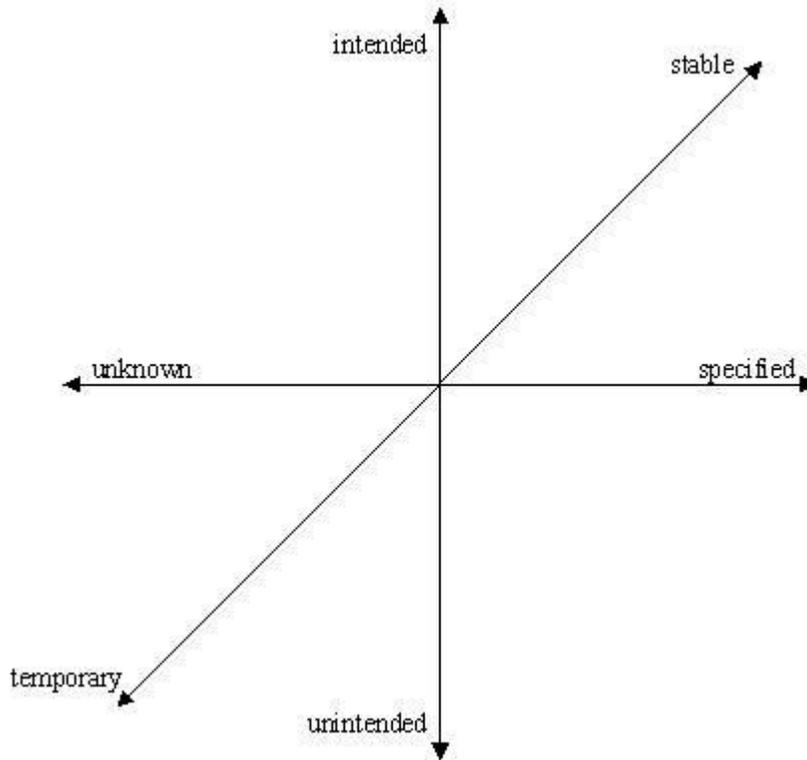
As it became clear that the terms *risk* or even *new risk* did not quite capture what seemed to be the interesting aspect, in the literature, there is a shift from what we know and control to what we do not know and therefore do not control. This insight has shifted the discussion away from the notion of risk and rather to the notions of uncertainties and ignorance. These notions existed before and did not emerge as a result of the limits of the

risk concept. Smithson writes: “Traditionally, ignorance is treated as either the absence or the distortion of “true” knowledge, and uncertainty as some form of incompleteness in information or knowledge” (1993, p. 136). However, to this day, these notions are still debated and there are still confusions and controversies on terminologies with differentiations between uncertainty and ignorance, which basically represent a full or partial lack of knowledge (Collingridge, 1980; Kahneman and Tversky, 1982 [In Wehling, 2006, p.110]; Ravetz, 1986; Wynne, 1992; Wehling, 2006). What is also interesting in the debates about non-knowledge and its fine differentiations is that sociologists worked on it especially through the notion of ignorance. Wehling (2006) for instance, criticizes the continuum between risk, uncertainties and ignorance and focuses his work on ignorance. He supports that ignorance has a completely different quality than risk or uncertainties and he suggests studying it through different dimensions. On the other hand, authors like Stirling (2007) provide a typology of risk, uncertainties, ambiguity and ignorance classifying them according the notions of known probabilities and known outcomes. Aside from classifying or putting in dimensions uncertainties and ignorance, Smithson (1989) argues that the rules that applied to the social construction of knowledge also apply to the social construction of ignorance. Further, Stocking and Holstein (1993) describe ignorance construction as a claims making activity. According to the authors, perspectives on ignorance vary depending on the situatedness of the claims-makers and their interests. As there is competition between claims, different groups will use rhetorical strategies to put their perspective forward.

All in all, the terms uncertainty and ignorance are used to describe the realm of what we do not know. Although scholars tend to focus on the term ignorance, politicians, entrepreneurs and the public seem to refer to it mostly as uncertainties. Therefore, although most of the cited work has been done on ignorance, I will refer to it as uncertainties, incorporating scholarly notions of uncertainties and ignorance.

## **2.2 Dimensions of uncertainty**

A useful way to look at uncertainties and how different actors talk about them is to look at a series of criteria occurring in each actor's discourse about uncertainties. To do so, Wehling's existing dimension of ignorance can be applied in this context (Wehling, 2006, p.116ff). Although he developed them to study *ignorance* in a three-dimensional fashion: looking at knowledge, intentions and temporal stability, I will use these to look at the different discourses about *uncertainties*. Figure 2.1 below offers a representation of the dimensions and their different degrees. It is important to note, that all three dimensions represent continuums. They therefore create a three dimensional space of possible intermediate forms.



**Figure 2.1:** Wehling's dimensions of ignorance

On the x-axis, we have the dimension of *knowledge*, within which different degrees go from unknown to specified. Wehling talks about *known* ignorance in the sense that, like knowledge, ignorance is not permanently present but it can become explicit in a relevant context where a problem needing that particular information occurs. For my analytical model, *unknown* uncertainties are the ones we do not know that we do not know and *specified* uncertainties are the ones we are aware we do not know, both in a specific context.

The y-axis represents the dimension of intentionality, which ranges from unintended to intended uncertainties. Wehling describes unintended ignorance as the inevitable by-product of the production of knowledge. Intended ignorance has an intention and interest-

laden quality. It can either mean that the actors do not want to know something or they want to hinder others from knowing something. In my analytical framework, there are in the same way unintended uncertainties, which result from the complexity of the system, and intended uncertainties, which are intentionally presented as uncertainty for the actor's interests.

The z-axis represents the dimension of temporal stability of uncertainties, which ranges from temporary to stable. What Wehling means by that in the context of ignorance is that a temporary ignorance is an ignorance that one will eventually transform into knowledge and a stable ignorance is one that will never be found out. However, Wehling (2006, p.133) has a point here that these distinctions are always apt to social interpretation or conditions, i.e. through the interests in an issue and the state of scientific knowledge at the time. Ignorance is usually considered temporary, but for certain issues like climate change or genetically modified organisms, the temporary notion is difficult to apply regarding the extent of what temporary can mean. In the present case, these dimensions will also apply to uncertainty.

### **2.3 Ways to deal with uncertainties and their limits**

As previously mentioned, dealing with risk had a predictable and comparable dimension and it has always been a challenge. However, with the overwhelming uncertainties of the current high-technology society, dealing with uncertainties has become an even bigger challenge. Different authors point out different ways of dealing with uncertainties in eco-socio-technological systems. Collingridge (1980) first opened the debate in 1980 with the so-called control dilemma in which he points out that

deliberate shaping of technologies can only take place at early stages of technological development but the consequences are only known at a later stage. Since then different proposals have been made as to how one could deal with uncertainties. Three of them that are widely discussed are presented here: scientific expertise, the precautionary principle and adaptive management.

### **2.3.1 Expertise**

Although social constructivism of knowledge has debunked scientists' ivory tower, they still remain the main reference to all questions and legitimate source for answers. Wehling (2006, p.279ff) presents the work of van der Daele and his expertise-model. It supports the following idea: if experts discuss sufficiently within their own community, without lay knowledge, they will be able to specify ignorance. In dealing with uncertainties, the notion that they are temporal as discussed earlier joins this expertise-model since it considers that answers will be provided in time even if at the moment it is unknown. Wehling criticises this model for only looking at the known or suggested ignorance of experts. It does not deal with the problem of unknown ignorance. This also applies to uncertainties (as the actors do not use the word ignorance) and the expectation is that experts find solutions to specific problems, which do not have any yet. It does not take into account problems that were not defined at the beginning of the project. The other problem it has, is that it considers experts as the ultimate source of legitimacy. The relevance of ignorance or uncertainties cannot only be assessed by empirical claims. It is genuinely connected to values.

An aperture that has been made in recent times is to consider other forms of knowledge as scientific knowledge. Lay-knowledge helps understanding the bigger picture and the stakes that are involved. It also challenges the idea of objective and absolute scientific knowledge and lets the idea of values come in as different social groups are taken into account. In this work, expertise is a concept used by all groups and which will be demonstrated in chapter 4.

### **2.3.2 The Precautionary Principle**

Another way of dealing with uncertainties is the precautionary principle (PP), which gives place to values. However, despite its broad use in the political sphere, there remains an extreme variability in interpretation (Foster et al., 2000). In its most extreme form the precautionary principle prohibits any implementation of new technologies unless there is an absolute proof of safety, and has therefore been criticized for its paralyzing effects (Foster et al., 2000; Sunstein, 2003). A less radical reading of the principle only demands that a lack of full scientific certainty should not be used as a reason for postponing measures to counteract possible harmful effects (cf. Rio Declaration on Environment and Development, 1992 [In: Foster, 2000]).

However, although the definitions are multiple, each of them still leaves room for interpretation. In the European context, with similar definitions and guidelines (cf. Foster, 2001; cf. European Community Communication on PP, 2000), Renn describes the PP as still possessing “serious ambiguities and queries” (2007, p.303).

To begin with, the PP is not a novel idea. Kriebel et al describe its presences under different appellations in different countries, originating in Germany as the

*Vorsorgeprinzip* related to environmental policy (Kriebel et al, 2001). With growing concerns regarding climate change and other global environmental issues, the term PP has become predominant (Adams, 2002). Moreover, Adams describes a transition between the precautionary approach and the precautionary principle depending on environmental and national contexts. Many authors argue that the precautionary principle is ill defined and perhaps even not definable (cf. Renn, 2007; cf. Adams, 2002; cf. O’Riordan, 2001).

Scholars point out the contradiction of the term in itself (cf. Adams, 2002; cf. Balzano and Shepard, 2002) as a principle, thus a general truth, and a precaution, which implies a judgement that cannot be defined by a universally accepted law. Also, PP presents contradictions with other fundamental rules of logic and accuses the PP of being “normatively empty” (Peterson, 2007, p.307). The place of science in the use of the PP has also been studied (cf. Resnik, 2003; cf. Foster et al., 2000). Since the PP is not a rule, and relies importantly on value-judgement, authors have suggested sound ways of using it since it is becoming widely used as a tool in environmental policy-making to deal with uncertainties (cf. Resnik, 2003; cf. Stirling, 2007; cf. Sandin et al, 2002).

Nonetheless, van Asselt and Vos point out another underlying paradox to the precautionary principle in its application, with the help of frameworks and so on, which is “on the one hand, it is increasingly recognized that science cannot provide decisive evidence on uncertain risks, while on the other hand policy-makers and authorities increasingly resort to science for more certainty and conclusive evidence (compare Weingart, 1999)” (2006, p.317).

The increasing debates on the PP in Europe have spilled over in North America. Although it is originally a European concept, it has been integrated to Canadian legislation with the same definition as found in the Rio Convention. Environment Canada has also published a pamphlet on its website regarding the precautionary principle. In this document dated from 2002, it stated on the one hand that the precautionary approach “creates a positive legal duty to act” but also that it is a “decision to act or not to act” (Environment Canada Guidelines on the PP). In this document, the terms precautionary approach and precautionary principle are used interchangeably, although a note remarks that they can be understood differently. This is however not commented upon. In the following chapters, the actors also seem to use these term without stating their difference. While the precautionary principle has a lot to do with a value judgement, this Canadian document stresses the need of sound scientific information and of scientific “follow-up” programs on precautionary decisions.

### **2.3.3 Adaptive Management**

The use of follow-up programs in a precautionary approach reminds of adaptive management, which is another tool that some groups seem to favor in dealing with uncertainties. Adaptive management is a concept developed by Canadian ecologists C.S. Holling and C. J. Walters (cf. Holling, 1978; cf. Walters 1986; cf. Holling and Walters, 1990) and it has been strongly embedded in North American customs of fishery management.

Adaptive management consists in handling the uncertainties step-by-step, as the problems show up. This corresponds to Collingridge’s initial idea of a control dilemma in

where the quandary lies in the decision under uncertainty and the path-dependency of a project. He supported that to avoid irreversible decisions one has to detect the negative effects as soon as possible and be able to adjust initial decisions. That is also the idea behind adaptive management: decisions under uncertainties are not fixed. They are subject to change as soon as there are negative signs showing up. This converges also towards the idea of real-world experiments developed by Krohn and others (Gross et al, 2005), where the process of learning is central to dealing with uncertainties.

Although the idea is so simple and enticing, it still presents some problems. Adaptive management (AM) has been criticized for overestimating the ability of the proponent to regulate and underestimating the temporal stability of the uncertainties (cf. Wehling, 2006). Beck (1996) describes these side effects as latent and unseen. Can they be monitored at all? And can they be specified in time? McLain and Lee (1996) also point out other pitfalls of AM which all result through the use of standardized models shared by scientists, regulators and policy-makers. This lack of diversity may lead to dismissing hypothesis that could be valid if studied under a different angle.

### 3. Methods

To verify the hypothesis that different groups have different discourses about environmental uncertainties according to their goals, I will study the KOS case that started as an environmental assessment process in 2003 and turned into a legal dispute in 2007, which was finally settled in 2008. The specific groups involved were identified from the KOS judicial review documents and the documents available from the Canadian Environmental Assessment Registry. The case opposes the claims and views of environmentalist groups to those of the oil industry, the review panel for environmental assessment and the government.

To answer my question, I will do a discourse analysis of several documents relevant to the case. The discourse analysis will look into the key themes of uncertainties, scientific expertise, the precautionary principle and adaptive management. The views of uncertainties and its approaches will be also analyzed following the dimensions described by Wehling (2006) in chapter 2 of this work. Looking at how the different groups use those concepts in their argumentation and what they say or do not say about them will provide an insight into the interests and goals of each group in this environmental controversy (cf. Tonkiss, 2004, p.378). Each group is also a claim-maker. Therefore, I will look for their rhetorical strategies (cf. Stocking and Holstein, 1993, p.189ff). The interactions between the groups are also central to understand the dynamics and influences, I will study them looking at the contexts in which those interactions occurred and their nature.

There are two phases to this case, one before the legal pursuit, and one during, which closes the debate. They are important to analyze in order to understand the

evolution of discourses from the different groups and also understand the escalation towards the legal dispute. The documents comprise letters, reports, and statements. For a detailed chronology and list of documents from the environmental assessment process, please see Appendix A. Also, the legal documents pertaining to the trial were analyzed, namely Simon Dyer's affidavit (January 11, 2008), Justice Lamer-Tremblay's ruling (March 5, 2008) and the Panel's response to the decision (May 6, 2008).

Also, since this is a very new case, semi-structured interviews (cf. Leech, 2002) were carried. I however encountered a lot of reluctance from several representatives since this is still a very sensitive issue in Canada. The interviews and personal correspondences with representatives will therefore not be used for analytical purposes but rather as examples. Nonetheless, the interviews were carried with a two-fold intention: first to gather information and explain already available information and second to bring out positions regarding the key themes. For a detailed list of interviews and contacts see Appendix B.

## **4. Case Study: The Kearl Oil Sands Controversy**

### **4.1 The Kearl story in context**

#### **4.1.1 The Kearl Oil Sands Project, how a controversy arose**

In 2003 Imperial Oil, one of Canada's largest petroleum companies took over an old exploitation project, the Kearl Oil Sands (KOS) project that ExxonMobil had initiated in 1997 but not carried out. Like other mining projects, it filed for regulatory approval in 2005 and provided an Environmental Impact Assessment (EIA) to the Canadian Environmental Assessment Agency (the Agency). Due to the scope of the project, a Joint Panel was to assess and review the EIA and hold public hearings, which took place in November 2006. Finally, in February 2007 the Panel issued the recommendation for the regulatory authority, the Department of Fisheries and Oceans (DFO), to approve the KOS project. The environmental impacts were judged to be insignificant provided Imperial Oil implemented its mitigation measures (in *Pembina Institute for Appropriate Development v. Canada (Attorney General)* (2008 FC 302) T-535-07, [March 5, 2008]).

Immediately after the DFO's approval based on the Joint Panel's report, the Pembina Institute for Appropriate Development, Prairie Acid Rain Coalition, Sierra Club of Canada and Toxics Watch Society of Alberta (the Coalition) filed a complain claiming that the environmental assessment of the Kearl Project had been done unlawfully. The accusations concerned the illegitimate approval of the Cumulative Effects Management Association (CEMA), endangered species and greenhouse gas emissions in Imperial Oil's EIA. Justice Lamer-Tremblay settled the case on March 5, 2008. The Canadian Environmental Assessment Act (CEAA) was the main legal document on which the ruling was based. According to the judge, the central tenets of this act are the

precautionary principle and adaptive management. She weighed each party's arguments against these tenets and the two fundamental steps of the CEEA i.e.: environmental assessment and decision and follow-up. She concluded that only the lack of rationale for mitigating significant carbon dioxide emissions in the Panel Report was unlawful and asked them to review only this part of the report.

This marked a partial victory for the Coalition, which took an unexpected turn of event. The DFO pulled out Imperial's permit following the ruling thereby halting the KOS project's developments. Imperial then sued them for taking away the license and claiming important damages as the result of delays. However, Mr. Justice de Montigny ruled against them on March 27, 2008, on the grounds that their claims for delays and damages were not precise enough to be justified. (*Imperial Oil Resources Venture Limited v. Minister of Fisheries and Oceans* (2008 FC 382) T-460-08. March 27, 2008.) Imperial appealed this decision but was turned down again on May 14, 2008 by Mr. Justice Campbell (*Imperial Oil Resources Venture Limited v. Minister of Fisheries and Oceans* (2008 FC 598) T-460-08. Date May 14, 2008).

In the end, on May 6, 2008, the Joint Panel added an addendum to its report as required to by the judge. This addendum stated that the governments of Alberta and Canada would be the ones regulating carbon dioxide. No further action was pursued from the Coalition and Imperial Oil was allowed to resume the Kearl Project on June 5, 2008.

The KOS judicial review is a first in the history of the Albertan oil sands exploitation. Although it only momentarily halted the KOS developments, it brought national attention to the environmental impacts created by the oil sands industry and shook up the power relations between government, industry and environmentalist groups.

The events and dynamics uncovered through the KOS trial allow studying how different groups talk about environmental risks and uncertainties. The next part will take a look at the legal foundations of Canadian environmental assessment process to provide an understanding of each group's rights and duties.

#### **4.1.2 Canada's environmental legal landscape**

##### **4.1.2.1 The regulatory process**

There are two levels of regulation in Canada: at the federal and at the provincial governments. When an oil sands project entails landscape modifications and overlaps federal and provincial authority, both authorities carry out an environmental assessment. In order to make the process more effective, the federal government has signed agreements with each of the provinces and territories to carry out a joint environmental assessment. The *Canada-Alberta Agreement on Environmental assessment cooperation* was first made in 1999 and lastly updated in 2005. It stipulates that environmental assessment should be conducted respecting two acts, the Alberta's *Environmental Protection and Enhancement Act* (EPEA) and Canada's *Canadian Environmental Assessment Act* (CEAA). Although not all landscape-modifying activities require an environmental assessment, oil sands do require one and the proponent of the project is charged to carry it on by producing an EIA. There is an extensive list of information stipulated by the *Canadian Environmental Assessment Agency* in the *Terms of Reference* (TOR) that the proponent has to include in the EIA. There are three types of reviews in environmental assessment: a screening (CEAA, ss. 18-20), a comprehensive study (CEAA, ss. 21-24), and mediation and panel reviews (CEAA, ss. 29-36). In the case of

larger projects entailing significant uncertainties, the federal government selects a *Panel* of independent experts whose main task is to review the EIA and hold public hearings. During those hearings, everyone related to or affected by the project is welcome to voice its opinion and rationale on different points of concerns. After compiling all those opinions, the Joint Panel formulates recommendations, which are then sent to the provincial regulatory authorities. The different cabinets will then have the decisional power to approve or not the projects. In the case of oil sands in Alberta, the former Energy Utility Board (EUB), which split into the Energy Resources Conservation Board (ERCB) and the Alberta Utilities Commission (AUC) as of January 1, 2008 usually are the ones handing out the permits. However, since the oilfields are located along the Athabasca River and the oil industry heavily uses its water and disturbing fisheries, the DFO becomes often the main authority for delivering permits.

The environmental assessment regulatory process therefore depends on the type of activity and the region where is it carried. There is no one standard environmental assessments process but rather a series of possibilities. The one described above is the one that usually takes place for large oil sands mines in the Athabasca oil sands fields.

#### **4.1.2.2 The legal background: the EPEA and CEAA**

The EPEA and the CEAA are the two most important acts governing the environmental assessment of oil sands in Alberta. Both acts were first established in 1992 with various amendments over the years. They also describe the regulation of environmental assessment, the different organs and how they interact with each other in the process.

The EPEA in Alberta is subdivided in 11 parts, which detail the above-described procedures of environmental assessment. The highlights of this act are the description of the purposes of environmental assessment in section 40 which are

“(a) to support the goals of environmental protection and sustainable development, (b) to integrate environmental protection and economic decisions at the earliest stages of planning an activity, (c) to predict the environmental, social, economic and cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the proposed activity, and (d) to provide for the involvement of the public, proponents, the Government and Government agencies in the review of proposed activities.” (EPEA, s. 40)

The roles of environmental protection and sustainable development are also defined in section 2: “(a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society” and “(c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations”. (EPEA s.2)

At the federal level, the CEAA has the same fundamental principles as the EPEA in Alberta, i.e. “to achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality.” (CEAA, Preamble). The main difference between the EPEA and the CEAA is that the provincial law goes into detail about what is acceptable to the level of the release of substances, contaminated sites, conservation and reclamation, potable water, hazardous substances and pesticides, and finally waste and recycling. Whereas the federal law limits itself to describing how environmental

assessment should be done and which activities must submit to it. This shows a lot of autonomy at the provincial level in determining up to what point the environment should be preserved or conserved.

Actors enact those laws and regulations and have to use them to meet their objectives thereby shaping their understanding. I will portray them in the following section.

## **4.2 The actors**

### **4.2.1 The Operator: Imperial Oil**

Imperial Oil is Canada's largest oil company. It was created as the result of a merger between several Southern-Ontarian refiners in 1880 (Imperial Oil website). Imperial Oil began installing refineries in Alberta in 1923 and slowly established itself as the province's biggest refiner with enlarged facilities (Klassen, 1999, p 144). The big break that launched the company to the top was the discovery of Leduc oil field in 1947. This not only settled Imperial Oil's stronghold in Alberta but also placed it as Canada's biggest oil company (Klassen, 1999, pp.125-126). Imperial Oil also became a local symbol for mass production and innovation in businesses in Alberta. It consolidated its empire by contributing to the creation of long-distance pipeline (Klassen, 1999, p144-146) establishing itself at all levels of the oil industry's technological system: production, refinery and transport. In 1985, Imperial Oil started exploiting oil sands and using its refineries to produce crude oil from it. It did so by creating subsidiaries and investing with other oil companies. For instance, it owns the oil sands project in Cold Lake and

also owns 25% of the Syncrude mine in Fort McMurray (Klassen, 1999, p147). Although Imperial is Canada's largest and strongest and it is also part of the larger international petroleum industry since 69.6% of its stocks belong to the American ExxonMobil.

In most documents that were analyzed, Imperial Oil is referred to either as "the proponent" or "the operator". The way the Canadian system is done forces the proponent to justify that its project is in the public interest. Recently, environmental issues around the exploitation of oil sands have taken a high priority on questions regarding the public interest primarily for human health and First Nation livelihood reasons. For large projects like the KOS project, Imperial not only invests in the industrial development itself but also in these other important issues. An *Environmental and Regulatory* manager, a *Stakeholder Relations* advisor and an *Aboriginal Affairs* advisor are responsible only for the KOS project itself. Moreover, on its website, Imperial prides itself of their environmental responsibility highlighting their sound use of technologies since 1918.

With its business worth about 24.5 billion Canadian dollars and mining projects occupying large areas of Canada, Imperial Oil also has a lot of responsibilities towards citizens.

#### **4.2.2 The Regulator: different governmental bodies involved**

There are several governmental bodies involved in any natural resource exploiting projects. Although many of them have regulatory power, it does not mean they have decisional power. In the KOS case, the DFO was the only one to have decisional power since the project entailed significant water use from the Athabasca River.

The DFO is nonetheless not alone in its decision-making role. Different cabinets have a counselling responsibility and the DFO only takes a decision after the Joint Review Panel formed by the Agency emits a recommendation. This recommendation is the result of a public participatory process involving lay-people, specialist consultants and other governmental bodies. In the end, when the Review Panel recommends specific management plans, it refers to the regulator to help Imperial Oil keep up the conditions to its approval. In the KOS case, the regulator is Alberta Environment (AENV) and Environment Canada (EC).

The DFO, AENV and EC all have for mission Canada's sustainability. They all mostly provide monitoring, surveys and expert reports. Therefore, their regulatory role lies in the monitoring and application of environmental management guidelines elaborated throughout the process of the KOS project environmental assessment.

#### **Independent actors nominated by the government**

The Joint Panel and the federal judges are independent actors that are chosen by the government. In the KOS case, three independent members were appointed to the Joint Panel, one from the federal government and two from the provincial government. Only biographical elements of the federally appointed member were available. Information gathered from interviews and other available documents suggested that the two other members were members of the EUB of Alberta although their biography was never published as opposed to the federally appointed member. The Joint Panel is an independent body. However, since its views will be put before a court next to Imperial Oil, its independence is in question. The federal judges are the ones ultimately deciding

the right and wrong in the issue and do not participate with any other groups, they are in that sense truly independent.

#### **4.2.3 The Resistance: Oil Sands Environmental Coalition and the Coalition**

##### **Before the judicial review**

The groups involved in the negotiations around the KOS project before the judicial review of the Panel Report were called the Oil Sands Environmental Coalition (OSEC). They are an association of three Alberta-based environmentalist groups: the Fort McMurray Environmental Association (FMEA), the Toxics Watch Society of Alberta (TWSA) and the Pembina Institute for Appropriate Development. These groups essentially have the same mission as governmental bodies such as AENV and EC. What is then their purpose and why do they exist? This is the reason I titled this section ‘The Resistance’. Glitches in the environmental assessment and the regulatory process might occur and independent bodies are necessary in order to act as both a consultant for better management practices and as a watchdog for environmental and human health.

TWSA and the Pembina Institute were both created in the 1980s as a result of environmental stresses and problems affecting human health. The Pembina Institute was created in 1985 following Canada’s largest public inquiry in the 1982 Lodgepole sour gas blowout that resulted in the death of two persons and heavy air pollution in Alberta (Pembina Institute Website). On their website, they describe their origins as “a small group of local residents [who] band together to press for higher safety standards in the oil and gas industry ... [and who were] empowered by the positive experience of citizen-lead action ... to found the Pembina Institute in 1985.” (Pembina Institute Website) TWSA

was created shortly after in 1986 “as ‘a needed and timely response to the growing use of toxic chemicals in *our* province.’” (TWSA Website). The FMEA is a local group to the city of Fort McMurray, which is located 70 km away from most large oil sands mining pits. OSEC can therefore be considered as a consortium of grassroots environmental movements.

However, TWSA and the Pembina Institute not only perform advocacy activities as a reaction to environmental problems but they also provide consultancy services. They are hybrids in the environmentalist movement domain. On the one hand they will lobby to protect the environment and citizens and on the other hand they will provide expert advice on how to deal with industrial effects in an environmentally friendly way. The largest of these is the Pembina Institute with offices in several Canadian cities including the Capital. They are very active in providing environmental consulting expertise to several oil companies and have distanced themselves from the grassroots type organization towards the consultancy type enterprise.

### **During the judicial review**

At this point, OSEC is not the group pursuing the KOS case it is now the Coalition. This term refers to the Pembina Institute, TWSA, and three important actors who were recruited for the legal pursuit. The Pembina Institute was however the group orchestrating it all. The Sierra Club of Canada, Ecojustice, formerly Sierra Legal Defence Fund and the Prairie Acid Rain Coalition (PARC) were the new additions. While these are all environmentalist organizations, they are not of the same scope. On the one hand, PARC is another grassroots type organization whose most prominent member was Martha Kostuch. As a retired veterinarian she became an environmental activist after

noticing the effect of oil industry's air pollution on cattle's reproductive system (Canadian Geographic Archives; Marshall, 2004, p.7). On the other hand, the Sierra Club is the oldest North-American group for wildlife conservation advocacy and it was founded by John Muir along with other American intellectuals in 1892. Its goals were "recreational, educational, and conservationist" (Cohen, 1988, Chapter 3). Through time, it became one of the leading groups for environmental advocacy in the U.S., it started acting in Canada in 1963 and was finally established in Ottawa in 1989 (Sierra Club of Canada Website). Ecojustice only officially exists since September 2007 but it has been active in Canada under the name of Sierra Legal for the last 17 years (Ecojustice Website).

To sum up, the actors involved in the KOS story are very high-profile actors: the biggest oil company, the government, several grassroots environmental groups that can recruit larger influential groups like the Sierra Club. This makes this sensitive issue even more visible to the public and the story even more important.

The controversy around the KOS project lies mainly in the questioning of the environmental assessment process, which is there to insure the projects are in the public interest. It is also a dispute on uncertainties regarding predictions, technological effects and environmental management, of which different groups have different visions. The following discourse analysis will provide a detailed look into each group's interests and strategies and will show the judicial review participated in the social construction of an environmental problem.

### **4.3 The negotiation of uncertainties**

#### **4.3.1 Conflicting views before the trial**

All the documents submitted to the Joint Panel are relevant to the making of the Panel Report and also allow a better understanding of each group's discourses. The following documents were not in question as such in the trial since the judicial review only looked at the Panel Report. However, the judge does refer to Imperial Oil's EIA as it is a significant document in the making of the Panel Report.

##### **4.3.1.1 Terms of Reference**

As previously mentioned, the terms of reference (TOR) is the document produced by the CEAA, which provides an extensive list of information to be included in the proponents Environmental Impacts Assessment (EIA). The elaboration of the TOR is the first step in the environmental assessment process.

It was initiated on November 7, 2003 through a letter and public notice from Imperial Oil to the DFO, which stated that the KOS project had been initiated in 1997 by Exxon Mobil and would be resumed by Imperial Oil in 2003. The TOR had then been drafted in 1998 but was no longer valid in the current context. An interesting quote from the public notice is the following, "considering TOR have evolved for oil sands mining projects since then, as have certain aspects of the projects, Alberta Environment has determined that a more current TOR is needed." The necessity to revise the TOR after five years suggests that concerns in the field of environmental health have changed. A letter followed this public notice from the Agency to the DFO on November 18, 2003 requiring more information on impacts on fish and fish habitat and referring the DFO to an Impact assessment biologist. On December 22, 2003, the Agency contacted AENV to

invite them in a cooperative environmental assessment review of the project. This brings in new governmental bodies such as Environment Canada, Health Canada and Natural resources of Canada in the consulting arena. In this communication, the Agency also includes a list of modifications that should be added to the TOR. These modifications concern mostly the identification of environmental uncertainties and their management. Also the Agency demanded, “uncertainties [to] ... be quantified whenever possible, or assigned to categories according to the degree of uncertainty” and “ [to] provide statistical confidence limits or another quantitative measurement of uncertainty in predictive tools and methods”. On the same day, the CEAA also contacted Imperial Oil to inform them that the DFO would be the main responsible authority. Then, on January 7, 2004, the DFO contacted Imperial Oil urging them to provide them, as the responsible authority, with more information in order to determine the level of environmental assessment. Finally, AENV published the updated final TOR on April 22, 2004. In this final document, there is a 30 page long list of information the proponent has to provide. Among the requirements, there are three types of activities that are remarkable. The identification of uncertainties and how to go about them: “Differentiate between emerging issues with uncertainties, issues with important environmental consequences and issues that can be mitigated through available technology and with existing management approaches. Describe how ongoing uncertainties and emerging issues will be addressed”, the adaptability of mitigation measures, “Identify any implications that those possible climate changes might have for the sustainability of the Project. Discuss any follow-up programs and adaptive management considerations” and the specification of uncertainties through models, “Habitat models used to evaluate impacts should be

modified/calibrated by comparing model predictions with wildlife data from the study areas”.

There are several things notable in the elaboration of the TOR. First, it included only two groups: the oil industry and the government. Second, it shows a one-way dynamic with demands from the government to Imperial Oil for what has to be in the EIA. Within the government, different bodies interacted regarding the content of the TOR but did so in unison. What really happens with the TOR is that the government creates a set of requirements that will frame the kind of discourse Imperial Oil will have in its EIA. The interests of Imperial Oil are to follow the directives in order to get their projects approved, whereas the government wants assurance that the project does not contain significant uncertainties that could be detrimental to both human and environmental health.

Regarding uncertainties, only the government’s discourse is present. What can be observed about their request is that they treat uncertainties in a classical way requiring “a range of possible outcomes” (cf. Smithson, 1993; cf. Collingridge, 1980). Prediction models and a science-based approach to uncertainties seem to have a very big part in how to deal with them. “More information” comes up often and reference to experts goes hand in hand with it. Another approach to understanding how the governmental bodies perceive uncertainties is that adaptive management is referred to directly, but also indirectly by establishing “environmental management procedures should monitoring indicate that mitigation strategies are not effective”. Expertise and adaptive management are the lines of thought that the government seems to endorse at this initial stage of the environmental assessment process.

In terms of Wehling's dimensions (2006) the government's discourse and approach to uncertainties places very high on the axis of *knowledge*, uncertainties have to be specified. This is motivated by the government's interests to provide a comprehensive list of issues to be addressed and clarified in order to make sure that the approval of the project is in everyone's best interests. On the axis of *temporality*, the government's discourse seems to consider uncertainties as temporary since management techniques such as prediction models, follow-up plans and adaptive management are sufficient answers to the specified uncertainties. Finally, on the axis of *intentionality*, uncertainties are unintended since in the discourse, there is no ambiguity regarding uncertainties as the inevitable side effects of industrial development.

#### **4.3.1.2 Environmental Impacts Assessment**

After the first step of elaborating TOR, Imperial Oil spent over a year producing its Environmental Impacts Assessment that was finally submitted to the former EUB of Alberta and to AENV on July 1, 2005. The document consists of 9 volumes altogether covering technical, environmental, social and economical issues in the KOS project.

In the executive summary, Imperial Oil states, "the environment impact assessment concluded that, with mitigation and adaptive management, there would be no unacceptable environmental, health, or socio-economic effects from the project." (EIA, 2005, Vol.1 p. xix) and suggests that "the proposed Kearl Oil Sands Project - Mine Development is in the public interest of Alberta and Canada and requests that it be approved." (ibid.). The aims of Imperial Oil are to have their project approved and in the summary of a document which contains over 8000 pages their discourse needs to be

assertive and leave no place for uncertainties. How did they develop such a firm conclusion? A closer look at the 9 volumes of the EIA will provide an insight into this discourse. Since it is a quite extensive document, the following part will be divided into the following themes: interactions, uncertainties, and approaches to uncertainties.

### *Interactions with other actors*

As a result of a multi-stakeholder process (EIA, 2005, Vol. 2 p. 2-5), the write-up of this document is a collaborative effort between Imperial Oil, other oil companies, citizen groups, the government and environmental NGOs (ENGOS). Consultants were also hired in the process. The meetings with the government and the ENGOS are of interest for our study. In volume 2 of the EIA, it is stated that OSEC met with Imperial Oil on Sept 8, 2004 to discuss its involvement in the KOS project. On March 2, 2005, Imperial Oil met with the Pembina Institute, which expressed its interest as a consultancy organization to participate in the KOS project although they will later reveal they did not have time to be involved (see part 4.3.1.3 of this chapter). On March 29, 2004, “Imperial Oil met with AENV to review the proposed EIA Terms of Reference. AENV indicated that new requirements would include: Climate Change, quantification of EIA modeling uncertainties, and discussion of mitigation measures for regional cumulative impacts.” (EIA, 2005, Vol.2 p. 2-24-27).

The information from those meetings suggests the government’s stronghold on the EIA. The lack of follow-up with environmentalists groups shows again their lack of power in influencing the environmental assessment process at this point in time.

### *Uncertainties*

The most straightforward way to understand Imperial's vision of uncertainties is to look at the glossary. In the first volume's glossary, they define the term: "**uncertainty:** Imperfect level of knowledge concerning the present or future state of the system under consideration; a component of risk resulting from imperfect knowledge of the degree of hazard or of its spatial and temporal distribution" (EIA, 2005, Vol.1 Glossary p.8).

Although in their executive summary they leave no place for uncertainties, they are still present in the remaining of the EIA. It is interesting to highlight discrepancies in the use of this "imperfect form of knowledge" (Ibid.) concerning different issues within the EIA. It is always used in the sense in which it is defined, but different attitudes in different fields towards uncertainties, are visible.

In the economical domain, they put the following notice in the introduction, "Please note that this application contains forward-looking information on future production, project start-ups and future capital spending. *Actual results could differ materially* due to changes in project schedules, operating performance, demand for oil and gas, commercial negotiations or other technical and economic factors." (EIA, 2005, Vol. 1 p. 1-5). This acknowledges uncertainties and cites different parameters that could interfere with predictions.

In the engineering domain, technical and environmental uncertainties are used to dismiss technological alternatives. Within the TOR, Imperial is required to provide alternative means of carrying out a task. For instance Imperial needs to use the water from the Muskeg River and suggested five ways of doing so, four including no river-diversion and one including river diversion. Three of the four no river-diversion

alternatives were rejected on grounds of "a negative effect on the mine and external tailings area", "technical uncertainties associated with flushing pore water from tailings" and "a negative effect on a low-flow river, caused by seepage collection wells" (EIA, 2005, Vol. 1 p11-8). Here uncertainties are associated to the functioning of the technology and are a sufficient reason to reject an alternative. Moreover, the fourth no river-diversion alternative was also rejected mainly on grounds of environmental uncertainties since the "level of certainty with this alternative in ensuring protection of the natural aquatic systems along the upper reaches of the Muskeg River is considered low." (EIA, 2005, Vol. 1 p 11-14). The environmental uncertainties are presented here are as a "low certainty" demonstrating the importance of the knowledge dimension. Therefore, the possible effects on the environment can be used as a reason for not using a particular technology.

What are then Imperial Oil's attitudes towards uncertainties in the environmental field? When talking about environmental effects and uncertainties, Imperial seems to have different kind of attitude. Different stances on the uncertainties about environmental parameters, the uncertainties in predicting and the uncertainties about environmental mitigation plans can be seen.

Uncertainties about environmental parameters are present in Imperial's EIA. For example, air quality is a big issue. Imperial states, "there remains uncertainty about the sources of ozone in northeastern Alberta. There are several plausible, but contradictory theories regarding ozone formation in northeastern Alberta, which are not being addressed by current research" (2005, Vol. 5 p. 2-146) and "uncertainties remain with

some of the individual TRS<sup>9</sup>, VOC<sup>10</sup>, PAH<sup>11</sup> and metal species; however the best available regional data was used to represent these compounds in the assessment” (2005, Vol.5 p.2-172). Imperial satisfies the uncertainties with available data and conservative estimates and it does not hinder them from proceeding with their predictions since “there is high confidence that the dispersion model and the modelling approach used will provide conservative air quality predictions” (2005, Vol. 5 p.2-116).

The present data is uncertain so there will be uncertainties in future estimates added to the imperfect nature of prediction models. Imperial heavily uses mathematical models to correct predictions about environmental effects like CALPUFF or predict what the baseline would be without industrial development like RELAD (2005, Vol.5, p. 2-134-135; Vol. 5 Appendix 2B). Also, “both sensitivity analyses and a rigorous analysis of model uncertainty were used to quantify the degree of uncertainty in the model output, and to strengthen the confidence in model results”(2005, Vol. 6, p. 3-16). Here the key word is confidence. The attitude about uncertainties in predictions therefore has the aim of transforming uncertainties into certainties through mathematical transformations. This approach to uncertainties is widely used and recognized in environmental assessment and supported by AENV (2005, Vol.5, p. 2-134-135).

Finally, uncertainties mitigation scenarios result from all those previous uncertainties. For instance “uncertainty in the composition and structure of reclaimed upland and wetlands communities makes it difficult to assign specific ecosite phases or wetlands types (or associated wildlife biodiversity index values) to the reclaimed landscape” (2005, Vol. 7 p.4-7). Also, “effects on vegetation resulting from changing

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<sup>9</sup> Total reduced sulfur

<sup>10</sup> Volatile organic compounds

<sup>11</sup> Polycyclic aromatic hydrocarbons

climates might affect certainty of reclamation goal achievement” (2005, Vol. 7 p. 4-9). What is noticeable from these quotes is that now uncertainty is a justification for an uncertain reclamation plan and schedule<sup>12</sup>.

Imperial Oil has different attitudes to uncertainties among fields and within the environmental field. In the environmental field it approaches uncertainties firstly as unknown ecosystem parameters in the case of effects and future mitigation and secondly as correctable mathematical objects. The diverse outlooks on the term uncertainty imply a set of rhetorical tools around this notion. Stocking and Holstein (1993, p.192) talk about rhetorical tools for ignorance claims. Among them are caveats, where scientists recognize their limitations in their findings and thereby explain they have done the best they could. This sort of rhetoric is the one Imperial uses when talking about uncertainties. “Conservative predictions” and uncertainty analyses contribute to showing caveats and thereby bringing credibility to the ignorance/uncertainty claims.

#### *Approaches to uncertainties*

As a means of responding to uncertainties, Imperial uses two related concepts. First, they show a strong trust in scientific ‘progress’ and second they only rely on adaptive management to answer to uncertainties. Imperial’s trust in research and development is clearly stated such as in Volume 7, they mention “ongoing research [which] continues to address areas of uncertainty in the system.” (2005, Vol. 7, p. 3-52). Expertise is central to specifying uncertainties. Therefore Imperial Oil invest

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<sup>12</sup> What is surprising is that climate change is considered as something external to the activities of Imperial Oil and treated as a variable creating uncertainty in mitigation plans. Meanwhile Imperial is also contributing to the emissions of greenhouse gases and is required to mitigate them as well as it is recognized that they contribute to climate change. Although it is not the sole contributor to greenhouse gases, it still has a local responsibility in climate related issues.

considerable amounts of money in R&D like its recent \$10 million contribution to the *Imperial Oil Centre for Oil Sands Innovation* at the University of Alberta whose “mandate ... is to find more efficient, economically viable and environmentally responsible ways to develop Canada’s oil-sands resources” (2005, Vol. 2 p.4-6).

Hand in hand with expertise comes adaptive management like the government of Alberta and Canada, as a six-step cycle. It entails the following:

- “assessing the risk of potential challenges, uncertainties and opportunities
- incorporating design elements that accommodate challenges, contingencies and knowledge acquisition
- implementing the design
- monitoring key indicators
- evaluating performance
- incorporating knowledge gained into existing processes and the design of future facilities and operations” (2005, Vol.1 p.2-41)

Although it is clearly defined, Imperial does not discuss the shortcomings of adaptive management like the extent of monitoring needed, the stability of uncertainties and the limiting frames in which adaptive management understands a system (see chapter 2, this work). Instead it is one of its core principles for reclamation (2005, Vol 7. p. 4-82).

Not only does Imperial ignore the shortcomings of its approaches to adaptive management, it also ignores the limitations of the expertise model developed by Van der Daele (see chapter 2, this work). The trust in “on-going research” shows Imperial’s approach that believes that if experts discuss enough within their community, they will find a solution. Imperial nonetheless uses a multi-stakeholder process, which includes

lay-knowledge. However, since they seem to rely mostly on the scientific community to find solutions, the multi-stakeholder process might as well be another way of keeping everyone satisfied so that the project can resume. All in all, Imperial has a classical view of uncertainties. The outcomes are known but their probability of occurring is not and they are linked to risk. In terms of Wehling's dimensions, Imperial's vision of uncertainties appears to be highly specified, temporary and unintended.

### *Controllability*

The discourse about uncertainties is accompanied by a discourse of controllability. It is seen in the attitudes toward the notion of uncertainties for instance as something correctable and also in the approaches to dealing with uncertainties using expertise and adaptive management. In addition, Imperial Oil refers to the work that has been done by governmental and non-governmental initiatives (CEMA and Regional Sustainable Development Strategy) and “the main environmental concerns associated with the Kearl project are similar to those previously identified and currently managed by the oil sands industry.” (EIA, 2005, Vol. 1 p. 2-35). Also Imperial states, “for most aspects of these projects, the project components and environmental interactions are well understood.” (EIA, 2005, Vol. 1 p. 2-41). Their discourse shows that environmental issues are known and understood, therefore controllable. Strategically speaking, they create themselves what Latour would call allies (cf. Latour, 1988). Imperial puts a lot of effort in specifying uncertainties in order to provide an illusion of controllability over this “component of [environmental] risk” (2005, Vol.1, Glossary p.8). Rhetorical tools like

caveats and allies along with their vision of uncertainties all work for their interests, which are to see the KOS project resume.

### *Summary*

So far in the story even before the EIA was produced, it was predictable that Imperial and the government would have the same vision of uncertainties since the TOR has a framing function. The previous analyses showed how Imperial succeeded in keeping the same discourse as the government about uncertainties through rhetorical tools like using caveats and allies and by their approach to uncertainties, expertise and adaptive management, which is the same than the government's. In this way, Imperial and the government's interests seem to be fulfilled.

#### **4.3.1.3 Initial exchange between OSEC and Imperial Oil**

After the submission of the EIA, different groups were invited to voice their opinion to the Joint Panel. On October 31, 2005, OSEC sent a letter (Statement of concern) to AENV and EUB, with a copy to the Panel. In this letter, they support that the KOS project is not in the public interest and undertake the position that no oil sands project should be "considered" until a regional planning for oil sands development is put into place. They also wrote that they had been too busy to fully participate in the EIA as consultants but wanted to contribute through the Review Panel. Moreover, documents show that OSEC was one of the four organisms to receive funding from the government to produce their contribution to the Joint Panel.

In the letter, they cite the "significant uncertainties regarding the recently announced Mineable Oil Sands Strategy and its implications for the Muskeg River

Watershed and the work of the CEMA” (p.1-2), which are environmental mitigation frameworks and management organisation. More precisely, they express concern towards the “insufficient resources ... dedicated to research, development and the piloting of alternative technologies offering superior environmental performance” (p 2), “ Imperial Oil’s plans to disturb such a large area and base their mitigation strategy on uncertain reclamation strategies and approaches.” (p.2), “the high levels of uncertainty in their ability to successfully reclaim its in-pit tailings and create a viable, maintenance free and ecologically sustainable end pit lake.” (p.5), “[the current impossibility] to predict whether this approach to MFT<sup>13</sup> management will prove adequate or successful, and whether it will have long term negative environmental implications” (p5), “[the lack of assessment by Imperial Oil] regarding the risks of potentially mining in proximity to undiscovered buried channels” (p.5) and finally, their lack of a specific plan for greenhouse gases emissions.

The discourse of OSEC regarding the EIA underlines the significant uncertainties regarding mitigation plans in various domains. Also, they support the advancement of science and alternative technologies to provide an environmentally friendly development of oil sands. However, as long as the mitigation plans and appropriate technologies are not fully understood OSEC endorses a precautionary approach that condones the arrest of further project approvals. This discourse reveals an approach that regards uncertainties as specified although they are not as specified as in the government’s or the industry’s discourses. They explain their reasons to believe that certain specified uncertainties in the project occur, but they also leave place for interpretation regarding unknown uncertainties with formulations like “[the current impossibility to predict] long term

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<sup>13</sup> Mature Fine Tailings

negative environmental implications”. What this also lets transpire from OSEC’s discourse is that they don’t consider uncertainties as being as strongly temporary as Imperial’s view. According to OSEC’s discourse, uncertainties can also be seen as stable when considered in the contemporary context. Lastly, uncertainties are also unintended since they are the result of the intensive industry.

To this statement of concerns, Imperial Oil emitted a response on August 6, 2006. While OSEC’s document took the form of a letter, Imperial’s document was a report systematically addressing the points raised by OSEC. In this document, Imperial quotes OSEC directly, therefore using the rhetorical strategy of echoic speech (Stocking and Holstein, 1993, p193) contributing to the demonstration of controllability. By taking OSEC’s arguments point by point, they show they do have all the answers. The way they address uncertainties also highlights the difference in discourses between the industry and the environmentalists. Imperial has an extremely assertive tone about uncertainties such as, “ongoing research is demonstrating that reconstructed soils are returning to equivalent capability.” (p.4), “uncertainty analysis performed on the project’s proposed pit lakes demonstrated that the predictions are robust and that they will achieve acceptable water quality (see Volume 6, Section 5.9.5.2 and Appendix 5A)” (p.3) and “the recognition that adequate time is available to progressively apply successive learning’s from ongoing research and modelling and resolve uncertainties before and after the first pit lakes are completed” (p.4). These examples show the central role of science and expertise to Imperial’s approach, and thereby strengthen their view of specified, unintended and temporary uncertainties (Wehling, 2006). The same rhetorical tools as in their EIA, i.e. caveats and allies with addition to the echoic speech, also support their assertive tone.

#### **4.3.1.4 Official submissions to the Panel**

##### **OSEC**

Nonetheless, these answers did not satisfy OSEC's concern. On November 12, 2006 they submitted through their lawyer a 900 page long document to the Panel Review in which they also undertake a firm tone requesting, "that the approval of the application for the Imperial Kearn project ... be denied on the basis that it is not in the public interest." (p.7). The core of the document is of 50 pages and contains a list of approval conditions to the project, a list of recommendations to the Panel and the bulk is a discussion of presented results by Imperial Oil. The remaining pages are scientific reports from various consulting sources.

The approval conditions section has nothing to do with uncertainties but everything to do with certainties such as requiring Imperial "to develop and submit a conservation offset mitigation strategy for terrestrial disturbance" (p.8), to "demonstrate how biodiversity monitoring in accordance with the protocols of the Alberta Biodiversity Monitoring Program will be incorporated into the Project's environmental monitoring systems" (p.9) and "to provide the evaluation of the significance of air quality in relation to the guidelines and standards accepted by the Province of Alberta that was called for in the Terms of Reference for the project" (p.9) The recommendations to the Panel can be summarized in three sections. First the need for transparency from all parties industry and government, second the integration and monitoring of the project in recognized frameworks and finally, the use of scientific techniques OSEC judges more appropriate for predictions. The aims of these recommendations are to provide a strict regulatory

frame to the KOS project. Lastly, OSEC discusses misrepresentations of scientific information in the EIA for instance comparing greenhouse gases emissions intensity from the Kearl Project with projects that are not its equivalent (see Appendix C for excerpt).

In this document, it is interesting to notice that OSEC starts talking more directly about risks. OSEC states, “in the absence of thresholds, a true assessment of the environmental impacts associated with proposed projects cannot occur, and proponents are left to assess the environmental risk associated with a project” (p.22) and “air quality guidelines and standards act as a means of evaluating risk to plants, animals, ecosystems, and humans” (p.33) thereby emphasizing the need of certainty before proceeding with a project that could turn out having significant risks. They therefore take another angle to their precautionary approach. In their initial letter, their differing view of uncertainties justified precaution. In this document, OSEC barely mentions uncertainties in its core document. However in the Appendices, which contain expert produced documents and reports supporting their claims, uncertainties are presented and mentioned. OSEC therefore seems to make a transition from addressing uncertainties to addressing certainties and potential risks to emphasize the need for precaution in the KOS project as a reaction to Imperial assertive tone towards OSEC’s vision of uncertainties. OSEC therefore does not change its discourse about uncertainties itself, but endorses a discourse where the approval or denial of the KOS project depends on the proponent’s ability to specify their uncertainties and to prove how they can be overcome. In their effort to make themselves understood by the Panel, they also use echoic speech to discredit Imperial’s arguments. OSEC shows flexibility in its strategies in order to attain its goal, which is to have Imperial Oil be denied approval for the KOS project.

## **The Government**

The DFO and EC also presented submissions to the review Panel respectively on June 1, 2006 and October 1, 2006. The DFO met with Imperial Oil to develop a No Net Loss plan (NNL), which Imperial Oil published. This plan involves the condition for Imperial Oil to create a 2:1 compensation ratio for fish loss created by the KOS project, which is also legally necessary for the approval of the project. The document itself does not directly address uncertainties but rather is concerned with the uncertainties in predicting effects and how they should be dealt with. In its series of recommendations, follow-up programs insure that predictions are met and mitigations are efficient.

Another document submitted by the government summarizes the points of concern of EC, the DFO and Health Canada (HC). Although they clearly express their concern over specific issues, they also formulate what they expect from Imperial Oil and the Panel's decision, "in closing, DFO, EC and HC welcome this opportunity to share our views with the Panel and so provide this information for its consideration in reaching a decision with respect to the Kearl Project" (p.150). As opposed to OSEC, they do not oppose or support the project. They only express their concerns and the measures they believe appropriate to remedy to those issues. The government's vision of uncertainties is mainly visible through its approach to the management of potentially adverse environmental effects, which is mainly monitoring, further research and adaptive management. Uncertainties are therefore still seen as temporary, unintended and specified (Wehling, 2006) like it was suggested already in the TOR.

#### 4.3.1.5 Panel report and decision

No written answer was given to OSEC's submission or any other submissions. During the public hearings OSEC presented on November 16, 2006 a PowerPoint document explicating Imperial's water use and the resulting problems. After receiving submissions and viewing presentations from different groups like First Nations and other oil companies, the panel produced its report on February 27, 2007. The Panel Report provides a summary of all issues raised and each group's viewpoint, followed by the Panel's own opinions and recommendations.

What appears through the Panel report is that the only discourse about uncertainties left is about the management of environmental effects. "The Joint Panel has made the decision that the KOS Project is in the public interest, but it must be clearly understood that the lack of certainty related to the management of cumulative impacts for key environmental parameters ... on the region have weighed heavily in this process." (p. 4). Nonetheless, "the Joint Panel has concluded that the project is not likely to cause significant adverse environmental effects, provided that the proposed mitigation measures and the recommendations of the Joint Panel are implemented." (p.5) These mitigation measures include for the larger part the ones suggested by the different governmental bodies, i.e. monitoring and adaptive management. For their success, the Panel recommends a stronger involvement from EC and AENV in the implementation of regulatory frameworks. (p.5) Interesting aspects to the monitoring process, which appear in the Panel Report is the notion of the control dilemma. For instance, the Panel insists, "monitoring should be carried out to ensure that impacts on fish and fish habitat ... [be] mitigated at the *earliest stage possible* to ensure that the cumulative impacts on the

Muskeg River watershed are *minimized.*” (p.86) This means that if the monitoring is not done properly, the cumulative impacts could be difficult to mitigate. Although Imperial did not recognize the pitfalls of their approach, the Panel stresses the necessity of carrying out mitigation plans properly. Generally, adaptive management seems to be the approach to uncertainties, which satisfies the Joint Panel. This suggests that the Joint Panel has a similar view on uncertainties as the government and the industry.

After this favourable report for the KOS project, the government of Canada accepted the Panel’s conclusions and all regulatory duties of monitoring that they recommended on August 1, 2007. The DFO granted approval to the KOS project.

While environmentalists groups endorse a precautionary approach, the industry and the government seem to favor an adaptive management approach. In chapter 2, adaptive management was presented as a tool to overcome the paralyzing effects of the precautionary principle. In this case however, different groups purposely use different approaches to uncertainties to satisfy their goals. The industry and the government have in mind economical development and the environmentalists, environment’s protection and preservation, as well as human health. Their conflicting views on uncertainties having been left unresolved through the environmental assessment process leading to a legal dispute supposed to settle the different.

### **4.3.2 Differing views of uncertainties settled in the trial**

#### **4.3.2.1 The Coalition's affidavit**

Shortly after the publication of the Report on March 29, 2007, the Coalition (see section 4.2.3) filed a judiciary review against Imperial, the Panel and the Government for unlawful environmental assessment. Simon Dyer of the Pembina Institute was the main actor in this trial along with Sean Nixon, the environmental lawyer from Ecojustice. He made his affidavit on January 11, 2008 talking about Imperial Oil's environmental management plans and referring the Panel's recommendations as "phantom mitigation" (p.5). The Panel is accused of not addressing the issue of what would happen to significant adverse environmental effects in the case that the mitigation plans did not work. The uncertainty of mitigation plans was only addressed through adaptive management and monitoring, the Coalition demands "technically and economically feasible measures" (p.2) and expresses its concerns on the regulatory frameworks like CEMA that have consistently failed to set environmental thresholds and be on time for their commitments. To the Coalition, this demonstrates a lack of precaution in the management of the oil sands development.

The Coalition is going to court and therefore needs to have an assertive and even aggressive tone. This is underlined by the use of ironic reversals using terms like "phantom mitigation". By opposing the Panel's approach to uncertainties, the Coalition reiterates its conflicting vision of uncertainties with the other groups, who so far have been on the same page. The Coalition's views on uncertainties is the same as OSEC's putting forward a precautionary approach, i.e. uncertainties are not so specified, more stable than temporary and unintended.

#### 4.3.2.2 The Ruling

The judicial review took place in Edmonton, during three days starting on January 15, 2008. Justice Lamer-Tremblay was the federal judge appointed to this case and she decided the case on March 5, 2008 in Ottawa. There are two main parts to this document. First she explained her interpretation of the CEAA and second she delivered her ruling analysing the complaints against the report, the EIA and the CEAA principles, as she understood them. The complaints presented in Simon Dyer's affidavit were subduced into three main issues of contention: a) Cumulative Effects Management Association (CEMA), Watershed Management and Landscape Reclamation, b) Endangered Species and c) Greenhouse Gas Emissions.

In the ruling, the environmental assessment process is described as a two-step decision-making process. The first one is an information-gathering step and the second one is a decision-making and follow-up step. She claims that the basic concepts behind environmental assessment are the "early identification and evaluation of all potential environmental consequences of a proposed undertaking" and sustainable development (para.15). In paragraph 22, she underlines with the help of jurisprudence how environmental assessment "is not a wholly objective exercise but rather contains 'a large measure of opinion and judgement.'" What the judge also makes apparent from this value-laden aspect of environmental assessment is the control dilemma, insisting that assessment must take place " 'as early as is practicable in the planning stages ... and before irrevocable decisions are made'" (para.23). However, she also insists, "finality and certainty in environmental assessment can never be achieved." (para.23). Nonetheless, an important aspect of environmental assessment was to provide "technically and

economically feasible” mitigation measures (para.26) Further into her interpretation of the law, she describes the two “guiding tenets to environmental assessment: the precautionary principle and adaptive management.” (para.33) Also, “as an early planning tool, environmental assessment is tasked with the management of future risk, thus a review panel has a duty to gather the information required to fulfill this charge.” (para.33)

In the evaluating the complaints, the judge refers to the precautionary principle several times. For instance, the complaints regarding CEMA as being inadequate to carry out mitigation measures were rejected. The judge interpreted the role of CEMA as a “vehicle for the development of environmental management frameworks” (para.44). Also, she invoked the precautionary principle with regards to the use of CEMA in the sense that it was backed up by AENV in the event that it was “unable to meet its timelines for management frameworks” (s.45). Here the precautionary principle is understood as a back-up plan. It is however odd that the precautionary principle be applied to a management framework, which is not considered as a mitigation measure.

The precautionary approach is further used in another situation. The Coalition suggested tailings thickeners were not an economically and technologically feasible technology and Imperial therefore relied on unproven technologies for mitigation plans. However, Imperial defended that this was not their only technology available and that they were working on it. The judge therefore ruled that not developing tailings thickeners would “stifle innovation in the field, which could potentially result in future benefits to the environment” (para.54). Ironically, in that case, we see a contradicting application of the precautionary principle. On the one hand the environmentalists refer to the principle in demanding full certainty on mitigation issues before approval is granted. On the other

hand Imperial and the judge refer to the precautionary principle in the sense that the lack of full certainty cannot be used as a reason against taking potentially beneficial mitigation measures.

The environmentalist groups also put adaptive management in question. Imperial claims the use of adaptive management will help them reclaim lands whereas the environmentalists affirm that there is not enough that is known to begin applying adaptive management. However, the judge ruled that there was enough knowledge about wetlands and states, “while uncertainties with respect to reclamation of peat-accumulating wetlands remained, they could be addressed through adaptive management given the existence of generally known replacement measures contained in Imperial Oil’s mine closure plan.” (para.62). Solely the judge and her appreciation of the Panel Report decided the question of how much knowledge is enough. This underlines the highly value-laden character of decision making under uncertainties.

The argumentation of environmentalists groups on the precautionary principle and adaptive management were unsuccessful. The views of Imperial Oil corresponded more to the judge’s vision and the Coalition failed to convince her. However, the Coalition won on one point, which were greenhouse gas emissions. They accused the Panel of not providing a rationale for stating that GHG emissions would not have significant adverse environmental effects. The judge referred to the Panel as a consortium of experts possessing enough information to provide a rationale for their decisions. She also referred to jurisprudence quoting, “Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their

conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible.” (para.75). Given that the Panel had to means to give a rationale but did not, she was “of the view that the Panel erred in law by failing to provide reasoned basis for its conclusion as mandated by s. 34(c)(i) of the CEAA.” (para.79). The Panel was therefore ordered to review its rationale for this particular point.

Although there is clearly a great amount of values in the judgment, the ruling was still strongly based on trust in science and scientific progress dismissing the views of the Coalition for the views of Imperial and the government. It was really a question of differing views of uncertainties rather than an issue where facts were disputed. The Coalition’s view was one against the industry and the government. The Coalition’s views however succeeded in the social construction of an environmental problem putting it through a legal dispute (cf. Hannigan, 2006, p.73ff).

#### **4.3.2.3 Panel’s Addendum**

On May 6, 2008, the Panel emitted its addendum as required by the Court. Instead of the three members, only two participated since one of them, from the EUB, had retired. In their addendum, the Panel first presents the issue like a misunderstanding of their initial report aiming to “to better communicate its rationale for its conclusion regarding air emissions, including GHG”. Also, they set out to explain their rationale for not only GHG emissions but also other air emissions. For GHG emissions, the Panel lists twelve actions taken by Imperial to mitigate their emissions and supports that they are

sufficient although Imperial has not specifically outlined a management plan for GHG emissions. The Panel also considers that provincial and federal frameworks for managing GHG emissions should take care of regulating GHG emissions and that “adaptive management will be required by Imperial to meet the forthcoming GHG emissions intensity targets.” There again, the Panel stays consistent to its approach before the trial

### *Epilogue*

In an interview with a representative for an environmental group, the interviewee said the Panel’s addendum was an “an insult” but that environmental groups would not pursue further action because they think they thought they could not win. It was apparent from the interview that the differing views of uncertainties create a true misunderstanding between the different groups and therefore make negotiation processes difficult and even conflicting in this case. The KOS project was finally granted approval by the DFO on June 5, 2008.

## 5. Conclusion

How do the different parties involved in the KOS case deal with uncertainties? Basically, there were two main visions of uncertainties and two corresponding approaches to each of them. Although there were more than two actors groups involved, they all seemed to line up behind one or the other approaches. The first approach, in terms of Wehling's dimensions, was a specified, temporary and unintended vision of uncertainties, or in other words a classical approach to uncertainties. It relies strongly on expertise to solve problems in time and on adaptive management to implement more appropriate and even newer techniques for environmental impacts mitigation. The Government, the oil industry, and the independent actors, i.e. the Joint Panel and the Judge, seem to find this approach satisfactory and actively undertake it throughout the KOS story. The second approach views uncertainties also as unintended but at the same time as not so specified and more stable positioning itself in an opposite way on the knowledge and temporality dimension. The approach strongly emphasizes the unknown and thereby justifies the use of a precautionary approach to uncertainties also backed up by considerable amounts of expertise. This is more consistent with Beck's ideas of the Risk Society since side effects of industrial development are unintentional (unintended), unseen (not specified) and compulsive (neither stable nor temporary). The environmentalist groups undertake this discourse. Yet, both views appear to consider not-well managed uncertainties as potential risks.

In those two visions there are however misunderstandings. The precautionary approach is understood in two different and opposing fashions. On the one hand, it is seen as a precautionary tool for the environmentalist groups to halt potentially harmful

and irreversible consequences and on the other hand, the judge ruled that the use of adaptive management and expertise is precautionary. The discrepancies concerning the precautionary principle underlined by Foster et al. (2000) are highly visible here. Although the principle is defined in Canadian law, the KOS case shows that the definition still leaves room for interpretation. However, environmentalist groups did not succeed in putting their interpretation of the law forward.

Ultimately, the differing views on and approaches to uncertainty of all involved actors have to be seen as strategic tools. The case study showed that the oil industry and the environmentalist groups used rhetorical tools to attain their means. Yet, they do not seem to be very influenced by each other in their views. Instead, as presented in the previous paragraphs, the views and strategies were and remain different. In addition, while the oil industry is strong in creating allies with other actor groups, the environmentalist groups seem to stand-alone. Regarding their internal consistence, all groups showed firm positions on how they viewed uncertainties and how they should be dealt with, helped by amounts of expert-produced scientific evidence.

All in all, why and how does the legal negotiation process contribute to the social construction of an environmental problem? Bringing an issue in front of a court of justice is a big step. Firstly, it brought national attention to the case that included high-profile actors, giving recognition to the oil sands exploitation and consequences issue. Secondly, the judge's decision becomes jurisprudence and will be referred to in further cases where approaches to uncertainty are debated. This therefore sets a reference for the use of the precautionary principle and adaptive management in Canada. Adaptive management is a Canadian concept and is well established in the environmental assessment's psyche. The

precautionary principle/approach is a European concept that even in Europe encounters variability. Its new addition to the Canadian legal and political spheres still needs experience and defining. The KOS case is therefore very important to that end and sets a trajectory on how to deal with environmental problems. The environmentalist groups seemed to refer to a precautionary approach rather than the precautionary principle, but the judge answered them on the basis of a precautionary approach/principle. Perhaps actors need to work on differentiating those two concepts in order to change the “path” that the KOS case has set for the precautionary approach/principle.

At the beginning of this work, I postulated the following thesis: in the social construction of environmental uncertainties around the KOS controversy, the ways these were addressed differed between the parties involved. Moreover, each party referred to uncertainties ambiguously for its own purposes. This thesis is partly supported by the case study. In fact, each group did have different ways to address uncertainties for their own purposes, however, they addressed them in an unambiguous way, sticking to their guns and allowing little place for negotiation.

In the end, the case itself was not a trial where facts were disputed. There were no experts supporting contrary claims and this is even more supported by the observation that the intentionality dimension (Wehling, 2006) did not show any variations. The current case did not allow showing whether certain groups would have had interests in hiding facts. To the contrary, everybody seemed to openly agree on the facts base of issues like air quality, wetland reclamation, etc.

However, the different groups did not agree on how to go about these potential problems. Therefore, it was essentially a controversy on what is acceptable or not and this

thereby shows that scientific facts alone are not enough to meet a decision. Although the judge recognizes the value-laden quality of environmental assessment, the values she seemed to favor were the trust in expertise and science. In the end, this important decision on how to evaluate the acceptable level of uncertainties was left for only one person to weigh.

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**Appendix A- Main documents for analysis from the CEEA Registry Website**

| <b>Date</b>       | <b>Document</b>   | <b>Author(s)</b>    | <b>Recipient(s)</b>                                     |
|-------------------|---|---------------------|---|
| November 7, 2003  | Public Notice – Proposed Revised Terms of Reference                                       | Imperial Oil        | DFO   |
| November 18, 2003 | Canadian Environmental Assessment Act: Federal Coordination Regulations Referral          | The Agency          | DFO   |
| December 22, 2003 | Invitation to participate in a cooperative environmental assessment review of the project | The Agency          | AENV  |
| December 22, 2003 | Responsible authority determination   | The Agency          | Imperial Oil  |
| January 7, 2004   | Federal environmental assessment and the Responsible Authority                            | DFO                 | Imperial Oil  |
| April 22, 2004    | Final Terms of Reference  | AENV                | Kearl Oil Sands development <sup>14</sup>               |
| July 1, 2005      | Environmental Impact Assessment   | Imperial Oil        | AENV  |
| October 31, 2005  | Statement of Concerns   | OSEC                | AENV, EUB of Alberta                                    |
| November 23, 2005 | Preliminary discussion with Imperial Oil  | Imperial Oil        | DFO   |
| June 1, 2006      | Kearl Oil Sands Project - Mine Development - Draft No Net Loss Plan Report                | Imperial Oil        | DFO   |
| June 1, 2006      | Supplemental Information Request no.2   | AENV                | Imperial Oil  |
| June 9, 2006      | Additional Supplemental Information   | Imperial Oil        | Alberta Environment, Alberta Energy and Utilities Board |
| July 14, 2006     | Notice of Referral to a Review Panel  | The Agency          | N/A   |
| July 14, 2006     | Agreement to Establish a Joint Panel  | The Agency /AEUB    | N/A   |
| July 25, 2006     | Supplemental Information Request no.3   | Alberta Environment | Imperial Oil  |

<sup>14</sup> All the parties (industrial and governmental) involved in the initial parts of the environmental assessment.

| <b>Date</b>        | <b>Document</b>   | <b>Author(s)</b>                  | <b>Recipient(s)</b>                |
|--------------------|---|-----------------------------------|------------------------------------|
| August 6, 2006     | SIR Round 3 - Health Team Clarification Questions on Additional Supplemental Information  | Imperial Oil                      | Alberta Environment                |
| August 6, 2006     | Responses to OSEC Statement of Concern  | Imperial Oil                      | OSEC                               |
| August 10, 2006    | News Release - Federal Government Awards Participant Funding  | The Agency                        | N/A                                |
| September 26, 2006 | Supplemental Information Request no.4   | Alberta Environment               | Imperial Oil                       |
| October 1, 2006    | Federal department submissions  | Government of Canada              | Joint Review Panel                 |
| October 6, 2006    | AHW Clarification Questions And Responses   | Imperial Oil                      | Alberta Health and Wellness        |
| October 6, 2006    | Letter confirming EIA report is complete  | Alberta Environment               | Alberta Energy and Utilities Board |
| October 6, 2006    | Government of Alberta Submission  | Alberta Justice                   | Alberta Energy and Utilities Board |
| October 12, 2006   | OSEC Submission   | Oil Sands Environmental Coalition | Alberta Energy and Utilities Board |
| November 15, 2006  | Imperial Oil Statement Clarification for AEUB (002-030)   | Imperial Oil                      | N/A                                |
| November 16, 2006  | Imperial's Proposed Water Use (008-008)   | Oil Sands Environmental Coalition | N/A                                |
| February 27, 2007  | Joint Panel Report  | Joint Review Panel                | N/A                                |
| August 1, 2007     | Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Kearl Oil Sands Project | DFO                               | N/A                                |
| May 6, 2008        | Joint Panel Report (Rationale)  | Joint Review Panel                | N/A                                |
| June 6, 2008       | Decision  | Fisheries and Oceans Canada       | N/A                                |

**Appendix B- List of interviews and exchanges**

| Date                                   | Person contacted   | Form of the exchange   | Content of the exchange  |
|--|--|--|--|
| June 6, 2008                           | Federal representative for the KOS project environmental assessment  | 1-hour phone call carried in French following initial email contact.                                     | General information on environmental assessment in Canada. No information on KOS project available and decision-making under uncertainty.  |
| June 25, 2008                          | High representative for the Sierra Club of Canada                    | 1-hour face-to-face interview carried in English in Ottawa following initial email contact.              | General and specific information regarding the KOS case, environmental assessment in Canada and decision-making under uncertainty.   |
| July 10, 2008                          | Recognised investigative journalist and book author on the oil sands | 1-hour and a half face-to-face interview carried in English in Montreal following initial email contact. | General and specific information regarding environmental problems created by the oil sands industry, general and specific information regarding industry-government dynamics and opinion information on decision-making under uncertainty. |
| Between May 30, 2008 and July 15, 2008 | Representative for decisional governmental body                      | Several email exchanges in English.  | General information regarding risk and uncertainty management.   |
| Between May 30 and June 30, 2008       | Representative for Albertan environmental grassroots organization    | Unanswered emails and phone calls.   |  |
| Between May 30 and June 30, 2008       | Representative for oil company                                       | Unanswered emails and phone calls.   |  |

**Appendix C: Excerpt from OSEC's official submission to the Joint Panel**

“Under the heading “Marginal GHG increments” the proponent identifies that at full operations the Kearl Project will contribute 0.51 % and 1.7% of the most recently reported national and provincial GHG emissions (2002 data). (Volume 5 – Page 2-166). Imperial indicates that the GHG intensity for the project will range from approximately 38 to 44 kg ECO<sub>2</sub>/bbl bitumen (Volume 5 – Page 2-167). Imperial then notes that this intensity “...*is in the range of intensities specified in approvals for other developments in the oil sands region,*” and presents Table 2-72 ((Volume 5 – Page 2-167).

Unfortunately this comparison is not particularly relevant and does not provide a useful analysis of Imperial's performance relative to its peers. Comparing the Kearl Project to *in situ* SAGD projects (Devon Jackfish and OPTI/Nexen Long Lake) is not a useful comparison given that these projects employ fundamentally different approaches to bitumen extraction. Similarly, Imperial fails to note that the apparently high GHG intensity provided for Canadian Natural's Horizon Project arises from the fact that this project will include an upgrader that will process bitumen into synthetic crude oil. It is more meaningful to compare the Kearl Project's GHG intensity with that of their oil sands mining peers. For example, Petro-Canada/UTS's Amendment Application for the Fort Hills Project notes that its GHG intensity will be 32.85 kg/barrel (Application for Amendment 2002, pg. 6-6, March 2005). Therefore, when comparing the Kearl Project's GHG intensity with that of the Shell Jackpine Mine – Phase 1 project or the PetroCanada/UTS Fort Hills Oil Sands Mine one finds that is considerably higher (at least 7 kg/barrel).” (p.13-14)