

Journal of Environmental Law and Practice Volume 13 Abstracts

Public Health Hazards and Section 7 of the *Charter*

- Andrew Gage

Government decisions that give rise to a health risk to the public at large may have a very real impact on the right to life, liberty and security of the person of individuals and the public at large. Surprisingly, there has been comparatively little litigation examining whether s. 7 of the Canadian Charter of Rights and Freedoms places limits on the ability of government create or authorize such health risks. After a review of the relevant Canadian court decisions, decisions from other jurisdictions with similar constitutional provisions and relevant international instruments, the author concludes that the scope of s. 7 does extend to protecting members of the public against government decisions that create a serious public health risk. The author then examines what types of government decisions could be vulnerable to such a challenge and concludes that government authorization of private actions that threaten public health must comply with the principles of fundamental justice. The article concludes with an examination of what "principles of fundamental justice" apply to a government decision impacting on public health. The author argues that in some cases the impact on the public's s. 7 rights is so egregious as to "shock the conscience of the nation," and will violate the principles of fundamental justice. In other cases, s. 7 will require that procedural protections be put in place to notify the public of the potential health risks, to provide the public with an opportunity to be heard, and to ensure that an unbiased decision-maker assesses the health risk and makes an informed and cautious decision.

The Great Lakes Charter Annex 2001: Legal Dimensions of Provincial Participation

- Marcia Valiante

As a response to the threat of water exports, the eight U.S. states and two provinces that comprise the Great Lakes-St. Lawrence River Basin agreed to develop by 2004 a regional agreement to supplement the 1985 Great Lakes Charter. The new agreement is expected to establish a coordinated and harmonized regional system of water management, requiring each jurisdiction to adopt an agreed set of environmentally-based common standards into its domestic regulatory regime. The substance of this new system is being driven by concerns over how water export proposals would be treated under international trade agreements, but these concerns have created for the first time the will to develop a comprehensive, environmentally appropriate water management regime for the Basin. This article examines the legal issues that arise with the participation of the provinces of Ontario and Quebec in this agreement, including how the provinces could be bound by the agreement and whether they are constitutionally able to fulfil all of their new obligations. The article goes on to consider

how Ontario in particular would have to modify its existing water management regime to accommodate its new obligations. Although Ontario is ahead of other Great Lakes jurisdictions in many features of its water management regime, it will still be required to make some important changes. A number of legal, political and technical challenges remain before full implementation of a coordinated system will be possible. However, it is important for the future of the Basin that the 10 jurisdictions make every effort to meet those challenges.

Seven Deadly Sins of Canadian Water Law

- Bruce Pardy

An ideal legal regime for the governance of water quality would include the following: clear and enforceable obligations on the part of government for the provision of clean water; citizens' rights to the supply of such water; and an ecologically sound approach to the protection of water quality. In Canada, water law has none of these things. Instead, it has at least seven flaws: (1) citizens have no legal right to clean drinking water, and government liability for failing to provide clean water is limited; (2) governments are either reluctant or unable to strictly enforce environmental standards; (3) water management is characterized by an unclear and complex division of powers and responsibilities distributed among three levels of government; (4) water quality is controlled by government, arguably the worst polluter in the country; (5) standards for drinking water are not based upon the precautionary principle; (6) water laws do not protect ecological units such as ecosystems or watersheds; and (7) the approach to water management is predominantly remedial, not preventative. This article proposes three steps to mitigate the flaws in Canada's water laws. The first is the creation of the right of private persons to require provincial governments to provide drinking water to prescribed standards. The second is the development of drinking water standards that are based upon the precautionary principle — standards that prohibit all contaminants except those specifically identified. The third is the separation of the function of developing standards from that of achieving them. These three changes would vastly improve the quality and dependability of drinking water in Canada.

Greening the international Human Rights Sphere? An Examination of Environmental Rights and the Draft Declaration of Principles on Human Rights and the Environment

- Karrie A. Wolfe

In this article, the author examines the connections between the environment and fundamental human rights by critically analyzing the United Nations' Draft Declaration of Principles on Human Rights and the Environment. Drafted in 1994 as part of a UN study on Human Rights and the Environment, the Draft Declaration articulates the links between a healthy ecosystem and basic human rights, such as the right to adequate food and housing. Despite its relatively logical framework, the Draft Declaration

remains conspicuously absent from the international human rights agenda. The author begins with an exploration of environmental rights in context and the history of the Draft Declaration, followed by an evaluation of the document. The author then canvasses supporters and critics of the human-rights based approach to environmental protection. After considering alternatives to this approach, the article concludes that the best way to address the interaction between the environment and human rights may be to shift the focus away from humans entirely.

Challenging the Intervention and Stay of an Environmental Private Prosecution

- Keith Ferguson

Private prosecutions retain important roles to play, especially in realms such as environmental law where government enforcement is lax. The Attorney General's office, however, will often intervene and stay a private prosecution, and some provinces have a blanket policy to always intervene. Although it is possible to seek judicial review of an intervention and stay, such attempts have been 'spectacularly unsuccessful.' This article describes the strict approach taken by the courts in such reviews and the rationales put forward for their reluctance to interfere with Crown prosecutorial discretion. In contrast, it is argued here that the intervention and stay of a private prosecution is fundamentally different from other forms of Crown prosecutorial discretion, and so these rationales should not apply. Additional factors in the environmental realm further support the argument that the intervention and stay of an environmental private prosecution should be reviewed according to normal administrative law principles.

Real Reform Deferred: Analysis of Recent Amendments to the *Canadian Environmental Assessment Act*

- Hugh J. Benevides

This article reviews recent amendments to the Canadian Environmental Assessment Act, with an emphasis on deliberations of the House of Commons environment committee, and controls imposed on it by presumptive Parliamentary. rules and by the government at Report Stage. In addition to proposing that the Standing Orders of the House of Commons be updated to give clearer guidance on the amendment process, the author suggests that the need for real reform to federal EA remains, particularly in the areas of strategic environmental assessment, the abolition of selfassessment, and reform of the current "central test" in the Act that tolerates incremental, cumulative environmental degradation by successive projects. Meanwhile, a strengthened legislative purpose and a new duty on the government to exercise precaution, as well as improved access to some (but not all) key documents through an electronic registry, may enhance opportunities for the public to help ensure compliance.

Water Quality Objectives and the Management of Public Drinking Water Catchments in Australia

- Alex Gardner

Good catchment management is now well recognized internationally as essential to the provision of safe, good quality drinking water. The legal framework for management of public drinking water catchments in Australia is developing in ways that give better recognition to the primacy of water quality. This article uses examples of regulatory developments in the States of New South Wales and Victoria to argue that the protection of water quality in drinking water catchments is best secured by establishing a specialist catchment management agency with pre-eminent regulatory authority to supervise the adoption and implementation of water quality objectives in the management of land use and development in public drinking water catchments. These regulatory developments are providing the basis for defining standards of water quality protection in catchments, including a "cap" on water quality degradation from new land uses and goals for the rectification of existing land uses.

Litigating Environmental Quality: An Economic Approach

- Cherrie Metcalf

Private litigation plays a relatively minor role in establishing environmental quality standards. An economic model is used to explore why this is so. Three features of litigation are considered: legal costs; uncertainty in the result; and the nature of available damages. Overall, reliance on private litigation alone results in inefficient environmental protection. Litigation costs prevent suits where damages are low and uncertainty leads firms to discount the costs of environmental damage. The nature of private litigation damages understates the social cost of environmental harm. Canadian class action regimes and statutes supporting environmental citizen suits are evaluated in light of the model. The performance of private actions is improved but difficulties remain.

Standing on the Shoulders of Rio: Greening Mediations under the Canadian Environmental Assessment Act

- Tyson Dyck

On October 30, 2003, An Act to Amend the Canadian Environmental Assessment Act came into force. This amendment did little to change CEAA's often criticized self assessment process, leaving an Act with a particularly dangerous mediation provision. Yet so far this form of assessment has never been used. Consequently, federal assessments have neither enjoyed the advantages nor suffered the disadvantages that mediation presents. This article explores ways to limit these disadvantages, indeed, environmental mediations have many dangers, particularly in CEAA's self-enforcing

and discretionary assessment process. Although mediations hope to create a private forum in which interested parties can reach an agreement, environmental disputes are public, not private. Many dangers therefore arise, including: power imbalances between the parties; the under-representation of environmental interests; private analyses of public risks; and the unaccountability of mediation settlements. This article suggests the federal government, using the principles of public participation and precaution found in the Rio Declaration, must refine CEAA's environmental mediation provisions. Filtered through these principles, CEAA mediations could minimize their inherent disadvantages and become a framework for sustainable development.

Interlocutory Injunctions and the Environment: Comparing the Law Between Quebec and the Other Provinces

- Calude Martin

Action to protect the environment or to control administrative action in respect to environmental decisions is often accompanied with interim court orders to prevent or avoid ongoing harm. The orders are granted if the applicants have standing, if the issue raises serious questions, and if they are necessary to prevent an irreparable injury. Applicants must also show that the balance of convenience tips in their favour. This article is premised on the idea that protecting the environment is now a fundamental value in Canadian society. One of the peculiarities of Canada is the coexistence of two legal systems: the civil law in Quebec and the common law in the other provinces. This article examines the differences and the similarities between the law in Quebec and the common law provinces with respect to interim injunctions. It also questions the appropriateness of the usual test the courts refer to when granting or denying an interim injunction in cases involving the protection of the environment. The article concludes that there are some differences between Quebec and the other Provinces. These differences exist to a large extent because of Division III.1 of Quebec's Environment Quality Act. The Act expands the standing requirement. It also limits an applicant's undertaking to cover damages that may flow from the interim relief if is granted to \$500.00.

“Maintaining ecological integrity is our first priority” – Policy Rhetoric or Practical Reality in Canada’s National Parks? A case comment on *Canadian Parks & Wilderness Society v. Canada (Minister of Canadian Heritage)*

- Shaun Fluker

Comments on the repeated use of ecological integrity in Parks Canada literature. Maintenance of park ecological integrity; Priority of legislative amendments in parks management; Determination of the characteristics of a natural region.

Standing in the Road: The Battle for Wood Buffalo National Park

- Dayna Nadine Scott

Focuses on the attempt of Parks Canada to construct a road through the Wood Buffalo National Park. Objections of conservation groups to the project; Challenge of road approval in court; Connection of isolated First Nations communities.

Accessing Environmental Information in Ontario: A Legislative Comment on Ontario's *Freedom of Information and Protection of Privacy Act*

- Lynda M. Collins, Jerry V. DeMarco and Alan D. Levy

Public access to information on request and the obligation of public authorities to disclose it irrespective of requests are essential for the protection of the environment...
F. Ksentini United Nations Special Rapporteur on Human Rights and the Environment
Access delayed is access denied. Dr. Anne Cavoukian information and Privacy Commissioner of Ontario.

Book Review: David Boyd – *Unnatural Law: Rethinking Canadian Environmental Law and Policy*

- Benjamin J. Richardson