Journal of Environmental Law and Practice Volume 14 Abstracts

Defining Canada's Environmental Priorities

- The Hon. Charles Caccia, P.C.

It is indeed a great honour to have been invited by you to speak on this topic today. The complexity of sustainable development is the priority of this presentation, together with some observations on the nature of the parliamentary process. But first I would like to say how glad I am to be in Percy Schmeiser's country and how grateful we can be for the role he played before the Supreme Court. His legacy goes far beyond the question as to whether he infringed a patent or not. What he did was to put forward the issue for everybody to reflect on the role of multinational biotech corporations, and how they control or attempt to control farming. In doing so, Percy Schmeiser put Saskatchewan and Canada on the map of the world on an issue which requires urgent attention by legislators and governments. And getting the attention of governments will not be easy, as you may gather from the following observations.

The Kyoto Protocol: Bad News for the Global Environment

- Brude Pardy (Queen's University)

The Kyoto Protocol will have little effect upon atmospheric concentrations of greenhouse gases. Even so, Kyoto and the U.N. Framework Convention on Climate Change could have established a path to solving the climate change problem. Unfortunately, they do not. Instead, they contain features that, if applied to future international environmental agreements, will make resolution of global environmental problems more difficult: emission targets are expressed in terms of reductions, not limits; each party has a different target, in accordance with its 'differentiated responsibilities'; the more pollution a country, has produced in the past, the more lenient are its obligations; economic development is encouraged to the detriment of the global atmosphere; the objective is not the prevention of climate change, but its management; progress on climate change is proclaimed but not achieved. Kyoto is the latest in a series of international environmental 'first steps' that are politically appealing but inadequate inform as well as substance.

Transaction Costs and Other Issues for Carbon Sequestration on Agricultural Land: Defining the Legal and Policy Agenda

- Steven A. Kennett and Alastair R. Lucas (University of Calgary)

Carbon sequestration on agricultural land has been promoted by Canada in international negotiations and domestic policy processes as a means of reducing net greenhouse gas emissions. This option will be available under the Kyoto Protocol, if that agreement enters into force. Emerging international and domestic climate change

regimes are likely to rely in large measure on a market for tradable sinks-based emissions offsets to create incentives for investment in sequestration projects. This paper argues that a legal and policy framework will be needed to support the operation of this market. In particular, this framework should address transaction costs, structural barriers to market transactions, and market failure in the form of both negative and positive externalities. The paper discusses these issues and enumerates the key elements of the resulting legal and policy agenda.

Linking the Kyoto Protocol and Other Multilateral Environmental Agreements: From Fragmentation to Integration?

- Meinhard Doelle (Dalhousie University)

This paper will consider the linkages between the issues of climate change and other global environmental challenges with a particular focus on the climate change and biodiversity regimes established at the 1992 World Summit in Rio. After briefly setting out the current state of the two regimes, the paper highlights substantive linkages between biodiversity and climate change. Against this backdrop, the paper considers whether there are opportunities for the climate change regime to benefit from commitments in other multilateral environmental agreements (MEAs), and specifically whether the United Nations Convention on Biological Diversity (CBD) can be used to motivate states to take more and more appropriate action on climate change. The paper identifies a number of positive influences a biodiversity perspective could have on how states respond to the challenge of climate change. The author concludes that domestic implementation of various international environmental obligations could significantly and mutually benefit from integration. By addressing the individual challenges identified through international agreements in an integrated manner generally, opportunities to move to sustainability are improved, as is the opportunity to reduce costs and increase the benefits associated with the implementation of individual international environmental obligations. The paper concludes that we cannot wait for the integration to occur at the international level, and that it may in fact be more appropriate at the national level. To date, however, Canada has chosen to consider its objectives and obligations on climate change, biodiversity, and other global environmental challenges as separate rather than part of an overall effort to move toward sustainability by reducing the stress of human activities on natural systems overall. This is unfortunate as an integrated approach would increase the benefits of addressing climate change, and would ensure that compliance with the Kyoto obligations puts us on the path to sustainability. The paper concludes that the time has come to bring together domestically in Canada the silos that have been created in international law through the negotiation of treaties dealing with individual environmental tissues.

The Great Lakes and the Mediterranean Sea: Ecosystem-Management and Sustainability in the Context of Economic Integration

- Jamie Benidickon (Unversity of Ottawa)

The paper surveys the evolution of two international environmental agreements originating in the 1970s and intended to promote water quality. Both the Great Lakes Water Quality Agreement and the Barcelona Convention system respecting the Mediterranean have adapted to newly acknowledged environmental challenges in the form of toxic substances, non-point pollution, and ecosystem management for example. More recently they have experienced external pressures in the form of economic integration, the NAFTA and the Euro-Mediterranean free trade initiative. Although the effectiveness of environmental regimes is ordinarily assessed in relation to environmental criteria, it is important for environmental institutions to remain responsive to the implications of policy developments in other fields which may constrain or facilitate environmental protection.

Trail Smelter Redux: Transboundary Pollution and Extraterritorial Jurisdiction

- Neil Craik (University of New Brunswick)

On December 11, 2003, the U.S. Environmental Protection Agency (EPA) issued an administrative order under the U.S. Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in respect of contamination of the Upper Columbia River in Washington State arising from the operation of the Trail Smelter, located in British Columbia. This order marks an unprecedented extension of the EPA's jurisdiction to seek remediation orders against foreign companies operating outside of the U.S., prompting a diplomatic response from the Canadian government. Using the facts of the current Trail Smelter dispute as a backdrop and drawing on linkages between the current and historic Trail Smelter disputes, this paper examines both the domestic law and international law respecting the imposition of prescriptive jurisdiction over environmental hazards arising in one state, but having effects in another. Finally, consideration is given to the extent to which the EPA order complies with these jurisdictional requirements, and, on a broader level, whether the EPA's turn to unilateralism is a positive development in addressing transboundary environmental harm.

The Citizen Submission Process Under NAFTA: Observations After 10 Years

- Randy L. Christensen (Sierra Legal Defence Fund)

The citizen submission process, created in 1994 under the NAFTA ‘environmental side agreement,’ allows individual citizens to directly challenge government environmental law enforcement failures. The mechanism has shown effectiveness at highlighting environmental problems, compelling governments to engage in debate on enforcement decisions, and bringing about positive environmental change through independent factual investigations. Ten years experience has also demonstrated that the citizen

submission process is vulnerable to manipulation by its governing body, the 'Council,' which is comprised of the top environmental official from each NAFTA country. Council members—often the targets of citizen submissions—have employed oversight powers in attempts to preclude scrutiny of enforcement failures. Given Council's actions, the citizen submission process has not realized its full potential. However, the environmental side agreement's strong environmental mandate and formal public advisory bodies have proven surprisingly effective counterbalances to Council abuses. With sufficient reform, the mechanism could provide a model for addressing environmental concerns in future trade agreements.

British Columbia at a Crossroads: A Path to Sustainability or the Enclosure of the Commons?

- Jessica Clogg (West Coast Environmental Law)

This paper, drawing on the context of forest management in British Columbia, explores concepts of property and tenure, with the objective of identifying the legal building blocks for property regimes and decision-making structures capable of maintaining and restoring ecological and cultural integrity. In doing so, the paper highlights how recent changes to forestry law and policy in B.C. risk undermining the promise of such an approach, and comments on an alternative law reform proposal. Proposed principles for reform include: recognition and respect for Aboriginal title; implementing co-jurisdictional decision-making; a legal framework for sustain- ability; and tenure diversification and redistribution.

Canada's "Forgotten Forests". Or, How Ottawa is Failing Local Communities and the World in Peri-Urban Forest Protection

- Stepan Wood (Osgoode Hall Law School)

The forests found in Canada's rapidly expanding urban fringes have been decimated by agricultural settlement and urban growth, yet they have been largely overlooked in Canadian forest policy debates. While these 'peri-urban' forests fall mainly under provincial jurisdiction, this paper argues that the federal government has the authority and opportunity to negotiate a more active role for itself in this area. The paper assesses the federal government's track record of international commitments and domestic action on peri-urban forests, canvassing developments in six policy areas: general principles; forest conservation and management; biodiversity and endangered species; land securement and ecological gifts; climate change; and sustainable cities. In all these areas the federal government's international commitments relevant to peri-urban forests have been modest and its actions at home disappointing. The paper calls for a substantially enhanced federal role in peri-urban forest protection, with an emphasis on national coordination, strategic leadership and funding.

Encouraging the Transition to Sustainable Forestry in Canada with Ecological Fiscal Reform —Potential and Pitfalls

- Nathalie Chalifour (University of Ottawa)

There has been some slow but steady progress on sustainable forest management (SFM) in Canada over the last decade. While the change is positive, it is insufficient to keep up with the multiple demands on forest ecosystems. This paper argues that while the provinces should work towards fundamental regulatory reform in the forest sector (such as reforming tenure structures to better reflect Aboriginal, social and ecological needs and values), the federal government should concomitantly offer short-to-medium term fiscal incentives to encourage forest companies operating in Canada to voluntarily move faster and closer towards SFM. The paper argues that such measures would also serve to help level the playing field between leading forest companies (who are facing increased costs from implementing SFM) and other companies who continue to operate at the regulatory baseline. The paper discusses some of the challenges of using fiscal incentives (such as WTO subsidy rules) and offers suggestions for ensuring the measures avoid these pitfalls.

The Future of Common Law Water Rights in Ontario

- Marcia Valiante (University of Windsor)

Ontario, usually considered a water-rich region, is in fact facing unprecedented demand for, and diminishing supplies of water in southern, inland areas away from the Great Lakes. Many government-initiated changes to water law are underway, including adoption of safe drinking water legislation, proposed source water protection legislation, new standards for water takings, proposed water charges, and new priorities for times of drought. Ontario's water allocation statute regulates most water takings but leaves a core of common law rights and small quantity uses untouched. This paper considers relevant reforms and their effects, with emphasis on these exempted water users. Despite the claims of a comprehensive review of water law, none of the reforms addresses these users directly or addresses whether they should be brought into the regulatory scheme. The paper considers the impact of continuing these exemptions in the face of changing environmental conditions.

The Limits of Western Canadian Water Allocation Law

- David R. Percy (University of Alberta)

The law of water allocation on the Canadian prairies was created over a century ago to provide secure water rights to agricultural settlers. It must now adapt to conditions in which water is scarce in the southern areas of the region. The paper sets out the common underlying principles of prairie water law and examines the extent to which legislation in the prairie provinces encourages the efficient use of water and provides

an adequate level of environmental safeguards. The paper contrasts the different responses of each province in introducing flexibility into the law of water rights and in creating environmental safeguards, both at the time that water rights are granted and when existing rights conflict with environmental goals. The paper compares the relative merits of the traditional regulatory response adopted in Manitoba and Saskatchewan with the beginnings of a market based approach found in the Alberta Water Act.

Greening Environmental Law: From Sectoral Reform to Systemic Re-Formation

- Michael M'Gonigle and Paula Ramsay (University of Victoria)

Environmental law has largely addressed the manifestations, not underpinnings, of unsustainability. From pollution control to forest management, environmental regulation is largely 'internal' to existing relations of economic production and political management. In response, this paper proposes a 'green theory, of law' that can provide an 'external' analysis of the role and limits of law itself. It would, for example, address the constraints of state-based regulation, how law underpins unsustainable institutions and practices, and what transformative approaches might entail. Drawing on other articles in this volume, the paper seeks to open up an intellectual space to develop broader 'legal' approaches to the constitution of a sustainable society.

Sustainability Law: (R)Evolutionary Directions for the Future of Environmental Law

- David R. Boyd (University of Victoria)

There is compelling evidence—in the form of climate change, the biodiversity crisis, and the global ubiquity of industrial pollution—that environmental law is inadequate for solving contemporary ecological challenges. Environmental law focuses on mitigating the damage caused by industrial society and is generally ad hoc, reactive, fragmented, crisis driven, short-term, prescriptive, rigid, narrow, confrontational, unscientific, ineffective, inefficient, and inequitable. This paper argues for a paradigm shift to sustainability law, aimed at transforming the relationship between humans and the environment. In contrast to environmental law, sustainability law would be systemic, holistic, proactive, solutions-oriented, long-term, ecological, effective, efficient, equitable, results-oriented, adaptive, substantive, diverse, and cooperative. Sustainability law would be guided by the four system conditions of sustainability identified by Swedish scientists, system conditions rooted in the laws of thermodynamics, the ecological reality of a finite planet, and the remarkable genius of nature.