

Journal of Environmental Law and Practice Volume 15 Abstracts

Law for Future Generations: The Theory of Intergenerational Equity in Canadian Environmental Law

- Jerry V. DeMarco

The theory of intergenerational equity, which is related to public trust and sustainable development concepts, requires each generation to pass on the planet's resources to future generations in no worse condition than received. This theory includes three principles: conservation of options; conservation of quality; and conservation of access. Though the phrase "intergenerational equity" is rarely referred to in Canadian environmental law, this article shows that a significant and growing body of case law and legislation concerns itself with the rights and interests of future generations. This article catalogues evidence of the incorporation of the theory and its principles into Canadian environmental law. Based on this survey, it is argued that intergenerational equity principles can be used as an important statutory interpretation tool and that recent Supreme Court of Canada jurisprudence demonstrates how common law remedies can be expanded to protect the interests of future generations in a healthy environment.

The Potential for Municipal Transfer of Development Credits Program in Canada

- Arlene J. Kwasniak

Transfer of development credits (TDC) programs provide a method of preserving rural landscape or urban areas by permitting the transfer of development potential from one area and conferring it on another. The owner of the restricted parcel receives development potential credit, which may be sold and used by a purchaser to increase development potential on another parcel, more suitable for development, all in accordance with the program. Unlike traditional zoning, transfer of development credits programs are designed to enable compensation for a landowner for the loss of development potential to carry out municipal preservation policies. They can provide economic incentive to preserve undeveloped land or other landscape features. The article deals with the question of whether municipalities in Canada may establish all aspects of TDC programs in the absence of specific legislative authority. It considers potential jurisdictional legal challenges to Canadian TDC programs, focussing on Alberta. It also assesses legal instruments currently available to municipalities to secure development restrictions.

Public Rights and the Lost Principle of Statutory Interpretation

- Andrew Gage

This article begins with a discussion of some of the public environmental rights that likely exist at common law, including the right to live free from unreasonable levels of pollution. The article then examines how the courts have construed statutes that impact public rights, demonstrating a common law presumption that a legislator would use clear and unambiguous language if it intended to interfere with such rights. The implications of this presumption are three-fold. First, statutes that have the effect of negatively impacting public rights should be interpreted strictly. Second, government decisions which have the effect of infringing public rights may be ultra vires the decision-maker unless the statutory authority clearly contemplates that public rights may be impacted. Third, there is the potential to adapt administrative law procedural requirements of fairness to statutory decisions which negatively impact public rights, in addition, in interpreting statutes which purport to address social and environmental problems, the courts may assume that the legislator intends to recognize and affirm existing public environmental rights.

Decoding Codes of Practice: Approaches to Regulating the Ecological Impacts of Logging in British Columbia

- Emily Walter

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Re-inventing Intervention in the Public Interest: Breaking Down Barriers to Access

- Michelle Campbell

In the fall of 2002, West Coast Environmental Law decided to engage in primary research to consider whether federal environmental assessment (EA) is working in Canada. A full "audit" of whether federal EAs are achieving the purposes set out in the Act would be a vast and costly undertaking, so it chose to conduct a qualitative review, focusing on the experience of the public when participating in CEAA panel reviews.

Despite the many challenges associated with public participation in Canadian Environmental Assessment Act review panels, public participation is critical: people can and do affect the process, decisions and outcomes of project reviews in a variety of ways. Notwithstanding that the process can work effectively, it is clear that in some cases procedural and other obstacles have made public participation in the process difficult, expensive or too late to make a difference. These obstacles undermine public access to, and confidence in, the panel review process, and ultimately, the potential for a successful EA.

The Assessment of Environmental Damages Following the Supreme Court's Decision in *Canfor*

- Martin Z.P. Olszynski

Following the Supreme Court's ruling in *British Columbia v. Canadian Forest Products Ltd.*, it is plain that any claim for environmental loss will have to be based on a coherent theory of damages and methodologies suitable for their assessment. The development of such a theory raises several important issues, including the nature of environmental harm and the purpose of compensation for such harm. An examination of the common law, legislation and academic literature reveals that protection of the environment, as a fundamental Canadian value, is predicated on the recognition that a healthy environment is requisite to the continuing well-being and prosperity of all Canadians, present and future. As such, any theory for assessing environmental damage must, first and foremost, recognize this function of the environment and seek to redress the injury done to it.

Belief and Environmental Decision-making: Some Recent New Zealand Experience

- Nicola R. Wheen

Two key pieces of New Zealand's environmental legislation - the Resource Management Act 1991 and the Hazardous Substances and New Organisms Act 1996 - contain references to Maori cultural and traditional relationships with land and other treasures (taonga) and the principles of the Treaty of Waitangi. In some recent controversial cases where Maori spiritual beliefs have been among the relevant environmental risks and effects argued under these provisions, decision-makers have wrongly tested the veracity of the beliefs, rather than focus on the risks to and effects on the people holding the beliefs. More broadly, the cases also show how the practice of including references to matters of belief in what are effectively lists of relevant - and frequently competing - considerations in environmental legislation tends to result in these matters being unlikely to determine decisions in situations where they are uncompromising.

Deconstructing *Tridan*: A Litigator's Perspective

- Katherine M. van Rensburg

Examines the decisions of the Ontario Superior Court and Court of Appeal in *Tridan Developments Ltd. versus Shell Canada Products Ltd.* Identification of the lessons to be drawn from the case; Presentation of the challenges that confront counsel in litigating contaminated lands disputes and in dealing with the appropriate measure of damages and other remedies; Indication of the case that claims for stigma damages will have to be based on compelling and persuasive expert evidence.

Opening the Door for Common Law Environmental Protection in Canada: The Decision in *British Columbia v. Canadian Forest Products Ltd.*

- Jerry V. DeMarco, Marcia Valiante, and Marie-Ann Bowden

The decision in *British Columbia v. Canadian Forest Products Ltd.* (Canfor) is the latest in a series of Supreme Court of Canada cases to chart a positive future for environmental law in Canada. With respect to the long term impacts of the decision, Canfor ranks as another progressive step forward in the evolution of Canadian environmental law in at least two key areas: 1. in the damages arena, the acknowledgement of interests previously externalized, such as many environmental and social costs and impacts on future generations, and 2. the possible expansion of the public nuisance doctrine and acceptance of the public trust doctrine in Canada.

***R. v. Kingston* and the Criminalization of Harmless Pollution**

- Ian Richler

It is perhaps no surprise then that the Ontario Court of Appeal, when asked recently to reinterpret Subsection 36(3) of the Fisheries Act chose instead to cling to the status quo. In this article it is argued that the status quo is wrong. First one explains how, for more than 25 years, the courts have interpreted s. 36(3) to mean that any amount of any kind of pollution is too much pollution. Next the Ontario Court of Appeal's rationale for endorsing that "zero-tolerance" approach in *R. v. Kingston (City)* is examined. It is argued that, thus interpreted, s. 36(3) is unfair because it threatens to send people to jail even for innocuous discharges. By the same token, the provision is unconstitutionally overbroad because punishing people for such innocuous discharges does nothing to protect fisheries. Finally, it is suggested that there is an alternative interpretation of s. 36(3), one that the text can easily bear.

Time Well Spent? A Survey of Participation in Federal Environmental Assessment Panels

- Susan Rutherford and Karen Campbell

Focuses on the importance of public participation in federal environmental assessment panels. Impact of public input on significant improvements in the process of consultation and in the planning and implementation of a project; Impediments involved to ensuring effective public participation funding.

Book Review: Brian Jones and Neil Parpworth - Environmental Liabilities

- Moira L. McConnell

Book Review: Rex Wylor - Greenpeace: How a Group of Ecologists, Journalists and Visionaries Changed the World

- Dana Treasure