

## Journal of Environmental Law and Practice Volume 16 Abstracts

### **The St. Mary's Irrigation District Licence Amendment Decision: Irrigation Districts as a Law unto Themselves**

- Nigel Bankes and Arlene Kwasniak

**Abstract:** This article discusses a recent decision of the Director, Southern Region, Alberta Environment, to approve an application from a major Alberta Irrigation District to amend its license to enable it to supply water for a multitude of uses in addition to irrigation. The article criticizes the decision and raises policy issues concerning the relationship between the Irrigation District Act and the Water Act. This article argues that legislative and policy changes with respect to these Acts have led to diminished public interest management of water resources in the over allocated South Saskatchewan Basin, and expanded corporate irrigation.

### **Innocent Drops and the Symbolic Generalization of Moral Harms: A New Basis for the Criminalization of Environmental Offences**

- Mark Davidson

**Abstract:** This article addresses the notion that criminal law is almost always an inappropriate mechanism for punishing illegal corporate pollution. The article argues that it is the "Symbolic Generalization" of an act's or omission's moral quality that attracts criminal liability. As such, the absence of provable physical harm need not necessarily block the use of the criminal law in punishing corporate polluters. And given that environmental protection is a 'core' or dominant social value, the criminal law is particularly well-suited to reinforce existing environmental regulatory regimes.

### **Harnessing Self-Interest to Realize a Double-Dividend? Achieving Other Environmental Benefits through Carbon Credits**

- Sharon Mascher

**Abstract:** The article investigates whether the self-interest associated with generating carbon credits will necessarily realize other potential environmental benefits in Canada under the government's action Plan to combat climate change. The Plan endorses the domestic recognition of a private property right, in the form of carbon credits, as the principal vehicle for expanding national carbon sink capacity. The government, has emphasized however, that managing forests and agricultural soils to increase carbon stores will deliver other significant environmental benefits.

### **Shining a Light on the Management of Water Resources: The Role of an Environmental Appeal Board**

- Nigel Bankes

**Abstract:** The article explores the hypothesis that environmental appeal boards (EABs) created by provincial legislatures in Canada may help transform the way in which provincial water management agencies make water management decisions, including decisions on applications to divert water and to engage in land-use activities that may affect watercourses. It cites the Capstone decision of Alberta's EAB as an example and concludes that while the EAB's decisions are largely insulated from judicial review by the doctrine of judicial deference, its decisions on standing have been relatively conservative.

### **Quenching Instream Thirst: A Role for Water Trusts in the Prairie Provinces**

- Arlene J. Kwasniak

**Abstract:** The southern regions of the prairie provinces, Alberta, in particular, are water short. Some areas are over-allocated meaning that there is not enough water to satisfy all water rights. Increasing population and drier climate put greater stress on water supplies. With so much attention paid to what we need to take out of watercourses we sometimes lose sight of what we need to keep in them to restore and maintain aquatic and riparian ecological integrity, so vital to the existence of watercourses themselves. Water trusts play an important role in the western United States in helping to restore, maintain, and enhance the instream needs of aquatic and riparian systems. They work with water right holders and governments so that water that would otherwise be allocated out of stream is left in stream to replenish the system itself. This article considers whether there is a viable role for water trusts in the prairie provinces, focussing on Alberta. It examines existing water rights legal frameworks and considers to what extent they would support water trusts. The article concludes that there is a viable and even vital role for water trusts in the Canadian prairies.

### ***Ontario (Attorney General) v. Walker: The Water's Edge and the Ripple Effect of Judicial Error in the Common Law***

- Susan Ross and Scott Hopley

**Abstract:** Since 1971, the case of Ontario (AG) v. Walker has been considered the definitive case supporting the proposition that common law that all boundaries located on water are located at the water's edge. This article challenges that there is a presumption in the law predating Walker that by examining the decision itself as well as the cases upon which the judgment was based. The authors argue that there is no principle of a grant of land bordering water is presumed to extend to the water's edge and that Walker fails to establish such a principle. Instead, they maintain that the true nature of a grant is to be determined by construing the language of the grant, possibly by reference to surrounding circumstances.

## ***Hoffman v. Monsanto Canada Inc.:* Looking for a Generous Approach to the Elephant in the Garden**

- Martin Z.P. Olszynski

**Abstract:** In *Hoffman v. Monsanto Canada Inc.*, the plaintiffs sought class action certification pursuant to the Class Actions Act to bring action against the defendants, Monsanto Canada Inc. and Bayer Cropscience Inc. (BCS), on behalf of all organic grain farmers in Saskatchewan. The defendants each developed and commercially introduced into Canada a variety of canola that had been genetically modified. The plaintiffs alleged various financial losses resulting from the actual and potential contamination of their organic crops by the introduction of these genetically modified varieties. In a lengthy judgement, Smith J. denied certification. Smith J. was of the view that the pleadings failed to disclose a reasonable cause of action in relation to negligence, strict liability, nuisance and trespass. This comment suggest that the Court was overly restrictive in its analysis, thus circumventing the full and proper consideration of several novel and important issues of law and policy.

## **The Cat Came Back, or the Nine Lives of the Kyoto Protocol**

- Meinhard Doelle

**Abstract:** The article presents the author's views on various issues concerned with the Kyoto Protocol, which is the first international accord on reduction of greenhouse gas emissions. The protocol insists developing and developed nations to find innovative ways to accept deep emission reduction targets. The article also discusses the failure of the government of Saudi Arabia with respect to the commitment to mitigate against the economic impact of climate change mitigation.

## **At a Watershed: Ecological Governance and sustainable Water Management in Canada**

- Oliver M Brandes

**Abstract:** Uncertainty of future supplies, constraints to economic growth, increasing conflicts between users and evidence of emerging ecological impacts are some of the many problems being addressed in the water sector. To solve these problems requires a shift from supply-side management toward a more holistic and sustainable approach to water management. Published in the Spring of 2005 by the POLIS Project on Ecological Governance at the University of Victoria, *At a Watershed*, grapples with the challenge of making the transition from a supply to a demand management regime, and offers possible solutions to some of the conflicts between past policies and emerging scarcity. The focus of this report, the fourth in a series, is to present feasible strategies and innovative opportunities for reforming Canada's water management

institutions toward a more holistic approach to sustainability based on the recognition that water is a limited and precious resource and must be conserved.

### **Keeping Public Resources in Public Hands: Advancing the Public Trust Doctrine in Canada**

- Scott Kidd

**Abstract:** In the US, the public trust doctrine has been used since the 1800's to protect and restore public control over, and access to, resources that have been conveyed to private interests. The idea that the public trust doctrine can be used to promote environmental protection and careful stewardship of common resources in Canada is being increasingly supported by Canadian legal academics. At the same time, many of these authors also note that the term "public trust" or the notion of the public trust doctrine is virtually non-existent in contemporary Canadian case law dealing with public natural resources. As a result, how the public trust doctrine might be used by rural communities in New Brunswick to re-establish rights of access to common resources is unclear. To address this uncertainty and other important questions including how the public trust, public rights, and native rights may coexist, the Conservation Council of New Brunswick (CCNB) conducted a legal research project.

### **Roda Verheyen - Climate Change Damage and International Law: Prevention Duties and State Responsibility**

- J. Terry Rolfe

The article reviews the book "Climate Change Damage and International Law: Prevention Duties and State Responsibility," by Roda Verheyen.