

Journal of Environmental Law and Practice Volume 18 Abstracts

Highways, Parks and the Public Trust Doctrine

- Andrew Gage ... 1

Abstract: While the common law doctrine of dedication and acceptance is most well known as a means of creating public highways, Canadian courts have also applied it to the creation of other public spaces, including playgrounds, greenbelts, and parks. This doctrine, which applies equally to private and government actors, has huge implications for understanding both private and public actions in relation to lands used by the public. The Doctrine provides an important tool in understanding the legal effect of government actions that set aside lands for public purposes. The cases discussing the public rights created in this way often describe them in terms of a trust owed to the public. A review of the case law suggests that governments hold public spaces subject to a fiduciary obligation to the public, likely arising from the relationship between the creation of such rights and the creation of charitable trusts as well as from the nature of fiduciary duties generally.

Alberta Crown Ownership of Slough/Marsh Wetlands

- Arlene Kwasniak ... 57

Abstract: Prairie slough/marsh wetlands provide a multitude of ecological and economic services, yet they continue to be drained or degraded. The Alberta Crown has considerable regulatory power over them by virtue of being owner of all water in the province, pursuant to the Water Act, and owner of the bed and shores of naturally occurring, permanent water bodies, pursuant to the Public Lands Act. Government currently interprets its ownership of bed and shores as applying only to wetlands that continuously or almost continuously contain water. The province's "interim" Cabinet wetland policy, however, strives to protect from development slough/marsh wetlands, whether containing water continuously or intermittently. In October 2007, the province commenced public consultations for a new, more encompassing wetland policy and implementation plan to replace the "interim" policy. This article concludes that under a correct interpretation of public lands legislation the Alberta Crown may own the bed and shores of slough/marsh wetlands whether they contain water continuously or intermittently. This conclusion bolsters Crown control over intermittent slough/marsh wetlands, will make the proposed wetland policy, as well as the "interim" wetland policy, more authoritative, and should make the policies more palatable to those affected by them.

Anticipatory Nuisance and the Prevention of Environmental Harm and Economic Loss from GMOs in the United States

- Margaret Rosso Grossman ... 107

Abstract: Canadian government regulatory approval for the unconfined release of GM canola was held in *Hoffman v. Monsanto Canada Inc.* to be "a powerful policy reason" for not fastening a duty of care on biotechnology companies for the economic losses sustained by non-GM farmers as a result of crop commingling. This article therefore explores the possibility of suing the federal government itself for negligence in regulating and controlling GM technology. It highlights the Ontario Court of Appeal decision in *Sauer v. Canada (Attorney General)*, a class action by Canadian cattle farmers for economic losses resulting from the discovery of a case of "mad cow" disease in Alberta, as a possible example of such an action.

“Government Wrongs”: Civil Liability for GMO Regulation in Canada

- Jane Matthews Glenn ... 169

Abstract: This article asserts that a significant gap exists in the regulatory framework surrounding Genetically Modified (GM) crops in Canada. While the short-term health and safety effects of these crops are extensively regulated, no mechanism currently exists to assess the potential long-term socio-economic impacts of their introduction. The analysis is framed through the lens of the potential introduction of GM wheat into Canada which could significantly impact primary producers, organic farmers, rural communities and export markets. Several pieces of Federal legislation are analyzed to support the conclusion that an examination of these impacts is beyond the scope of existing regulations. Finally, the article discusses recent American jurisprudence which offers a potential remedy for Canadian regulators.

Are Genetically Modified Crops in Canada Under-Regulated?

- Martin Phillipson ... 195

Abstract: This article asserts that a significant gap exists in the regulatory framework surrounding Genetically Modified (GM) crops in Canada. While the short-term health and safety effects of these crops are extensively regulated, no mechanism currently exists to assess the potential long-term socio-economic impacts of their introduction. The analysis is framed through the lens of the potential introduction of GM wheat into Canada which could significantly impact primary producers, organic farmers, rural communities and export markets. Several pieces of Federal legislation are analyzed to support the conclusion that an examination of these impacts is beyond the scope of existing regulations. Finally, the article discusses recent American jurisprudence which offers a potential remedy for Canadian regulators.

Equalization as an Economic Instrument For Sustainable Development

- Erin McLaughlin ... 225

Abstract: Equalization is the constitutionally enshrined fiscal transfer program designed to ensure that each province is able to provide a comparable level of services at a comparable level of services at a comparable level of taxation. Income from the extraction of natural resources forms part of the income available to the provinces to fund their services, and yet, the inclusion of income derived from natural resource industries is among the most contentious issues in the equalization debate. The exclusion of natural resource revenues derived from the extraction of natural resources is not justified by the wording of the constitutional provision, which in fact offers very little guidance as to the proper structure of the equalization program, nor by provincial ownership of natural resources, but rather is premised on provincial development interests. Resource-rich provinces receiving equalization payments state that natural resource revenues ought to be excluded from the calculation of their income levels to allow them to develop their resource industries without these revenues thereby reducing their equalization entitlements, to allow them to develop their economies and reduce their dependence on federal transfers. This policy, in effect, turns equalization payments into a federal subsidy for provincial development based on natural resource exploitation. Such a subsidy is unsustainable.

However, the environmental impacts of the equalization program have yet to be addressed in the debate regarding equalization and natural resources. This article seeks to introduce environmental concerns into the equalization debate and to begin to explore some of the legal implications of structuring equalization in accordance with the tenets of sustainability, arguing that if equalization is to be used to support development, such development should be sustainable.

Friends of the Earth v. the Minister of the Environment Does CEPA 166 Require Canada to Meet its Kyoto Commitments?

- Christine Elwell and Grant Boyle ... 253

Abstract: This article considers the 2007 Friends of the Earth's application for judicial review in the Federal Court of Canada against the Canadian Ministries of Environment and Health for violating the Canadian Environmental Protection Act, 1999 by failing to take action to achieve Canada's Kyoto targets. The article gives a brief overview of global climate change litigation and then details some of the evidence that supports the application. The article specifically aims to address the ministerial discretion defence - a central obstacle to judicial review cases in Canada, and concludes that the government's discretion over its implementation of CEPA 166 is legally structured by Canada's obligation under the Kyoto Protocol.

"The Public Interest": Can it Provide Guidance for the ERCB and NRCB

- Jodie L. Hierlmeier ... 279

Abstract: In Alberta "the public interest" is expressly included within the legislative mandates of two boards: the Energy Resources Conservation Board (ERCB) and the

Natural Resources Conservation Board (NRCB). Both Boards regulate natural resource development in the province. This article seeks to determine if the term "the public interest" provides sufficient guidance for the ERCB and NRCB in making these decisions and, if not, whether it is possible to create a more meaningful construct of this term for these Boards. After reviewing the many ideas that have been expressed about the public interest from academic literature, court decisions, other tribunals, statutory definitions and from ERCB and NRCB decisions this paper concludes that the public interest, in its present form and use by these Boards, provides limited guidance for directing decisions over natural resource development in Alberta. To be useful, the term must have both a substantive and a procedural component. The article then sets out recommendations for reform.

R. Gemtec Ltd.: Advancing Environmental Consultants Liability in Canada

- Cameron S.G. Jefferies ... 313

Abstract: The recent New Brunswick Court appellate decision in *R v Gemtec Ltd* involves the criminal prosecution of a consulting firm and a project manager for their participation in the closure of the Moncton City landfill. Gemtec raises significant questions regarding the future of consultant's liability in Canada. The legal analysis in Gemtec is not novel, but the imposition of criminal sanctions against consultants has substantial impacts upon the relationship between owners and consultants and contracted workers. Gemtec has moved consultant's liability beyond civil litigation and into the realm of criminal prosecution. The decision also raises issues regarding the ability of prosecutors to separately pursue consulting organizations, and the preventative role that lawyers can assume to help clients within the consulting profession avoid future criminal liability. The major lesson from the Gemtec decision is that consultant firms should be wary of involving themselves in projects beyond providing opinions in the form of plans or proposals.

Thinking Outside the Box: Environmental Protection Alternative Measures

- Leah M. Howie ... 87

Abstract: Environmental Protection Alternative Measures (EPAMs) are provided for in the Canadian Environmental Protection Act, 1999 (CEPA), the Species at Risk Act and potentially in the Fisheries Act, 2007. The provisions in all three acts are similar; however, this article will focus on CEPA as it is the only act under which an EPAM has been conducted. Although EPAMs appear to have many obvious advantages to both the Crown and the offender, they have only been used five times for CEPA offences since they became an option in 1999. This article begins by discussing the EPAM process and provides a brief overview of the five EPAMs conducted to date in Canada. Various advantages and disadvantages of EPAMs will then be identified and analyzed. Lastly, recommendations will be suggested to ensure that EPAMs remain an effective tool for enforcing compliance with environmental laws in Canada.

Book Review: Jamie Benidickson - *The Culture of Flushing: A Social and Legal History of Sewage*

- David Wood ... 219