

## Journal of Environmental Law and Practice Volume 19 Abstracts

### **Statutory Structure and Species Survival: How Constraints on Cabinet Discretion Affect Endangered Species Listing Outcomes**

- Stewart Elgie

**Abstract:** This article examines how statutory constraints on executive discretion affect decisions about listing endangered species, comparing 11 jurisdictions across Canada. Using the recommendations of the national scientific advisory committee on endangered species as a baseline, it finds that jurisdictions which limit cabinet's discretion, through time limits and a duty to give reasons, are more than twice as likely (78 per cent) to list species as are ones which give cabinet unconstrained listing discretion (35 per cent). The article examines the causal mechanism that could explain this significant effect, with reference to the literature on instrument design and constrained discretion (which includes very few other empirical studies). It also discusses the broader implications for the design of endangered species legislation and other statutes.

### **Litigating the Precautionary Principle in Domestic Courts**

- Chris Tollefson and Jamie Thomback

**Abstract:** This article reflects on the challenges and opportunities associated with litigating the precautionary principle in the domestic judicial realm as a basis for seeking review of governmental action. While domestic courts are increasingly being called upon to consider the principle, in much of the emerging jurisprudence it is treated as a discretionary consideration or background interpretive canon. To what extent, therefore, can the principle be given, in the words of one leading jurist, "some specific work to do." Drawing on a diverse range of caselaw and scholarship, the authors conclude that a "tamed and trained" version of the principle can indeed play a more robust role in the judicial review process. In support of this conclusion, they offer a detailed discussion and critique of a pioneering recent judgment of the Land and Environment Court of New South Wales.

### **Building a Strong Foundation for Action: A Review of Twelve Fundamental Principles of Environmental and Resource Management Legislation**

- Jerry V. Demarco

**Abstract:** The guiding vision is an important aspect of environmental and resource management legislation. Clear purposes and principles help demonstrate what a regime is all about, help establish useful boundaries for the exercise of discretion, and provide much needed direction to the day-to-day implementation of a statute. Clarity of purpose is especially needed in areas where there are competing interests. Those

designing environmental and resource management legislation should consider including principles such as: environmental rights, the polluter pays principle, the precautionary principle, pollution prevention, intergenerational equity, sustainability/integration, the public trust, inherent value, the ecosystem approach, cumulative effects, ecological integrity, and access to information. The adoption of some or all of these principles will assist in communicating the goals of the legislation to those affected by it and will ultimately result in better responses to today's pressing environmental challenges.

### **Sustainable Urban Transportation And Ontario's New Planning Regime: The Provincial Policy Statement, 2005 and the Growth Plan for the Greater Golden Horseshoe**

- Kirsten E. Courtney

**Abstract:** Ontario's cities are facing significant challenges due to growth pressures and numerous social, economic and environmental problems. In order to address these concerns, and to promote more sustainable urban regions, the Government of Ontario made a number of changes to the municipal planning regime between 2004 and 2007. A new Provincial Policy Statement and the creation of the Growth Plan for the Greater Golden Horseshoe were among the most significant changes. These policies aimed largely at moving cities towards more sustainable transportation systems and models of urban form. Importantly, changes to the Planning Act enshrined these requirements in law. This article examines these changes to assess their effectiveness in the realm of transportation planning. It concludes that while the policies are ambitious, and while the legislative language appears sufficiently strong, they have not been effective in transforming decision-making at the municipal level, particularly when it comes to active transportation.

### **Creative Sentencing and Environmental Regulation in Canada: Creative Solution or Re-Branding Deregulation?**

- Meredith James

**Abstract:** In response to growing dissatisfaction with regulatory efficacy and efficiency, results-based regulation (RBR) has become an increasingly popular form for revised regulation within the field of environment. This article addresses whether results-based standards are an effective means to regulate the environment and what limitations are inherent in this approach. It also aims to act as a resource for stakeholders participating in regulatory review processes that are considering results-based regulation. Using a full range of regulatory tools is essential to effective and efficient protection of the environment. While RBR is an important tool, it is not a silver bullet for all environmental problems.

## **The Lion that Squeaked: CEPA, Mercury, and the Need for Better Regulation and Enforcement**

- Hugh Wilkins and Elaine Macdonald

**Abstract:** The Canadian Environmental Protection Act 1999 (CEPA) has been identified by the federal government as "one of the most advanced environmental laws of its kind in the developed world," yet it has never been effectively implemented. The federal government has the power under CEPA to make comprehensive binding regulations to substantially reduce emissions of toxic substances and their effects. However, for many toxic substances, the federal government has largely failed to do so. In the case of mercury emissions, non-binding tools -- including pollution prevention plans under CEPA and Canada Wide Standards -- have been applied to mercury emitters, but these tools appear to be having little impact. Using mercury emissions as a case study, this article examines the tools that the federal government has at its disposal to comprehensively address emissions of toxic substances under CEPA, and analyses the efficacy of these tools. The inclusion of fine-splitting provisions in CEPA would assist those engaged in either private prosecutions or environmental protection actions.

## **Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification**

- Patrick Hayes

**Abstract:** An environmental toxic tort (ETT) may arise where a personal injury results from tortious exposure to environmental contamination. The subject of this article is the apparent trend in the class action jurisprudence to treat certification of ETTs as generally, if not inherently, undesirable, due to the allegedly "individualized" nature of the causation inquiry. The author argues that, by characterizing ETT claims in this way, the courts have overlooked elements of causation that are common to all class members, in particular the requirement to determine whether a toxic substance or contaminant is even capable of causing a particular harm or disease (general or generic causation).

## **Aboriginal Claims to Water Rights Grounded in the Principle *Ad Medium Filum Aquae*, Riparian Rights and the *Winters* Doctrine**

- Scott Hopley and Susan Ross

**Abstract:** The authors examine in some detail three areas of the common law on which First Nations have based claims to proprietary rights to the beds of water bodies or to water; the interpretive presumption *ad medium filum aquae*, riparian rights and the decision of the Supreme Court of the United States in *Winters v. United States*. They conclude that while some vestiges of the common law of riparian rights continue to exist generally, and in respect to First Nations in particular, none of the principles in the

case law in any of the three areas gives rise, in western Canada, to a viable claim to an interest of a proprietary nature in the beds and shores of water bodies or an entitlement to ownership of water or use of water for commercial purposes.

### **Wading into Uncertain Waters: Using Markets to Transfer Water Rights in Canada – Possibilities and Pitfalls**

- Oliver M. Brandes and Linda Nowlan

**Abstract:** Water scarcity will affect all of society including virtually all businesses either directly or indirectly over the next few decades. Canada, despite its seemingly immense water wealth, is not immune to water scarcity, especially in the more populated and key agricultural parts of the country such as Southern Alberta, the Okanagan Basin, and parts of Ontario. Overuse, population pressures, and degradation of water bodies are all potential causes of water scarcity. Greater use of markets to allocate water is one policy response to scarcity that is receiving more attention worldwide and rapidly emerging in the western regions of Canada. This article provides an overview of the key considerations that might inform the use of markets as a tool in the Canadian context and offers some priority policy directions for governments. This article reviews the potential benefits and limits of introducing market-based transfers of the right to use water into Canadian water allocation regimes to address water scarcity.