

Journal of Environmental Law and Practice Volume 20 Abstracts

Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward

- Arlene Kwasniak

Abstract: A cornerstone of sustainable development is environmental assessment. Through environmental assessment processes regulators identify and assess the environmental, social, and economic consequences of proposed projects to assist them in determining whether projects should be approved, and if so, under what conditions. Despite the benefits of environmental assessment (EA), the federal government has undertaken a course of action that is diminishing federal EA in Canada under the Canadian Environmental Assessment Act. The federal government claims that there is unnecessary overlap and duplication between federal and provincial EA processes. This article deconstructs the premise that there is such unnecessary overlap and duplication and that federal EA should therefore be diminished. The article concludes that where improvements relating to joint federal and provincial or territorial assessment are needed, they should be made through increased but appropriate harmonization, and better cooperation, coordination, and convergence.

Towards a Greener Olympics: Sustainable Development and the Vancouver 2010 Athletes' Village at Southeast False Creek

- Jonathan Laski

Abstract: The Olympic Games have historically been terrible for the environment. Despite incremental progress over the past 20 years, specifically attempts to incorporate environmentalism into the Olympic 'spirit', their negative environmental impact looms. With the Winter games coming to Vancouver-Whistler, British Columbia in 2010, this article checks for signs that momentum towards sustainable Games exists. This article tells the story of the Athletes' Village located at Southeast False Creek (SEFC) in downtown Vancouver. From the city's original official development plan in 1999 to designs for one of the most sustainable neighbourhoods in North America today, the coming Olympic Games have actually elevated and hastened the redevelopment of this brownfield site. Further, games-related media attention, acting on the growing sense of 'green living' elsewhere in society, has provided incalculable exposure to sustainability-minded building and planning. Access to information, accountability and auditing are also evaluated in relation to the SEFC project and the Olympic Games as a whole. While new environmental reporting mechanisms are being put to use, timely information on if and how environmental commitments are being fulfilled, especially following the economic downturn in the Fall of 2008, is still lacking.

The Ethical Obstacles of Environmental Law: Assessing the Need to Effectively Incorporate an Environmental Ethic into the Practice of Environmental Law

- Cameron Jefferies

Abstract: Environmental law has come a long way in the last 30 years. Nonetheless, environmental law must continually evolve to address existing and future challenges. This article examines legal ethics and proffers that the codes currently governing the legal profession hinder the ability of environmental lawyers to represent the interests of the environment, and advocates incorporating mechanisms that fit within lawyers' ethical obligations that are not currently being fully utilized. It concludes that the most appropriate way to address the needs of the environment is to create a code governing the conduct of environmental lawyers that properly recognizes their public service function.

Policy Proposals for Reviewing Alberta's Water (Re) Allocation System

- Nigel Bankes

Abstract: Alberta's new Water Act entered into force in 1999. The Act continues the commitment to the principle of first in time first in right but also initiated water management planning in Alberta. The Act also introduced the possibility of separating water rights from the land to which they are appurtenant, and thereby opened up the idea of marketing water rights. This became a reality with the adoption of the water management plan for the South Saskatchewan Basin. Now, ten years later, the province is reviewing the transfer mechanisms under the Act. In conjunction with that review, the province released three reports on the issue in November 2009. This paper provides a review and critical analysis of those reports. Topics covered included: protected water, unused water, mechanisms to facilitate transfers, and dealing with shortages.

Building an Effective North American Emissions Trading System: Key Considerations

- Christie J. Kneteman

Abstract: This article examines how the design of greenhouse gas emissions trading systems impacts their effectiveness in addressing climate change. The author argues that the critical components of an effective emissions trading scheme are the following: a sufficiently tight emissions cap; an ability to enforce compliance with the cap and trading rules; breadth; flexibility; regulatory certainty over time; transparency; and market liquidity. The author analyses three trading systems - the European Union Emissions Trading Scheme, the Regional Greenhouse Gas Initiative, and the Western Climate Initiative - against these criteria to illuminate the greatest weaknesses in the current systems and to identify how a North American emissions trading system must develop in order to be environmentally- and cost-effective.

Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options

- Robert B. Gibson, Hugh Benevides, Meinhard Doelle, and Denis Kirchhoff

Abstract: Canada has a long and diverse but largely disappointing record in integrating environmental and sustainability considerations into the development of policies, plans, programs and other strategic undertakings. For over 25 years, the federal government has had a policy-based strategic environmental assessment (SEA) process. In 2003, the deficiencies of this process led the House of Commons Standing Committee on Environment and Sustainable Development to recommend establishment of a legislated framework for mandatory SEA before the 2010 Parliamentary review of environmental assessment. Governments since then have not acted on this recommendation but have promised to strengthen federal SEA. In this paper, we examine the three basic options for strengthening federal SEA - a law-based option, a policy-guided option and a combined law and policy approach - using criteria drawn from international assessment literature and reviews of Canadian and international SEA experience. In the Canadian context, the combined approach appears to be most promising. Accordingly, we provide a broad outline of how an integrated law and policy-based SEA regime could be structured to satisfy the criteria and deliver a workable union of firmness and flexibility.

Improving the Effectiveness of Environmental Assessment in Addressing Federal Environmental Priorities

- Stephen Hazell

Abstract: Global climate change caused by burning of fossil fuels and changing land use is arguably the defining challenge for humanity in the 21st century. For over 20 years, the federal government has acknowledged the seriousness of this challenge and pursued regulatory and funding programs to reduce Canada's greenhouse gas emissions. Based on case studies of three recent joint panel reviews, this article argues that the federal environmental assessment process has not been used effectively to address at least one of the government's own stated environmental priorities - climate change and greenhouse gas emissions. The article goes to examine how environmental assessment under the current or a reformed Canadian Environmental Assessment Act could be used more effectively to meet stated environmental priorities.

Coutume autochtone et gouvernance environnementale dans le système interaméricain de protection des droits de l'homme

- Ghislain Otis

Abstract: Like many other countries, Canada is confronted with the challenge of a dialogue between western and indigenous legal cultures in the field of environmental

law. This article analyses the recent jurisprudence of the Inter-American Court of Human Rights in order to assess the contribution of international human rights law to the creation of a normative space for indigenous custom in managing and protecting the environment of traditional indigenous territory. The author demonstrates the functional connection between the recognition of indigenous customary law as a source of environmental law and the international recognition of indigenous group rights to land and natural resources based on a pluralistic interpretation of property rights.

Book Review: Mark Sagoff, *The Economy of the Earth: Philosophy, Law and Environment*

- Meredith James

Book Review: Arthur P.J. Mol, *Environmental Reform in the Information Age: The Contours of Informational Governance*

- Timothy Petrou

MiningWatch Canada v. Canada (Fisheries and Oceans): Hoisted on One's Own Petard?

- Shaun Fluker

Abstract: EcoJustice, on behalf of its client Mining Watch Canada, declared victory on Jan 21, 2010 with the release of the Supreme Court of Canada's decision in *MiningWatch Canada v. Canada (Fisheries and Oceans)*. In brief, Justice Rothstein for a unanimous Supreme Court ruled that the track of environmental assessment conducted by a federal responsible authority pursuant to the Canadian Environmental Assessment Act (CEAA) flows directly from the scope of the project as proposed by a project proponent. The decision confirms that tracking an environmental assessment sequentially precedes project scoping under CEAA, and is of obvious significance in the conduct of federal environmental assessment on projects on a go forward basis. The author would like to suggest and comment on three reasons why celebration over the Mining Watch judgment ought to be tempered. One reason is the judgment ignores the socio-ecological context in which this dispute is situated in northwest British Columbia.

The Implications of the SCC Red Chris Decision for EA in Canada

- Meinhard Doelle

Abstract: The Supreme Court of Canada (SSC) has not granted leave in environmental cases very often. There have only been a handful of decisions in the past 20 years with a clear focus on environmental law. The January 2010 decision in the case of *Mining*

Watch Canada v. Canada is the latest in this string of environmental SCC decisions. As such, the case provided an opportunity for the SCC to further elaborate on some of the themes developed in previous cases. Areas for possible elaboration ranged from the expanding roles and responsibilities of all levels of governments in environmental law, to the role of international law principles such as precaution and public participation in domestic environmental law. In this respect, Red Chris is a clear disappointment. Red Chris is the first SCC decision dealing directly with the substance of Canadian Environmental Assessment Act, and in this respect makes an important and constructive contribution to environmental law in Canada.