Journal of Environmental Law and Practice Volume 21 Abstracts

Adaptive Management in Canadian Environmental Assessment Law: Exploring Uses and Limitations

- Martin Z.P. Olszynski

Abstract: Adaptive management is a process-based and experimental approach to environmental management that enables the continuous improvement of management practices by learning about their outcomes. Although most commonly applied in the field of resource management, increasingly it is being applied in the context of project-specific environmental assessment and management, including under the Canadian Environmental Assessment Act (CEAA). In this context, adaptive management is being invoked for its potential to reduce uncertainties associated with proposed mitigation measures so that these can be taken into account when making determinations about a project's likely environmental effects. This article examines the use of adaptive management in this way to date and explores the limitations that CEAA may impose on such use.

Bringing Justice to Environmental Assessment: An Examination of the Kearl Oil Sands Joint Review Panel and the Health Concerns of the Community of Fort Chipewyan

- Nathalie J. Chalifour

Abstract: Environmental assessment is a critical tool for helping to reduce the environmental impacts of development projects. However, the process as currently designed and implemented does little to ensure that the environmental harms created are fairly distributed among members of the public. Using the human health concerns raised by the community of Fort Chipewyan in the wake of massive oil sands developments upstream as a case study, this paper argues that the Kearl Oil Sands environmental assessment process did little to promote social justice for this community. The author argues that the duty to apply the precautionary principle now explicitly embodied within CEAA creates a reverse onus upon project proponents to show that their proposal will not create significant environment adverse effects and suggest it should be interpreted to include a duty to demonstrate that the environmental harms deemed acceptable will not be shouldered disproportionately by an underprivileged community.

Unsustainable Development in Canada: Environmental Assessment, Cost-Benefit Analysis, and Environmental Justice in the Tar Sands

- Heather McLeod-Kilmurray and Gavin Smith

Abstract: Canada is on record as a strong supporter of sustainable development, yet the environmental costs of projects like the oilsands are justified by the creation of economic wealth. Tar sands are the fastest growing source of greenhouse gases (GHG) in Canada, contributing to climate change, which impacts the world's most vulnerable populations the hardest. Projects like oil sands are assessed in Canada by means of environmental assessments (EA). This paper tries to answer two questions in relation to EAs, using the tar sands as a case study. The authors argue cost-benefit analysis (CBA) should not be the basis of environmental assessments, which must be guided by clear and legally enforceable minimum standards. However, when performed in a way that attempts to include the full range and types of values in question, CBA can be one tool to help identify, clarify and make more accessible the balancing of all competing interests and values at stake in projects like the tar sands, before final decisions are made.

Transboundary Environmental Assessment in Canada: International and Constitutional Dimensions

- Neil Craik

Abstract: At a time of reassessment and possible retrenchment of domestic EIA requirements, this paper considers whether international law may provide a set of baseline requirements against which the adequacy and legality of Canadian EA law may be measured. The paper considers Canada's international legal obligations to perform EIAs and how the implementation of that duty is affected by the constitutional division of powers over environmental matters. This examination is undertaken with the specific goal of considering whether CEAA conforms to Canada's international legal obligations, and how the international rules may impact the exercise of discretion under CEAA. The conclusion of the paper is that the structure of transboundary EA rules under CEAA fails to implement international legal requirements in a number of important areas and, as result, misses an opportunity to strengthen transboundary environmental cooperation.

Environmental Assessment and Three Ways Not To Do Environmental Law

- Bruce Pardy

Abstract: As a means of achieving rigorous environmental protection, environmental assessment has become an empty pretence, and, for those whose projects are subject to its processes, a pointless and expensive waste of time. It is based upon three premises widely accepted throughout modern environmental law: that public comment is relevant to environmental decisions; that the environment should be managed to maximize public utility; and that environmental governance should be a discretionary exercise whose purpose is to achieve the "right result" in each case without reference to general rules and principles. These three premises should be rejected. The alternative is a "systems approach" to environmental governance based upon a

contrasting set of propositions: that environmental law consists of substantive legal rights not dependent upon public opinion; that the purpose of environmental law is ecosystem protection rather than managing for public utility; and that environmental decisions are based upon concrete, generally applicable rules and principles in a decision-making process consistent with rule of law norms.

Rethinking Environmental Contracting

- Natasha A. Affolder

Abstract: Environmental contracts occupy an ill-defined middle ground between command and control regulation and voluntary initiatives. These agreements have captured the imagination of policymakers and scholars in the U.S. and Europe in particular. They are heralded as promising examples of "new governance." This Article explores a little known example of environmental contracting which emerged in the context of a Canadian diamond mine - the Ekati Environmental Agreement. Through a fine-grained case study of the Ekati Agreement, this article challenges some of the assumptions that shape the "environmental contracting literature as well as the wider literature on "new governance." By debunking the myths about contracting that pervade this theoretical literature, we can deepen our analysis of the complex interplay between regulating and contracting for environmental protection.

EA and Climate Change Mitigation

- Albert Koehl

Abstract: The Canadian Environmental Assessment Act (CEAA), as well as comparable laws such as the Ontario Environmental Assessment Act, is precisely the type of law one would expect to play a role in mitigating greenhouse gas (GHG) emissions from new projects. Unfortunately, in practice, CEAA is proving to be a failure in reducing or even stabilizing ever-increasing Canadian GHG emissions most notably from the oil and gas sector, particularly the tar sands. This article explores the reasons why CEAA has thus far disappointed advocates hoping to see the mitigation of GHG emissions from new projects. The author suggests that headway in reducing GHG emissions may nonetheless be made under CEAA by convincing courts that significance can only be defined in a manner consistent with the dictates of climate science. In particular, a focus on cumulative effects may help define significance in a more climate-friendly manner. The article also explores law reform options that would make CEAA a more effective tool in addressing climate change.

Current Issues in Environmental Assessment in British Columbia

- Mark Haddock

Abstract: This paper canvasses current issues in the environmental assessment (EA) process in British Columbia from a public interest law perspective. There are no doubt many additional issues worthy of examination and comment from the private bar that represents proponent interests, as well as a host of issues that arise in other disciplines that converge in the EA arena, particularly the sciences, social sciences, public policy and dispute resolution fields. After briefly discussing the history of the EA regime, the paper will examine the current legislation and case law, and suggest some law reform measures to improve the EA process. Currently, the EA process lacks credibility in the eyes of many citizens and non-government organizations, whose lives and interests can be deeply affected by its outcomes, but who feel increasingly on the sidelines, or in the bleachers, outside of the game.

Getting to "No" Through YESAA? A Look at an Alternative Federal Assessment Model Based Upon the Principle of Independence

- Teri Cherkewich

Abstract: This paper posits that the structural assessment model adopted by Parliament for Yukon presents a better approach to federal assessments than the model under the Canadian Environmental Assessment Act (CEAA) due to its adherence to the principle of independence of the assessor. The paper outlines criticisms of CEAA's structural model and reviews statistics regarding determinations made by assessors allowing a project to be carried out versus determinations restricting a project from being carried out. The paper proposes that one reason for the huge discrepancy between the numbers under each of these categories is the lack of independence of the assessor. The paper then introduces an alternative federal model that provides for such independence: the Yukon Environmental and Socio-economic Assessment Act (YESAA). As was done in regards to CEAA, statistics are provided in relation to YESAA regarding projects that have been recommended to proceed versus those that have been recommended not to proceed. Based upon a small but notable distinction between the overall statistics under CEAA versus YESAA, the paper proposes that an important underlying reason for such distinction relates to the presence or absence of an independence model. The paper concludes that on both a quantitative and qualitative basis the model under YESAA provides for a more balanced approach to federal assessments in Canada and, therefore, should be adopted on a nation-wide level via legislative changes to CEAA, which would consequently provide for more congruent federal assessment legislation in Canada.

Environmental Assessment Reform in Saskatchewan: Taking Care of Business

- M.A. Bowden

Abstract: It has been 30 years since the passage of the Environmental Assessment Act in Saskatchewan. Little has changed in the legislation and no regulations pursuant to the act have ever been passed. To be fair, after some initial legal skirmishes to

determine the boundaries of public participation the EA process, although conservative in approach, has operated in an efficient manner. Shortcomings were known to all involved and although change was desirable to proponents, stakeholders, and those within the EA Branch committed to effective environmental management, the legislation was not a high priority within Government or Saskatchewan Environment. A change in power following the 2007 election marked an opportunity to re-evaluate EA in the province: to fix the shortcomings and update the legislation to reflect, if not cutting edge EA, at least the current state of EA nationally. This paper examines the process through which the EA Act was reviewed and amended in Saskatchewan: a process noteworthy for the poor consultation practices, the predetermined outcomes, and the lost opportunity for progress towards sustainability.

Environmental Assessment in Ontario: Rhetoric vs. Reality

- Richard D. Lindgren and Burgandy Dunn

Abstract: Ontario enacted the Environmental Assessment Act in 1975, and substantially amended the legislation in 1996. However, there has been long-standing concern about how to make Ontario's environmental assessment program more effective, efficient and equitable. In this article, the authors summarize Ontario's current environmental assessment program, and review recent trends and developments that warrant further reform initiatives.

The Integration Of Environmental and Planning Law: The New Era Of Ontario Infrastructure

- Rodney Northey

Abstract: Like many jurisdictions, Ontario has responded to the economic hardship of the current recession with budgets proposing massive spending in infrastructure across many sectors -- including energy, transportation, drinking water, and waste management. Legally, Ontario seems well situated to apply such spending wisely: Ontario projects are subject to well-established infrastructure planning processes set out in federal and provincial environmental assessment laws and regulations, and binding, long-term plans and policy statements that set out strong guidance on where and how infrastructure should proceed. This paper argues that these existing priorities to process over substance are not based on legal limitations; to the contrary, each environmental assessment regime and process provides ready opportunities to follow applicable substantive standards. This paper identifies these opportunities and promotes the use of such standards to expedite project planning and deliver wiser infrastructure spending.