

Journal of Environmental Law and Practice Volume 22 Abstracts

Fish Lakes and Tailings Ponds

- Andrew Gage

Abstract: In the Metal Mining Effluent Regulation (MMER), enacted under Canada's Fisheries Act, the Governor General in Council purports to designate fish bearing waters as "Tailing Impoundment Areas" allowing mining companies to deposit hazardous mine waste into such waters regardless of the amount of waste or the resulting contamination levels. This article analyzes the MMER in light of the public's rights, and the Crown's obligations, in respect of fish and fish habitat. The author discusses various theories about the nature and extent of the public's rights in respect of fish and fish habitat in inland waters, concluding that, particularly in the Western Provinces and, especially, in British Columbia, the public does have such rights. The author then reviews the legal effect of the Fisheries Act and the MMER. While an approach to statutory interpretation that ignores the public's rights in respect of fish might presume that Parliament intended to allow the regulation made under the Fisheries Act to be used broadly, full recognition of the existence of such public rights supports a narrower interpretation. Such an approach would require the federal government to point to a clear and plain legislative intent to authorize regulations, which have such a direct and devastating impact on the public's rights in respect of fish and fish habitat in the affected water bodies. The author concludes that the Fisheries Act does not demonstrate such an intention, and the MMER should be held to be ultra vires the Act.

Genetic Resources & Access and Benefit Sharing: Politics, Prospects and Opportunities for Canada after Nagoya

- Chidi Oguamanam

Abstract: Biotechnology is a core technological driver of the new knowledge economy. It is mainly controlled by developed countries and relies on biological resources and, by extension, biological diversity. Consequently, biotechnology is implicated as a factor in the unidirectional transfer of the benefits of biological resources from indigenous and local communities to the developed countries. To address this perceived equity gap in the new knowledge economy, the concept of Access and Benefit Sharing (ABS) is designed to ensure that providers and users of genetic resources conduct their affairs in a fair and equitable manner. Highlighting Canada's unique and complex ecological profile, especially in the realms of Forest and Marine Genetic Resources, this paper argues that a holistic outlook on biological diversity that incorporates the two necessitates a rethinking of the perceived disposition of Canada as a user, in contrast to a provider of genetic resources under the emerging global ABS process.

The Regulation of Wind Power in Alberta: The Case of Municipalities

- Nickie Vlavianos

Abstract: Wind energy development has been on the rise over at least the last decade for a number of reasons, including the increasing awareness of the need to reduce greenhouse gas emissions from carbon-based electricity generation. As wind power development increases, so too will concerns from local governments over this type of development. This article considers the role of municipalities in decision-making around wind power development in Alberta. It assesses the position of municipalities within the current policy and legal framework. It asks the following questions: What is the legal position of municipalities with respect to wind power development in Alberta? How are their views and concerns taken into account? Can municipalities address wind power development through land use bylaws and other statutory instruments? Should they do so? Although municipalities are a level of government with legislated mandates and legitimate interests and concerns over wind power development, this article finds that they are clearly subordinate to provincial decision-making in the current regime. It also finds that the relationship between provincial and municipal decision-making with respect to wind power development is a complex one. Many questions are raised and left unanswered. Still, drawing upon the experiences of the Municipal District of Pincher Creek in particular, the article notes that there are important avenues available for municipalities to pursue in this context. It also concludes that there are valid reasons for municipalities to be proactive with respect to wind power development within their borders.

Climate Change and the Protection of Drinking Water in Ontario: An Opportunity to Adopt Adaptive Management?

- Patricia Hania

Abstract: Climate change is a threat to the protection and conservation of drinking water sources. However, the Ontario Ministry of the Environment's (MOE) recent regulatory response to climate change falls short by failing to develop a policy that is premised upon adaptive management (AM). This article offers lessons for both the practice and theory of environmental stewardship, specifically the issue of water governance. First, this paper offers the MOE a practical recommendation: a province-wide climate change policy that is premised upon AM should be adopted. Secondly, the critical examination of the legal perspective of adaptive management identifies the need to reorient the jurisprudence to support an ecological resiliency perspective of adaptive management. At present, the jurisprudence is an institutional barrier to protecting and conserving aquatic ecosystems. Thirdly, this article expands the environmental governance literature by bridging the pluralist environmental regulatory approach promoted by legal scholars Gunningham and Sinclair with resiliency theory, as articulated in the natural science literature.

Charles Caccia and the Construction of Environmental Legitimacy

- Douglas Macdonald

Abstract: Sustainable development is now established as the dominant norm used to identify environmental legitimacy, having replaced earlier and more radical candidates such as limits to growth and bioequity. This has significant implications for the global future, since it works to limit the scope of environmental protection action to the boundaries of capitalist economic development and a focus on human well-being. This article examines the role of Canadian environmental non-governmental organizations (ENGOS) in establishing sustainable development as the dominant norm in this country during the period approximately 1985 to 1993. Some of those ENGOS endorsed the concept because it resonated with their own values (as it did for government and business) while others rejected it because it did not. Many, however, endorsed it strategically -- because they thought its acceptance by government and business provided new opportunities for environmental gains. The article argues that endorsement by ENGOS was, for a number of reasons, essential to the ascendancy of sustainable development. The hoped for strategic gains have not been realized, however, and today we are left with a norm which, because it precludes fundamental societal change, cannot address the two major, related, threats of biodiversity loss and climate change.

Role of Parliamentary Committees in Canadian Environmental Policy Formulation and Evaluation: The Case of the Standing Committee on Environment and Sustainable Development 1994-2004

- Mark S. Winfield

Abstract: This article examines the experience of the Canadian House of Commons Standing Committee on Environment and Sustainable Development between 1994 and 2004, while under the Chair of the Honourable Charles Caccia. The article finds that during this period the committee provided an example of what the academic literature on parliamentary committees and Members of Parliament themselves have suggested such committees have the potential to achieve in terms of influencing policy development and providing mechanisms for accountability and policy evaluation, but has rarely been seen in Canadian practice. The committee's role in the development of the new Canadian Environmental Protection Act (CEPA 1999) and the Species at Risk Act are highlighted. The committee's success is attributed in large part to Caccia's leadership, who took the unusual step in Canadian parliamentary practice of pursuing the chair of the committee as a non-cabinet oriented career path, supported by a relatively stable committee membership, particularly on the opposition side. This article emphasizes that the committee's successes were achieved within the existing framework of standing orders and resources available to Canadian parliamentary committees, suggesting that similar outcomes could be achieved by other standing committees, given a strong and experienced chair, and a willingness among members

to establish an independent working space within committees where the partisan dynamics of the floor of the House of Commons are attenuated. A comparative discussion of the work of standing committees in the Legislative Assembly of Ontario is also provided, and recommendations made to improve the effectiveness of the committee process at the federal level and in Ontario.

Sustainability Lost: Comments on "Planning for a Sustainable Future: A Federal Sustainable Development Strategy for Canada"

- C. Scott Findlay, Jamie Benidickson, Hugh Benevides, Karen Kraft Sloan

Abstract: Planning for a Sustainable Future, the draft federal government strategy for sustainable development that was released for comment earlier this year, is both welcome as an acknowledgment that the challenges of sustainable development remain to be addressed, and discouraging in its failure to clarify the nature of those challenges and the means through which they may be systematically and most effectively addressed. On the positive side, Planning for a Sustainable Future correctly recognizes that a successful strategy for sustainable development (SDS) must integrate decision-making across a broad institutional and jurisdictional landscape. Less encouragingly, the federal sustainability strategy discussion paper suffers from several important limitations. Canadians need a far more forthright account of the nature, scope and causes of the unsustainable course of our current arrangements than the draft strategy provides. Within Canada, several provincial jurisdictions have also directly addressed the challenges of governing sustainably within the scope of their responsibilities.

Beyond the Species at Risk Act: Recognizing the Sacred

- David Suzuki

Abstract: Headlines in the popular press give us a due about a biodiversity crisis with terrifying implications for humanity. These stories range from the endangerment of the polar bear to depleting songbirds and the sixth extinction crisis on earth. Unfortunately, such stories are usually one day reports in the backpages, a reflection of how little species extinction matters to society. In contrast, any economic story about falling or rising stock prices, the value of the US dollar or a corporate takeover, may play on the front pages for days. And despite the fact that Canada was the first country to ratify the UN Convention on Biodiversity and the fact that Canada passed a new endangered species policy, the Species at Risk Act in 2003, most Canadians rarely take pause to consider the sanctity of biodiversity or the future of conservation in the country.

SARA's Safety Net Provisions and the Effectiveness of Species at Risk Protection on Non-Federal Lands

- Stéphane Wojciechowski, Christopher Brassard, Stewart Elgie, C. Scott Findlay & Sue Mckee

Abstract: Although Canada's Species At Risk Act (SARA) applies strictly to federal lands and waters, it includes provisions requiring the Minister of Environment to recommend that a "safety net" order be issued if he/she determines that a SARA-listed species is not effectively protected on non-federal lands. Here we show that of the 298 species listed under SARA as of November 2010, (a) 36 per cent are not listed under any provincial/territorial endangered species or wildlife statute or equivalent; (b) of those 66 species that occur in 2 or more provinces or territories, only 33 per cent are listed in all jurisdictions in which they occur; (c) only 26 per cent of SARA-listed species have provincial recovery strategies, compared to the 40 per cent with federal strategies, while 76 per cent of those with federal recovery strategies have, as yet, no provincial or territorial counterpart. Species were more likely to be listed in at least one province or territory the longer they had been listed under SARA and they were in decline in the decade preceding the most recent COSEWIC status report. Species were less likely to be listed if the jurisdictions in which they occur do not have dedicated endangered species legislation and competition with exotic species was an identified threat. We explore the implications of these findings to implementation of the safety net provisions of SARA in light of the precautionary approach to protection explicitly articulated in SARA's preamble.

Can Stewardship Work for Species at Risk? A Pelee Island Case Study

- Andrea Olive

Abstract: Under the Species at Risk Act, Canada takes a "stewardship first" approach to the conservation of biodiversity. The central argument of this paper is that such an approach is problematic because private landowners may lack knowledge about endangered species, they may lack information about conservation laws, and that not all landowners possess a stewardship ethos. A case study from Pelee Island in Ontario, including in-depth interviews with landowners, is used to illustrate this argument. It is concluded that the federal government, in collaboration with provincial governments, need to focus on landowner education and awareness if stewardship is going to be viable in Canada.

Canada's Species at Risk Act and the Atlantic Salmon: Cascade of Promises, Trickles of Protection, Sea of Challenges

- David L. VanderZwaag, Maria Cecilia Engler-Palma & Jeffrey A. Hutchings

Abstract: This article reviews through a three-part format the role and efficacy of the Species at Risk Act (SARA) in trying to save SARA-listed inner Bay of Fundy (iBoF) Atlantic salmon and other Atlantic salmon populations at risk from the brink of extinction. The cascade of SARA promises is first discussed, including: the

independent assessment of the status of the species based on best available scientific information; the protection of listed species, their residences and critical habitat; and the two-stage recovery planning process. The trickles of protection actually delivered by SARA in relation to Atlantic salmon are next described, including the recent adoption of a Recovery Strategy and identification of critical freshwater habitat. The sea of challenges in implementing SARA and in strengthening the protective net outside SARA is finally highlighted. Particular challenges include: overcoming the slow implementation of the Act; addressing scientific limitations of the Recovery Strategy; forging a clear agenda for recovery actions; confronting limitations in incidental harm permitting; protecting critical habitat; getting a grip on protection and recovery of other Atlantic salmon populations at risk; bolstering environmental assessment; enhancing provincial engagement in recovery efforts; ensuring full implementation of Canada's Oceans Act; and charting future directions for the North Atlantic Salmon Conservation Organization.

An Emerging Pacific Initiative to Ban Shark Finning and Limit the Consumption of Shark Fin Soup—the Case for Canadian Participation

- Cameron Jefferies

Abstract: To some, sharks represent the insatiable man-eaters oft portrayed in Hollywood and represented in the media, but to others they may be symbolic of the mysteries of the ocean or in some ways represent the majesty and intrigue of top predators similar to the respect associated with bears and lions. Regardless of the school of thought one subscribes to, one fact is increasingly becoming clear -- many shark species are in imminent danger of disappearing. 2010 and early 2011 also experienced the development and implementation of innovative shark conservation legislation in the USA at both the federal and state level, which has led to various Pacific island nations and coastal states considering or implementing similar protection. In this legislative review the author will demonstrate the importance of America's efforts in light of continued international failure and suggest that there is a case to be made in favour of introducing similar legislative action in Canada.