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The Failed Reform of Ontario's Mining Laws

- Bruce Pardy and Annette Stoehr

Abstract: The Ontario government's recent modernization of mining laws falls short of genuine reform. Recent amendments have left untouched the Mining Act's central function of facilitating mining at the expense of other legitimate interests. In the south and near-north of the province, the continuation of the free entry system gives priority to the pursuit of mineral rights over the property rights of surface and neighbouring owners. The Crown's duty of consultation with Aboriginal peoples is being twisted into a burden for mining companies, and under the Far North Act, into an effective veto for Aboriginal interests over mining development. The environmental rules that apply to mineral development are scattered and complicated, and the standards that apply to the rehabilitation of mining sites are lax. Instead of establishing rules for mining that are general, equal and certain, the legislation gives government officials broad discretion over mining policy. Much of the substance of the legislation is delegated to the regulations.

Basin Closing Orders and Crown Reservations: Two Tools to Protect In-stream Flows?

- Nigel Bankes

Abstract: This paper examines the use of basin closing orders and Crown (state) reservations as two different but related means of establishing in-stream flows to protect aquatic ecosystem health. Adopting a comparative approach the paper examines the use of these tools in the two western provinces of Alberta and British Columbia¹ and (in order to draw on the experience in the western United States) Montana. The paper proceeds as follows. Part one explains the term "in-stream flows" and the importance of trying to ensure in-stream flows for the purposes of protecting aquatic ecosystem health. Part two explains the terms "basin-closing order" and Crown reservation. Part three offers a thumbnail sketch of the water rights regimes of the three selected jurisdictions. Part four develops a common analytical framework and Parts five, six and seven apply that framework to the three jurisdictions. Part eight offers some conclusions evaluating the use of basin closing orders and reservations as tools to protect in-stream flows.

Realizing a "Pious Wish" of Peoples and BCE: Enforcement of Pluralist Theory and Corporate Environmental Responsibility

- Thomas Posyniak

Abstract: In the last decade, the Supreme Court of Canada has challenged an underlying assumption of corporate law. Hitherto, shareholders were arguably the practical beneficiaries of a corporate director's statutory fiduciary duty. The Supreme Court in *Peoples Department Stores Inc (Trustee of) v. Wise*, and *BCE Inc v. 1976 Debentureholders* rejected this assumption and accepted a broad, permissive director's duty to consider a multitude of non-shareholder stakeholders. One of those stakeholders mentioned in both cases was the environment. This paper considers the reality of the changes advanced by the Supreme Court in the context of corporate environmental responsibility. Rather than act to install a legal norm of corporate environmental responsibility, the instruction by the Court was seemingly little more than a progressive wish situated in a decision that has availed corporate decision-makers with judicial deference. The status quo of relying on judicial fiat to craft high-level corporate law and policy does a disservice to what is a national policy issue.

Canadian Approaches to America's Public Trust Doctrine: Classic Trusts, Fiduciary Duties & Substantive Review

- Anna Lund

Abstract: The American public trust doctrine imposes duties on governments when they deal with certain natural resources on the basis that the governments hold the natural resources in trust for the public. This paper analyzes why Canadian courts have been slow to embrace the American public trust doctrine. It starts with an overview of the American public trust doctrine and emphasizes that it is primarily used to challenge procedural aspects of government decisions that affect public trust resources. The paper then considers Canadian attempts to make use of the public trust doctrine and identifies three reasons for the paucity of the doctrine in Canada: (1) In an early decision, a court applied classical trust law concepts to defeat a public trust claim; (2) litigants responded by incorporating fiduciary law, because fiduciary law is an area of the law where courts have been willing to impose duties on governments outside of classical trust law; (3) Canadian litigants have used the hybrid fiduciary-public trust doctrine to challenge the substance in addition to the procedure of government decisions, but courts are reluctant to engage in such substantive review.

Lessons from an Ancient Concept: How the Public Trust Doctrine will meet obligations to protect the environment and the public interest in Canadian water management and governance in the 21st century

- Sarah Jackson, Oliver M. Brandes & Randy Christensen

Abstract: The Public trust doctrine is a longstanding legal principle that has the potential to provide protection to ecological values, ensure water for future needs, and protect public uses and interests. While application of the principle is widespread in the US, it has yet to be fully articulated in Canada. This paper will outline the opportunity to enshrine the Public trust doctrine into Canadian water law by highlighting the

foundational aspects required in any legal framework. It will highlight key cases in which courts in other common law jurisdictions have applied Public Trust principles, and discuss the interplay between the development of this principle at common law and in legislation. It will provide an overview of the core legal principles of the Public Trust that already exist in Canada's common law tradition, and discuss the potential to develop these principles in the context of modern water governance using the current water law reform process in British Columbia to illustrate the powerful potential of this ancient concept to address modern freshwater challenges.

The Constitutionality of Federal Climate Change Legislation

- Alastair R. Lucas and Jenette Yearsley

Abstract: Over the last decade, the Canadian government has not managed to produce comprehensive climate change legislation and has failed to adequately consider the constitutional implications of doing so. The 2006 Clean Air Bill, a 2006 amendment to the Canadian Environmental Protection Act, that followed the 2005 Notice of Intent to Regulate Greenhouse Gas Emissions by Large Final Emitters is the closest approximation Canadians have of comprehensive federal climate change legislation. But the Clean Air Bill as amended by a Parliamentary Committee died on the House of Commons Order Paper. There is little doubt that direct and discrete federal greenhouse gas emission prohibition provisions could be constitutionally valid as Criminal Law. But if constitutional attack focuses on complex regulatory compliance provisions, a different picture emerges -- one that suggests that the Amended Clean Air Bill may not have been within federal constitutional jurisdiction.

CPR for Canadian Rivers — Law to Conserve, Protect, and Restore Environmental Flows in Canada

- Linda Nowlan

Abstract: Environmental flows are a key factor in freshwater biodiversity and ecosystem integrity. The term is increasingly used to describe the quantity, timing, and quality of water flows required to sustain freshwater and estuarine ecosystems as well as the human communities that depend on these ecosystems. Human alterations to environmental flows through withdrawals and impoundments have a critical impact on aquatic ecosystems, and on the abundance, composition and resilience of freshwater species. Though freshwater biodiversity loss and river fragmentation are widespread on a global scale, in Canada, the picture is not as grim but still worrying: the number of endangered or threatened fish species is increasing, and Canada is one of the largest diverters of water in the world. Legal rules are needed to protect environmental flows and ensure the availability of water for nature and water for people. This article canvasses the legal tools to protect environmental flows in Canada, and finds that such legal frameworks remain inadequate. The article argues the legal frameworks for

environmental flow protection in Canada should be reformed, and advocates for a strong collaborative national approach to conserve, protect, and restore flows.

Protecting the Arctic Marine Environment: The limits of Article 234 and the need for multilateral approaches

- Ryan O'Leary

Abstract: Article 234 of the UN Convention on the Law of the Sea enables coastal states with ice-covered waters to adopt laws and regulations for the protection of the marine environment. These standards may be stricter than those otherwise accepted by the international community. They may also be adopted unilaterally and without reference to a competent international organization. In the framework of the LOSC, this power is unique. It is an exception to the general structure of international cooperation that the Convention seeks to ensure. As with any exception, Article 234 should only be used sparingly. Despite the (limited) unilateral rights granted to coastal states with ice-covered waters, strict Arctic environmental regulation should be pursued through international and multilateral means. The focus of this article is on the development of Arctic shipping standards that relate to the protection of the marine environment. There will also be an emphasis on the important role of Canada in this process. For both legal and practical reasons, it is in Canada's interests to pursue Arctic environmental regulation through multilateral means despite the limited unilateral rights granted under Article 234.

CURRENT RESEARCH

Water Stewardship in the Lower Athabasca River: Is the Alberta Government Paying Attention to Aboriginal Rights to Water?

- Monique Passelac-Ross and Karin Buss

Abstract: The provincial debate about water management and water rights, including water allocation and proposed water transfers, proceeds without regard for Aboriginal territorial rights, including to water. Nevertheless, Aboriginal peoples continue to struggle for the recognition and protection of their rights, and the ability to exercise these rights, many of whom are closely tied to waters and rely upon a continuing supply of clean water. The development of oil sands in the Lower Athabasca River region provides the background for this analysis of how Alberta deals with Aboriginal peoples' concerns with respect to water in the resource development process. We examine various water management planning initiatives, the approval process for oil sands development, and the monitoring of the impacts of industrial development on water resources. We assess whether the provincial government is acknowledging and protecting Aboriginal rights to, and uses, of water, and whether it is adequately consulting the affected communities. Our conclusion is that Alberta largely fails to properly discharge its constitutional obligations to Aboriginal peoples.

Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority

- Meredith James

Abstract: This case comment considers the analysis of the British Columbia Court of Appeal in *Susan Heyes Inc v Vancouver (City)*. At trial, the judge found that the construction of a transit line in downtown Vancouver was the source of a nuisance that resulted in a significant decline in the plaintiff business's income and held the defendants liable, awarding damages in the amount of \$600,000. Writing for the appellate court, the Honorable Madam Justice Neilson upheld the finding of nuisance on appeal, however, she overturned the trial judge's holding that the defendants had failed to establish the defense of statutory authority. They were successful in establishing the defense on the basis that the Authority's incorporating legislation provided statutory authority for the construction of the transit line and nuisance was an inevitable result of exercising that authority. Justice Neilson's approach significantly broadens the defense of statutory authority, perhaps making it broader than was contemplated by the SCC in either *St Lawrence Cement* or in its earlier decisions.

Jerry V. DeMarco and Paul Muldoon: Environmental Boards and Tribunals in Canada: A Practical Guide

- John Swaigen

Abstract: *Environmental Boards and Tribunals in Canada: A Practical Guide*, by Jerry V. DeMarco and Paul Muldoon, is reviewed.