# Journal of Environmental Law and Practice Volume 24 Abstracts

## CEAA 2012: The End of Federal EA As We know it?


- Meinhard Doelle



**Abstract:** This commentary assesses the key changes to the federal environmental assessment (EA) process contained in the 2012 Budget Implementation Bill. The resulting Canadian Environmental Assessment Act 2012 (CEAA 2012) is compared to the federal EA process that had been in place since the implementation of the original CEAA in 1995. The article concludes that the key changes brought about by the enactment of CEAA 2012, including the shift in responsibility for EA, the discretionary application of the process, the narrowed scope, new powers of delegation, substitution and equivalency, and the more restricted role of the public all function counter to the improvements to CEAA 1995 recommended in the academic literature.


## Protecting listed aquatic species under the federal Species at Risk Act: the implications for provincial water management and provincial water rights


- Nigel Bankes



**Abstract:** This article examines the implications of listing decisions for freshwater aquatic species under the federal Species at Risk Act. In particular it examines the implications of listing for provincial water management decisions and for those who hold provincial water rights or authorizations. The paper begins with an analysis of the analogous situation in the US and the literature that examines the potential for conflict between the federal Endangered Species Act and the water rights regimes of the western states. The article then examines a sample of Assessment and Status Reports and Recovery Strategies prepared by COSEWIC (the Committee on the Status of Endangered Wildlife in Canada) for listed freshwater aquatic species in Canada in order to identify the ways in which provincial water management decisions, including dam construction and operations and provincial water licensing decisions (as well as the actions of third parties relying on those licences), may have contributed to the status of those species as threatened or endangered and may threaten the continued viability of those species. The final part of the article considers the application of the Species at Risk Act to aquatic species under four headings: (1) federal duties in relation to listed species, (2) duties imposed on all persons (e.g. no take), (3) possible claims to compensation, and (4) federal deference to the provinces.


## Le développement durable, ses principes et leur intégration en droit canadien


- Paule Halley et Pierre-Olivier Desmarchais



**Abstract:** This article reviews the concept of sustainable development, which was agreed upon by the 182 states gathered at the Rio Summit in 1992 and has since been

quite largely incorporated into international and domestic law. Taking a synthetic approach suitable for a wide readership, the analysis revolves around the normative evolution of the concept of sustainable development and how it is integrated into the Canadian legal system. From this point of view, the text describes the international roots of the concept of sustainable development, its purpose and its key principles (Part 1). Next, it shows how the concept of sustainable development and its principles were introduced and integrated into the Canadian legal system (Part 2). It focuses on examples taken from international and domestic law to illustrate how sustainable development is incorporated into legal systems and how it works in practice. In sum, this text, which demonstrates that sustainable development has become an increasingly significant legal concept, is an opportunity to propose a plan to bring structure to its key principles.

**The Environmental Regulation of Genetically Modified Bacteria: Case Studies of Canada's Piecemeal Regulatory Approach to Biotechnology**

- R. Nelson Godfrey

**Abstract:** The release of genetically modified bacteria into the environment is an important technique in a number of emerging industries. Canadian regulators have responded to this practice with a piecemeal system that (a) regulates most genetically modified bacteria using previously existing, industry-specific statutory schemes and (b) generally monitors the toxicity of any otherwise unregulated product. This article conducts a preliminary analysis of the provisions, regulations and relevant government and academic commentary on the Pest Control Products Act and Canadian Environmental Protection Act, 1999, as case studies to analyze whether the overall system is likely to prevent environmental harm, is predictable and is scientifically-based. It finds that the standards of risk assessment are not uniform across different industries and are generally poorly adapted to the challenges posed by genetically modified bacteria. It also identifies several avenues where further research could contribute to a better understanding of the existing regimes and available alternatives.

**"Nothing to Report": The Failure of Ontario's Provincial Wildlife Population Monitoring Program for Commercial Timber Harvesting**

- Stacey O'Malley, Christopher Wilkinson & Gord Miller

**Abstract:** In Ontario, the Ministry of Natural Resources (MNR) is authorized to undertake planning for timber harvesting and related activities under a Class Environmental Assessment, subject to binding terms and conditions. A condition of the original 1994 decision was to maintain a Provincial Wildlife Population Monitoring Program (PWPMP). The PWPMP was established to monitor population trends of representative terrestrial vertebrate species within the Area of the Undertaking of commercial timber harvesting (AOU), in order to understand the effects of forestry on wildlife at the provincial level. Despite being a legal requirement for the last 18 years,

the program has failed to achieve its own objective and is unable, in its current form, to adequately inform government policy and/or management decisions. The net result is the inability of MNR to mitigate potential declines of wildlife populations or to ensure the sustainability of Crown forests.

**Accretion, The Torrens System, and Law Reform**

- Arlene Kwasniak

**Abstract:** According to common law accretion principles a riparian owner is entitled to the land bordering the riparian source that has built up or been exposed through gradual and imperceptible natural processes. This paper discusses the evolution and potential future of accretion law, focusing on Alberta. The paper begins with the reception of common law of accretion and a description of the Dominion Lands Survey, the Alberta Township Survey, and the Torrens system. It reviews key accretion cases, from foundational jurisprudence in western Canada, to the most recent court attempts to reconcile common law accretion with Torrens based legislation. In this context the paper discusses legal issues related to riparian ownership and accretion, including the riparian ownership entitlement resulting from avulsive processes, erosion, and issues concerning ownership of bed and shores that have moved or been abandoned in riverine processes. The paper suggests that in light of conflicts and issues arising from the common law doctrine, it may be time for legislative reform. The paper concludes with setting out policy issues and considerations relevant to law reform.

**Uncharted Waters: Applying the Lens of New Governance Theory to the Practice of Water Source Protection in Ontario**

- Patricia Hania

**Abstract:** "New" governance theory, which is premised upon a participatory, collaborative and flexible decision-making process, has emerged as a leading regulatory theory in the legal scholarship. The shift to a governance model in Ontario's water source protection planning sector is examined in this article. Water governance, under the Clean Water Act 2006 (CWA), is a participatory, pluralistic and localized mode of governance that is carried out by a group of State and non-State actors called a Source Protection Committee (SPC). Given the legislative infancy of the CWA and the experimental nature of these SPC committees, this article unravels the practice of new governance theory as played out at an SPC. The methodology applied is a case study approach based on the observation of the Lake Erie Source Protection Region SPC. It is argued that the mode of governance as practiced in Ontario's water source protection planning sector is a state-centric model of decision-making.

**Food For Thought: Effecting Shark Conservation through Marine Protected Areas Enhanced Collaboration with International Organizations**

- Kelsey Dick & Cameron Jefferies

**Abstract:** Concern is mounting that many shark species may not survive current extinction pressures caused by humans. Shark conservation, at the domestic and international levels of governance, is currently receiving considerable attention from the legal community as it responds to human fishing pressure and over-use of the marine environment. This article assesses the status of shark conservation, including the general failure of the international community to sufficiently and effectively address declining shark populations, and the need for holistic, ecosystem-based conservation. As societal perceptions surrounding sharks begin to shift, and as advances in science and technology enable more effective population modeling and enhance our understanding of sharks, it is imperative that the legal response embodies innovation and foresight. This proposal advances the need to develop an international coordinating body for shark conservation efforts, as well as the opportunity for coastal and island nations to coordinate marine protected area enforcement and monitoring efforts with non-governmental organizations.

**Climate Change Litigation and the Public Right to a Healthy Atmosphere**

- Andrew Gage

**Abstract:** The damages caused by, and the costs of adapting to, climate change are running into the billions of dollars per year in Canada alone. It is remarkable that a human caused activity that causes such widespread harm to legal rights and economic interests should not be seen as a major source of liability. However, if a public right to a healthy global atmosphere is recognized, then the focus of a climate change litigant can be on the impacts of large-scale greenhouse gas emissions on the composition of the atmosphere, and therefore on that right, which simplifies the issues of causation considerably. Drawing on cases related to water pollution and the rights of riparian owners to an unaltered flow of water past their property, it becomes clear that it is possible to demonstrate that large-scale individual emitters contribute significantly to the alteration of the global atmosphere and thus violate that public right.

**Environmental Class Actions for Historical Contamination: *Smith v. Inco Limited***

- Peter Bowal

**Abstract:** Smith v. Inco Ltd is a noteworthy environmental law case for several reasons, not the least of which it is that it is the first environmental class action lawsuit to proceed through a trial and appeal in a common law province in Canada. The case, which took more than a decade to be decided, alleged that continuous tortious behaviour on the part of mining giant Inco Ltd commencing almost a century earlier had adversely affected a large class of landowners' property values. The case evolved through several styles of cause and claims that led to many trips to the courthouse on a wide assortment of intractably contested legal issues. Although the various

procedural issues contribute in their own ways to the development of the law, particularly in respect of class action proceedings, this Comment is focused on analysis of the substantive issues in the case.