Journal of Environmental Law and Practice Volume 26 Abstracts

The Consideration of Sustainability by Corporate Directors

- Jeffrey Bone

Abstract: There has been a long standing assumption that directors are required to consider only the interests of shareholders as part of the best interest of the corporation. My research suggests this assumption does not accord with Canadian law. Corporate directors are required to consider the best interest of the corporation which includes a diverse set of stakeholders. Recent case law suggests that corporate directors have a legal obligation to make decisions as a good corporate citizen. This research tests the legal liability of so-called corporate sustainability pledges and finds they do not create legally binding obligations upon corporate directors. However, directors are shielded from liability when engaging in a standard of conduct aligned with the protocols contained in a sustainability pledge. Therefore, while stakeholders may not be empowered to legally hold corporations to account on sustainability pledges, it remains in the purview of directors to decide whether they will follow these self-imposed guidelines.

Private Prosecutions Revisited: The Continuing Importance of Private Prosecutions in Protecting the Environment

- John Swaigen, Alberta Koehl and Charles Hatt

Abstract: Private prosecutions have played an important role in the interpretation and enforcement of environmental laws across Canada. Private prosecutions remain an important tool for individuals and environmental groups where governments either lack an interest in, or the necessary resources for, pursuing enforcement action. The complexity of such prosecutions along with evidentiary, procedural, and disclosure burdens ensure that they will be used sparingly. Provincial authorities across Canada use varying approaches in determining whether to exercise their right to intervene in a private prosecution to stay or withdraw charges, or to take over the prosecution. The authors provide an inventory of key private prosecutions in the environmental field from the last several decades. Private prosecutions today remain essential to promoting the societal goals of access to justice, government transparency, and government accountability. This is particularly true in the case of environmental protection laws.

How *Smith v. Inco* Failed: Recognizing the Category of "chemical interference" in Private Nuisance Cases

- Claire Seaborn

Abstract: Within a year the Supreme Court of Canada refused leave to appeal in Smith v. Inco and released a decision on Antrim Truck Centre Ltd v. Ontario (Transportation).

These two cases have had a significant impact on the evolution of Canadian private nuisance law. This article considers the shortfalls of private nuisance in the toxic torts context and argues that private nuisance should include the category of "chemical interference" within its legal test. Smith v. Inco is re-litigated as a thought experiment to demonstrate the barriers faced by toxic torts plaintiffs and how the case could have been decided in the residents' favour.

Who Regulates Trading in the Carbon Market?

- Shaun Fluker & Salimah Janmohamed

Abstract: Carbon markets offer the promise of reducing excessive carbon dioxide (CO2) emissions by putting a price on carbon. The effectiveness of the carbon market as a tool to reduce CO2, emissions depends heavily on its ability to deliver accurate price signals, which in turn requires a carbon market that is liquid, transparent and protected from fraud. Regulatory oversight is key to ensuring market liquidity and transparency. This paper asks who regulates carbon trading. A growing body of literature points to financial authorities to provide trading oversight. This paper adds to that literature by analyzing how financial regulation applies to carbon trading in Canada. After providing an overview of carbon markets and comparing their operation with traditional commodity markets, this paper describes common trading schemes and categories of trade, including spot, forward and derivative carbon trades. Commodity forward and derivative trading has received scant attention in Canadian literature and this paper attempts to fill that gap by reviewing regulation of commodity markets by Canadian financial regulators before proceeding to demonstrate how securities legislation in the two provinces with active carbon markets, Alberta and Quebec, applies to carbon trading.

Recovery Planning under Canada's Species at Risk Act in a Changing Ocean: Gauging the Tides, Charting Future Coordinates"

- Aaron Lemkow & David L. VanderZwaag

Abstract: The Species at Risk Act (SARA), Canada's primary legislative tool for protecting threatened and endangered species, has been criticized for its lack of enforceability, controversial listing process, slow implementation, and limited geographical scope. However, another important issue has not yet been addressed: whether and how SARA integrates climate change and ocean acidification into recovery planning for species at risk. Recovery planning will be ineffective if it does not address these changes because of their impact on key survival factors. The purpose of this article is threefold: (1) to assess whether and how SARA recovery planning integrates observed and anticipated changes in climate and ocean acidity; (2) to assess how this level of integration reflects basic threats identified in the scientific literature and compares to the United States' recovery planning; and (3) to discuss the

implications for Canada's marine species at risk and offer suggestions for improved recovery planning.

Planning For the Future of Albertans: Healthy Aquatic Ecosystems and Environmental Flows Protection

- Glorilyn Bruno

Abstract: Multi-sector and integrated approaches to natural resources management are the way forward for the sustainable management of the world's limited natural resources and for coping with conflicting demands. However, the practice in Alberta has showed that harmonizing policies and laws of different sectors and coordinating the necessary activities is not easy or straightforward. Whether the provincial government will be able to implement the ambitious approach and effectively protect the health of aquatic ecosystems remains uncertain.

The Regulation of Novel Water Quality Assessment Biotechnologies: Is Canada Ready to Ride the Next Wave?

- Id Ngueng Feze, Natalie Prystajecky, Christina Cook, Emily Kirby, Bartha Maria Knoppers, Vural Özedemir, Gemma Dunn, Judy Isaac-Renton & Yann Joly

Abstract: Microbial assessment of drinking and recreational water is a key tenet of public and environmental health risk management. Since it is both impractical and impossible to test for all possible microbiological pathogens (microorganism that cause disease), water quality assessment instead tests for the presence of indicator microorganisms which serve as proxies for the presence of contamination. This type of microbial water quality assessment relies on slow culture-based microbial methods rather than newer, more rapid molecular techniques, such as the nucleic acid amplification tests ("NAAT"). NAAT have been applied with great success in other contexts (e.g. clinical diagnostics and forensics); application of NAAT to water quality monitoring have the potential to precipitate a paradigm shift to a new water quality assessment approach characterized by speed and accuracy. However, to date, NAAT-based methods are not part of routine water quality monitoring in Canada. An important aspect of an efficient transition from research to routine use will be the adaptation of legal and regulatory frameworks to facilitate the integration and accessibility of NAAT-based methods as practical tools for all stakeholders. This article explores how new microbiological methods to assess drinking water quality are developed, validated and introduced into testing laboratories, and considers potential avenues for regulatory reform in Canada. In this perspective, a comparative legal analysis of current regulatory frameworks in Canada's three most populous provinces -- British Columbia, Ontario and Quebec -- and the more centralized approach used in the United States was conducted.

How Tribunals and Appeal Boards Are Contributing to Advances in Environmental Laws

- Marilyn G. Lee

Abstract: This paper posits that, since the wave of ambitious environmental protection legislation which began in the 1970s has subsided, environmental tribunals and appeal boards have made significant contributions to the advancement of these laws in ways that the legislature has not. First, by looking at and briefly postulating reasons for the diminishing pace of legislative reform of environmental laws in recent years, the paper concludes that economic considerations have affected legislatures' interest in bold environmental enactments, and offers the incrementalist model to explain why further improvements to environmental laws may be better achieved through the administrative hearing process than by legislative changes. Second, the paper suggests that two significant changes to adjudicative practices have facilitated boards and tribunals' abilities to make advances in environmental laws: namely, the practice of merit based appointments and the passage of statutory provisions giving third parties the opportunity to participate in proceedings before environmental boards and tribunals. Last, drawing on decisions from environmental appeal boards and tribunals in Ontario, Alberta and British Columbia, the paper demonstrates how those decisions have broadly interpreted environmental protection statutes and applied emerging principles of environmental law, such as the ecosystem principle and the precautionary principle, in their reasoning. Accordingly, this paper illustrates how decisions from boards and tribunals have contributed significantly to the body of environmental protection laws and to the changing dynamic of environmental law reform in Canada.