

ACHIEVING ENVIRONMENTAL SUSTAINABILITY IN THE FACE OF CLIMATE CHANGE: A JOINT CROSS-BORDER CONFERENCE ON SUSTAINABILITY

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Sustainability—the principle that development must meet the economic and social needs of present populations without compromising the environmental quality upon which the ability of future populations to meet their own needs depends¹—is a key component of environmental policy, law, and planning in Canada and the United States. It is a principle that the two nations recognize both as a matter of domestic necessity and as an obligation under international law. In particular, sustainability is a transnational issue for Canada and the U.S., given their shared geographic, economic, and cultural interests and history.²

On June 11, 2011, Vermont Law School (VLS) joined with the McGill University Faculty of Law, and other McGill academic units, to present a conference in Montreal that brought together legal, environmental policy, and urban planning scholars and professionals to provide insights leading to approaches of general applicability on these specific and immediate sustainability issues:

- Sustainability and Land Use, including the use of market and regulatory approaches to address such matters as urban sprawl, development in rural areas, and the use of resources in a sustainable manner.

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1. For the classic definition, see U.N. General Assembly, *Report of the World Commission on Environment and Development: Our Common Future* (Brundtland Report), available at www.un-documents.net/ocf-02.htm (“[s]ustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs”).

2. See e.g., Commission For Environmental Cooperation, *North American Agreement on Environmental Cooperation*, http://www.cec.org/Page.asp?PageID=1226&ContentID=&SiteNodeID=567&BL_ExpandID=&BL_ExpandID=&BL_ExpandID (last visited July 15, 2012); U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, (Aug. 12, 1992), <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>.

- Sustainability and Trans-Border Environmental Policy, Planning, and Regulation, including sustainable approaches to air pollution, regulation of onshore and offshore energy production, protection of transnational water bodies, such as the Great Lakes, Lake Champlain, and the Arctic Ocean, and other common environmental concerns.
- Sustainability and International Law, including issues concerning the International Joint Commission created by the Boundary Waters Treaty of 1909, and numerous other bi-national and international agreements that affect sustainability in the U.S. and Canada.
- Sustainability, Sovereignty, and Human Rights, including comparative constitutional analyses of sustainability-related rights, such as the right to scarce natural resources (*e.g.*, water) and the inherent rights of native peoples.

These issues are both broad and open-ended, and their enumeration was not intended to preclude consideration of other issues. The purpose of the conference was to encourage participation by a diversity of scholars and others with the widest possible range of interests that could be brought under the umbrella of sustainability.

This purpose is consistent with the goals of the longstanding relationship between VLS and the McGill Faculty of Law that the Sustainability Conference furthered. Following a successful series of conferences and exchanges begun in the 1990s and partially funded by Canadian Studies Program Enhancement and Conference grants awarded by the Government of Canada through the Canadian Embassy in Washington,³ the two faculties formally established the “Vermont-McGill Initiative on Cross-Border Sustainability” in August 2006. The Initiative was intended to establish a serious long-term relationship between the two institutions that would take advantage of Vermont’s leadership in environmental law and McGill’s leadership in international and comparative law and sustainable

3. For publications resulting from prior conferences, *see* Symposium, *Law and Civil Society*, 15 ARIZ. J. INT’L & COMP. L. 1-317 (1998); Symposium, *Quebec, Canada and First Nations: The Problem of Secession*, 23 VT. L. REV. 699-859 (1999); Symposium, *Mountain Resorts: Ecology and the Law*, 26 VT. L. REV. 509-751 (2002); Symposium, *Accommodating Differences: The Present and Future of the Law of Diversity*, 30 VT. L. REV. 431-937 (2006).

development.⁴ With further Canadian Studies Program Enhancement Grant support for VLS, the two faculties jointly planned and conducted a “Workshop on Water” at VLS in October 2009. Seven faculty members from each institution participated as presenters or discussants, and eight resulting papers were published in the *Vermont Law Review*.⁵

The Sustainability Conference, funded by a generous Canadian Conference Grant awarded to VLS in 2010, built on the success of the Workshop on Water and broadened its scope by including colleagues from other McGill faculties and other Canadian institutions. The broad rubric of sustainability was intended to encourage scholars—particularly junior scholars—to bring their own current research interests to bear on aspects of this critical topic. The interchange among colleagues from both sides of the border afforded by the conference creates opportunities for continuing long-term relationships among individuals that will bear fruit in future joint research and teaching projects, not only in law, but also in the related disciplines of planning and environmental studies, to the benefit of both VLS and McGill University.

The Conference, coordinated by Assistant Professor Hoi Kong of the McGill Faculty of Law and the present author, consisted of presentations by 14 faculty members and four students from VLS; the McGill Faculty of Law, School of Environment, and School of Urban Planning; the Schulich School of Law, Dalhousie University; and the University of Montréal Faculty of Law. The presentations were grouped in five sessions: Ecology and Policy, Domestic Law, Comparative Coastal Zone Management, Bi-National Management and Comparative Law, and International Law.⁶ Six of the presentations resulted in papers published here that address the concept of sustainability in various contexts; others have been accepted or are being considered for publication elsewhere.⁷

4. For documentation of the development of the Joint Initiative on Cross-border Sustainability, see <http://www.vermontlaw.edu/Documents/Land%20Use%20Institute/lui-mcgill-scharf-1-1--011109-k021010.pdf>, last visited 2/28/12.

5. See Joint McGill-Vermont Law School Workshop on Water, 34 VT. L. REV. 855-973 (2010), available at <http://www.vjel.org/docs/WRKSHOP20091024.html>.

6. See http://www.vermontlaw.edu/Documents/174033_Sustainability_Workshop-11June2011.pdf, last visited, 2/28/12.

7. See *infra* notes 9-14 and accompanying text; Jason J. Czarnecki, *The Future of Food Eco-Labeling? A Comparative Analysis* in FOOD, AGRICULTURE, POLICY, AND THE ENVIRONMENT (Environmental Law Institute Press, forthcoming 2012); Patrick A. Parenteau, *Species and Ecosystem Impacts in LAW OF ADAPTATION TO CLIMATE CHANGE: U.S. AND INTERNATIONAL ASPECTS* (American Bar Association, 2012).

Three papers consider the actual or potential impact of various régimes of coastal zone management and marine spatial planning on sustainability in a coastal environment. The joint paper of Aldo Chircop, Director of the Marine and Environmental Law Institute and Professor of Law, Schulich School of Law, Dalhousie University, and student researcher Ryan O'Leary is a comparative study of the interplay of integrated coastal and ocean management and integrated coastal zone management in Canada and the European Union.⁸ The authors note initially that, despite the greater institutional complexity of the E.U., both polities share many common attributes, including a commitment to sustainable development. The Canadian federal legislative framework, through a system of integrated coastal and ocean management, provides a regime of marine spatial planning with guidelines for the provinces to address coastal zone management issues. Although the E.U. has labeled its initiatives as integrated coastal zone management, its most recent initiatives have emphasized the development of general marine spatial planning guidelines. Structural and funding issues mean that both polities have a long way to go in bridging the gap between marine spatial planning and coastal zone management, but each can learn from the other's experience. Both can also learn from the U.S. Coastal Zone Management Act, under which general guidelines supported by the incentives of funding and the federal consistency requirement have led to locally appropriate coastal zone plans in virtually all coastal states.

Richard Brooks, Professor Emeritus at VLS, considers the relationship between ecosystem management and sustainability in the application of the federal Coastal Zone Management Act and Connecticut's Coastal Management Act, adopted pursuant to the federal act, to Long Island Sound.⁹ After describing his personal relationship to the Sound and its ecological and cultural attributes, Brooks characterizes the federal act as founded on ecosystem management principles but striking a balance with the needs of the human environment, while the Connecticut act initially, though deferring to the existing local land use régime, essentially embodied ecosystem management principles. Despite some successes, the net effect of the legislative and regulatory web that came to surround the federal and

8. Aldo Chircop and Ryan O'Leary, *Legal Frameworks for Integrated Coastal and Ocean Management in Canada and the European Union: Some Insights from Comparative Analysis*, 13 VT. J. ENVTL. L. 425 (2012).

9. Richard O. Brooks, *Making the "Mediterranean of the Western Hemisphere" a Sustainable Community: The Connecticut Coastal Management Act and The Long Island Sound*, 13 VT. J. ENVTL. L. 453 (2012).

state acts was to fracture their integrity by causing key coastal issues to be determined through other avenues. Most important, the basic scientific data, assessment, and monitoring that is a key component of ecosystem management was inadequate to sustain the original purpose of the legislation, given the difficulty of accounting for variables resulting from ever-changing human activity on and around the Sound. Brooks concludes that the future health of the Sound must be determined in sustainability terms that balance current and future human needs with those of the natural environment.

The present author's paper focuses on current environmental problems in Lake Champlain and suggests that the extension to the Lake of the federal Coastal Zone Management Act and the Coastal Marine Spatial Planning initiative, proposed by a recent federal executive order, could provide a new and effective mechanism for addressing those problems.¹⁰ The Lake and its basin fall within the jurisdiction of six entities—the United States, Canada, New York, Vermont, Québec, and the International Joint Commission. Though there is no formal environmental regulatory and planning structure in place for the Lake in either Canada or the U.S., agencies of all six régimes have engaged in cooperative management under the Lake Champlain Basin Program established under the Clean Water Act. Recent litigation, however, has shown the fragility of such arrangements. The paper, looking to analogous possibilities in the Great Lakes region, proposes that the Coastal Zone Management Act and the Coastal Marine Spatial Planning initiative be made applicable to Lake Champlain. The resulting framework, extended to involve the participation of Canada, Québec, and the International Joint Commission, could serve as a well-structured and enforceable mechanism that would oversee the development of a coordinated bi-national régime of sustainability for the human ecosystem of the Lake Champlain Basin.

Two papers address the role of indigenous peoples and practices in the development of sustainability principles in international law. Dr. Konstantia Koutouki of the University of Montréal Faculty of Law illustrates the increasing importance of international sustainable development law by describing the development and adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, in 2010, to put teeth into the Access and Benefits Sharing (ABS) provisions of the Convention on Biological

10. L. Kinvin Wroth, *Six Flags over Champlain Revisited: A Case for Coastal Zone Management or Coastal Marine Spatial Planning?*, 13 VT. J. ENVTL. L. 489 (2012).

Diversity (CBD) of 1992.¹¹ Koutouki focuses on the role of indigenous peoples in continuing to press for international protection of their biodiverse genetic resources, which are threatened by their increasing economic value and use in the health food and pharmaceutical industries. She details the provisions of the Protocol that address the weakness of the CBD and ABS, including the slow development and non-binding nature of detailed guidelines for implementation. In conclusion, Koutouki notes failures of the Protocol, such as the continued dominance of the interests of states, its failure to impose direct obligations on them, and the lack of recognition and protection of intellectual property in the traditional knowledge of the indigenous peoples. She calls for interpretation of the Protocol that will recognize protection of genetic resources and traditional knowledge as the essence of the idea of sustainability.

In a similar vein, Samantha Fow, a 2012 graduate of VLS, describes the development of the Arctic Council, an integrated governance mechanism for the Arctic environment in which the indigenous tribes of the region are active partners with the eight nations that claim sovereignty of portions of the Arctic.¹² She sketches the practices of an historic indigenous subsistence culture at one with the ecosystem, and describes the impact on that culture and the environment of economically driven European exploitation beginning in the 19th century. That development first despoiled the resources and degraded the environment and then, through activities both within and outside the region, brought significant air and water pollution and major effects of global warming upon the Arctic ice and the human and animal life dependent on it. Recognition of these impacts by the European nations, particularly Finland and Canada, led to the establishment of the Council in 1996 and the emergence of the Arctic Sustainability Principle from its continuing deliberations over environmental issues of common concern. Application of the Principle results in significant deference to indigenous practices in decisions concerning the development of the natural resources of the Arctic in an environmentally sustainable way.

In his paper, Professor Kong applies the concepts of instrument choice, as developed in administrative law, to the use of non-Euclidean land use regulation to achieve sustainability.¹³ His purpose is to serve the purpose of achieving sustainability in land-use decision-making by shifting the focus

11. Konstantia Koutoukis, *The Nagoya Protocol: Sustainable Access and Benefits-Sharing for Indigenous and Local Communities*, 13 VT. J. ENVTL. L. 513 (2012).

12. Samantha Joule Fow, *The Arctic Sustainability Principle*, 13 VT. J. ENVTL. L. 535 (2012).

13. Hoi Kong, *Sustainability and Land Use Regulation in Canada: An Instrument Choice Perspective*, 13 VT. J. ENVTL. L. 551 (2012).

of land use discourse from a property rights to an instrument analysis. Identifying recognition of a range of interests, flexibility in development of regulatory approaches, and the necessity of public participation as essential to legitimacy, Kong demonstrates their role in evolving ideas of non-Euclidean land use regulation aimed at halting sprawl and promoting sustainable development by adapting devices such as floating and overlay zones to implement the ideas of the New Urbanists and other smart-growth advocates. Offering Dockside Green in Victoria, B.C., as a case study, he argues that the use of instrument choice principles in producing a comprehensive development zone and master development agreement avoided the obstacles that an unrestricted contract zoning approach would present to sustainable development. In conclusion, he suggests that use of additional regulatory approaches would have addressed issues raised in Dockside Green concerning adequate attention to the public interest in providing affordable housing, treating individual landowners fairly, and addressing regional sustainability concerns.

It is the hope of the sponsors of the VLS-McGill Conference on Sustainability that publication of these papers will achieve the goal of the conference by providing insights and guidance to Canadian and U.S. policy-makers, planners, and regulators concerned with devising new and coordinated ways of addressing critical issues of trans-border sustainability. Policy and the practicalities of its implementation are central to the academic disciplines of law, planning, and environmental studies that this conference brought together. These papers suggest that partnerships forged by the conference can serve as a vital resource in policy development and implementation as the federal governments of Canada and the U.S. and the provincial and state governments that share our common border work together for a sustainable future.