

JOINT MCGILL–VERMONT LAW SCHOOL WORKSHOP ON WATER: INTRODUCTION

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Water is an overarching human need that raises a host of legal and policy issues in areas such as human rights, taxation, international regulation, health law, constitutional law, aboriginal rights, government organization, property rights, civil liability, security, business administration, land use, and border security. The papers presented in this Workshop address a number of such issues. The papers are the first concrete product of a joint initiative on cross-border sustainability established a number of years ago by the faculties of the McGill University Faculty of Law and Vermont Law School. The initiative is intended to build on the two institutions' long history of collaborative activity, including faculty visits, student exchanges, and joint conferences and publications.¹

The goal of the initiative is to establish a serious long-term relationship between McGill and Vermont Law School in areas of their respective strengths in environmental law, comparative law, and sustainable development. The investigation of issues in these areas across borders will allow the faculties to consider what it means to do justice to future generations when the task cannot be accomplished within the bounds of sovereign jurisdiction alone. From a practical standpoint, this investigation can lead to the development of proposed bi-national or other agreements and legislation that will address cross-border environmental and sustainability issues as they affect our shared region. To move toward that goal, members of the two faculties developed a joint program statement calling for a focused effort on the cross-cutting issue of water rights and management, a core thematic area that links a variety of cross-border environmental and sustainability issues. The focus on water is merited because of its critical importance among issues of common concern to both countries and the pressing and growing demands now being placed on both national governments and states/provinces around this issue.²

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1. See e.g., Symposium, *Accommodating Differences: The Present and Future of the Law of Diversity*, 30 VT. L. REV. 431–937 (2006); Symposium, *Mountain Resorts: Ecology and the Law*, 26 VT. L. REV. 509–751 (2002); Symposium, *Quebec, Canada and First Nations: The Problem of Secession*, 23 VT. L. REV. 699–859 (1999); Symposium, *Law and Civil Society*, 15 ARIZ. J. INT'L & COMP. L. 1–317 (1998).

2. For documentation of the development of the Joint Initiative on Cross-border Sustainability, see Vermont Law School, Land Use Institute, http://www.vermontlaw.edu/Academics/Environmental_Law_Center/Institutes_and_Initiatives/Land_Use_Institute/Events.htm (last

As a first concrete step, Professor Emeritus Jane Matthews Glenn of McGill and the present author issued a call summoning our colleagues to prepare and present brief papers in a joint “Workshop on Water” to be held at Vermont Law School on October 24, 2009. In response, faculty members of the two schools submitted and presented the eight papers published here, as well as three comments that were presented only orally, and one presented in absentia. The papers published here were delivered, with the unpublished comments, in a series of four panels, each chaired by a colleague from McGill or Vermont.³

In the two papers from the first panel, “Water: Private Law,” Professor Emeritus Madeleine Cantin Cumyn and Adjunct Professor Robert P. Godin, both of McGill, focus on evolving Quebec civil law principles of the use of water as *res communis* and of the limitations that the general interest imposes on the ability of the owner of land to prevent pollution or exhaustion of water to which that ownership confers a right of use.⁴ In papers from the second panel, “Water: Public Law,” Vermont Law School Professor Janet Milne addresses ways in which provisions of tax codes can affect the quality of a watershed, using the example of the varying effect of federal income tax and Vermont property tax incentives on agricultural nonpoint-source pollution in the Lake Champlain Basin.⁵ Associate Professor Kim Brooks of McGill offers a comment that considers budgetary criteria as a method of evaluating the effectiveness of incentives (“tax expenditures”) like those discussed by Professor Milne and compares the substance and administration of the U.S. tax deduction approach and the Canadian tax credit approach to donations of conservation easements and similar interests in ecologically important land.⁶ Shifting the focus to planning, Professor Glenn considers the sources and potential effect of the incipient rivalry between administrators of the traditional land use planning regime of Ontario’s 1946 Planning Act and of the drinking water source

visited Feb. 15, 2010).

3. For the Workshop call for papers and agenda and brief biographies of the participants, see Vermont Law School, Land Use Institute, http://vermontlaw.edu/Academics/Environmental_Law_Center/Institutes_and_Initiatives/Land_Use_Institute/Events.htm (last visited Feb. 15, 2010). The Workshop was made possible by a grant from the U.S. Embassy’s Canadian Studies Program and the generous support of the Deans of the McGill Faculty of Law and Vermont Law School.

4. Madeleine Cantin Cumyn, *Legal Regime Applicable to Fresh water in Quebec*, 34 VT. L. REV. ____ (2010); Robert P. Godin, *Short Essay on the Notion of General Interest in Article 982 of the Civil Code of Quebec or Je Puis Mais N’épuise*, 34 VT. L. REV. ____ (2010).

5. Janet E. Milne, *Watersheds: Runoff from the Tax Code*, 34 VT. L. REV. ____ (2010).

6. Kim Brooks, *A Comment on Watersheds: Runoff from the Tax Code*, 34 VT. L. REV. ____ (2010).

protection provisions of its 2006 Clean Water Act.⁷

In the single paper from Panel III, “Water and Human Rights,” McGill Assistant Professor Vrinda Narain outlines a rights-based approach to access to water, using the example of India’s experience with the development of a judicially declared right to water as a component of India’s Constitutional right to life and considers the inadequacy of current legislative and administrative enforcement of a right that should be considered a part of the public trust.⁸ The fourth panel, “Water: The Global Picture” consisted of two papers by Vermont Law School Faculty members focusing on the impact of climate change on water. Visiting Professor Jack Tuholske addresses the effects of climate disruption in drastically depleting native trout species of the rivers of the American West under the traditional water management regimes of prior appropriation and government subsidization of water use and suggests that a solution lies in a combination of federal funding for state water flow protection programs and federal water management on a watershed-wide basis.⁹ Professor Patrick Parenteau’s paper summarizes the drastic impact of climate change on the survival of essential water resources and proposes legal solutions such as expansion of the public trust doctrine, the capture and re-use of storm-water runoff, establishing and strengthening federal measures for the protection and restoration of floodplains and wetlands, and stringently regulating water withdrawals by thermoelectric power plants to reduce the impact on water flow and aquatic species.¹⁰

Thanks to the industry of the authors and the enthusiasm and support of the editors of the *Vermont Law Review* and the *Vermont Journal of Environmental Law*, we are pleased to be able to offer in the present format these brief papers, which take a significant first step in carrying out the goals of the McGill–Vermont Law School joint venture. For electronic versions of all of the Articles, please visit the *Vermont Journal of Environmental Law*’s website at: <http://www.vjel.org/index.php>.

7. Jane Matthews Glenn, *Sibling Rivalry: The example of the Planning Act and the Clean Water Act in Ontario*, 34 VT. L. REV. ____ (2010).

8. Vrinda Narain, *Water as a Fundamental Right: A Perspective from India*, 34 VT. L. REV. ____ (2010).

9. Jack R. Tuholske, *Hot Water, Dry Streams: A Tale of Two Trout*, 34 VT. L. REV. ____ (2010).

10. Patrick Parenteau, *Come Hell And High Water: Coping with the Unavoidable Consequences of Climate Disruption*, 34 VT. L. REV. ____ (2010).