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Canadian Environmental Law, Policies and Politics: A Primer

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CANADIAN ENVIRONMENTAL LAW, POLICIES AND POLITICS: A PRIMER

NAFTA AND GATT: THE IMPACT OF INTERNATIONAL TREATIES ON ENVIRONMENTAL LAW AND PRACTICE

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I. INTRODUCTION

The creation and implementation of Canadian environmental law and policy is inherently fused with Canadian politics. This is especially true for the grandest of all Canadian political issues, the relationship between the federal and provincial layers of government. Thus, it is hard to see a better title than that chosen by the organizers for a "primer" on the Canadian environmental law system.

The key to understanding the Canadian environmental law system is an understanding of the constitutional law relating to environmental management and regulation. It is this area that will be discussed first. Following the constitutional discussion, this essay will briefly review the existing structures and main features of federal and provincial environmental law in Canada. Then the essay will comment on the political issues and directions that are presently motivating changes in the Canadian environmental management system. Finally, changing directions in environmental management policy will be noted, bringing together the above themes.

For each of the legal issues reviewed, some critical statutes and cases are provided. These brief lists are, of course, only a starting point for any analysis of the legal questions that are touched on in the sections that precede them.

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II. Constitutional Law Framework

Under Canada's constitution, responsibility for environmental protection is shared between the federal and provincial governments. In 1992, the Supreme Court confirmed earlier jurisprudence that neither level of government has exclusive jurisdiction in this area. Rather, the *Friends of the Oldman River* case held that environmental protection must be seen as an inherent part of the powers that are already assigned to the federal and provincial governments. For example, the power to regulate railways carries with it the power to regulate the environmental effects of their operation; the power to regulate the fishery carries with it the power to protect fish habitat; and the power to regulate an industrial undertaking carries with it the power to control their environmental impacts. It is interesting to recognize that the Court went to some length to note that, within the Canadian constitutional system, this approach is essential for integrating environmental factors as a full part of decision-making, thereby promoting sustainable development.

Unlike the United States, where sweeping environmental jurisdiction has been established under the Commerce Clause of the United States Constitution, no such single broad source of jurisdiction exists in Canada. The closest analogy is Canada's "peace, order and good government power," which allows the federal Parliament to legislate for limited purposes outside the subjects specifically enumerated in the Constitution Act of 1867, Canada's main division of powers law. In 1988, the Supreme Court, in *R. v. Crown Zellerbach*, ruled for the first time that this power did indeed allow for environmental laws to be adopted by the federal legislature. It is still a matter of considerable debate, however, as to whether this power is a broad one for environmental purposes, or one that can only be used in limited and discrete circumstances. The federal government has not, to date, sought a wide interpretation of this power.

Two, more specific, comparisons to the United States' constitutional framework may be helpful. First, the exercise of provincial jurisdiction is independent of federal law. Unlike so much of United States' state environmental law, provincial law does not implement federal law. Each set of laws can, and does, go its own way. Generally speaking, only in the case of true conflict between the two, where compliance

with one will mean the breach of the other, will provincial law be found inapplicable by the courts.

Second, there is no treaty-implementing power in Canada. Under jurisprudence established in 1937, legislative implementation of the subject matter of a treaty falls to the level of government that would normally have jurisdiction over that subject matter. As a result, there is often a need for extensive federal/provincial coordination and consultation to establish national positions concerning negotiations with Canada. Where a treaty will not result in the need for new legislation, more flexibility for federal actions may be available.

This issue is particularly germane to this symposium. The North Atlantic Free Trade Agreement [hereinafter "NAFTA"] itself, for example, is subject to federal jurisdiction as part of the international trade and commerce power, and has been implemented through federal law. (This is subject to some limited exceptions.) The North American Agreement on Environmental Cooperation [hereinafter "NAAEC"], on the other hand, attracts no such federal jurisdiction, the environment being an area of shared power. The result was the inclusion in the NAAEC of a special provision and Annex for Canada, whereby the extension of the provincial laws of a certain jurisdiction will only be applicable once a province has formally indicated its willingness to undertake those obligations. Thus, only federal environmental laws are currently subject to the disciplines of the NAAEC throughout the country.

Canada's shared approach to environmental jurisdiction has led to a certain amount of overlap and duplication in Canadian environmental law. Generally speaking, the provinces have jurisdiction over most businesses operating in their territories. This gives them the authority to regulate all of the environmental impacts of those operations. The federal government, in these circumstances, can only regulate specific environmental issues flowing from federal jurisdiction, including the protection of fish and fish habitat, transboundary pollution, and transboundary movements of goods or wastes. In those limited circumstances where the enterprise is under federal jurisdiction, such as most railways and airlines, the situation is essentially reversed. Thus, it is not

uncommon for any given enterprise to be subject to both federal and provincial environmental laws.

This has generated a considerable amount of concern among Canadian businesses, both from the standpoint of understanding which laws to apply as well as determining which set of enforcement officers have jurisdiction. One particular area of overlap in the last few years has been environmental assessment. In fact, the two most recent Supreme Court cases dealing with environmental jurisdiction have both come from the application of federal environmental assessment law to mainly provincially controlled projects.

A number of mechanisms are still evolving to deal with some of the divisions and inconsistencies that result from the division of powers in Canada. Foremost among these is the federal/provincial Canadian Council of Ministers of the Environment [hereinafter "CCME"], which coordinates the promulgation and implementation of a variety of programs on air, water and waste related issues.

III. The Legislative Framework

A. *Some Common Issues*

The federal and provincial environmental law frameworks in Canada share some basic features. First, both tend to be fragmented in nature. Despite certain names like the Canadian Environmental Protection Act [hereinafter "CEPA"] or the Ontario Environmental Protection Act, no single statute at either level consolidates the full scope of environmental law. Rather, specific statutes deal either with specific media, such as water and air, or specific types of concerns, such as wastes or a toxic substance. This can often result in the application of a wide variety of statutes and regulations from the federal and provincial levels to the environmental impacts of business. This fragmentation is not just a result of constitutional issues, but also of the general end-of-pipe, reactive approaches to addressing environmental problems that have prevailed over the past few decades. A holistic approach to environmental management has never been implemented in Canada.

Second, and despite much discussion, environmental law in Canada continues to focus on traditional command and control formulas. This approach is under considerable chal-

lenge today, both for its weaknesses in delivering a cleaner environment and for its administrative and economic costs. Economic instruments and private sector standards are the leading alternative choices.

Third, there is a growing awareness of the so-called environmental bill of rights issues. One aspect of this is the inclusion of statements on rights to a healthy environment. Some provinces have already done so, though the legal nature of such declarations, in terms of creating justiciable fundamental rights, is still doubtful. The second aspect is the more developed procedural one, guaranteeing access to environmental information, decision-making and enforcement processes. "Stakeholder" consultation processes have become a common feature at the federal and provincial levels. Some federal statutes, like CEPA, contain provisions for public complaints and input into the regulation-making process, as well as for public initiation of investigations and enforcement action. Ontario has recently enacted an Environmental Bill of Rights, which consolidates these rights for all of Ontario's environmental law. Other provinces are expected to follow shortly.

On the enforcement side, investigators and prosecutors have increased the number of their investigations over the past few years. They have charged an increasing number of directors and officers of companies with environmental violations. This has resulted in the first jail sentences imposed on individuals for environmental mismanagement, including an eight month sentence for one company president in Ontario. Individual fines, as well as corporate fines, have also increased significantly in recent years. In 1993, a fine of $4 million was levied against a Québec company following several years of government efforts to bring it into compliance.

This increase in personal and corporate liability has led to an increased effort by lawyers in encouraging their clients to take proactive measures to ensure proper environmental performance. Lawyers are also employing personal "due diligence" defense to charges in the event of a violation. As a result, the business of environmental audits and management plans is now brisk, and some law firms have hired environmental engineers and other technically proficient persons for this purpose.

B. *Federal Legislative Framework*

Federal environmental protection legislation is highlighted by three main statutes: the CEPA, the Canadian Environmental Assessment Act, and the Fisheries Act. Conservation of birds and wildlife, and protected natural areas, is covered by a series of other statutes. However, it must be stressed that there are over fifty statutes, plus numerous related regulations, that govern discrete aspects of environmental conduct. Pipelines, for example, are specifically regulated, as are railways, shipping, off-shore activities, pulp mills, mining operations, Arctic waters pollution, and so on.

CEPA, the purported flagship statute at the federal level, actually has a fairly limited scope. CEPA's main areas of environmental regulation today include a limited number of toxic substances and maritime dumping. In other potential areas of regulatory authority under CEPA, such as transboundary pollution, the issues have been dealt with through both provincial laws and federal/provincial programs. A separate part of CEPA allows for non-binding guidelines and objectives to be established by the federal government. These guidelines and objectives are seen as providing a national framework within which further legislative or policy action can be taken by the different governments. CEPA is currently undergoing a five year review by the House of Commons which could lead to the introduction of significant amendments by early next summer.

One should also note in relation to CEPA that its main feature, the cradle to grave regulation of toxic substances, has been challenged on constitutional grounds by Hydro Québec, a provincially owned utility. The challenge arose after Hydro was charged under CEPA for the release of PCBs into the environment. At criminal trial and at the Superior Court level, this challenge was successful. The federal government has appealed these decisions to the Québec Court of Appeal and a decision is pending. If this part of CEPA is ultimately ruled unconstitutional, CEPA's overall value would be severely restricted.

The Canadian Environmental Assessment Act was passed by Parliament in 1992, but will only be proclaimed in January 1995. This delay was a result of intervening federal and provincial elections, notably in Québec, and the process of developing four regulations needed to make the Act opera-

tional. Once in force, new projects which receive federal monies, are on federal lands, are federal government projects, or involve permits under a list of permitting requirements, will undergo a federal assessment process. The history of environmental assessment law under the pre-existing Environmental Assessment and Review Process Guidelines Order shows that long delays can occur for government departments or companies seeking to avoid or minimize the required assessment. This is an area where careful guidance is required.

The Fisheries Act contains federal controls on water pollution "deleterious" to fish and on habitat depletion. This Act has been used, for example, to regulate pulp mill effluents and mining operations. Although modest in title and limited in the number of actual environmental protection provisions, this is a central piece of federal environmental protection legislation.

C. *Provincial Legislative Frameworks*

The provincial legislative frameworks are fairly similar to the federal framework. Those provinces with the highest industrial outputs, Ontario, Québec and British Columbia, have a similarly extensive range of laws and regulations. Other provinces may have fewer laws due to their smaller industrial base. All provinces now have environmental assessment laws, some of which include technology forcing requirements not unlike those found in the United States' Clean Air Act.

It is at the provincial level that the greatest amount and scope of activity in environmental law can presently be found in Canada. This includes the emergence of pollution prevention planning strategies and requirements as a future trend, as seen in the solid waste management regulation recently adopted in Ontario. Consolidation and streamlining of environmental laws is also an emerging theme. Because of the diversity and quantity of provincial laws, it is impossible to cite any in a meaningful way here. The general references at the end of this paper provide comprehensive sources for this purpose. The only statute noted here is the Ontario Environmental Bill of Rights because of its importance as a precedent setting statute in the field.

IV. The Political Context

The above discussion describes, albeit in general terms, the existing state of environmental law in Canada. A variety of political pressures have emerged over the past few years that are beginning to impact the future development of this law.

Through the 1970's and 1980's, the major relevant political trend in Canada, like elsewhere, was the growth of the environmental movement. The peak of general public awareness was probably reached with the publicity and effort surrounding the 1992 Rio Conference on Environment and Development. Since then, Canadian public opinion is, according to the polls, much less focused on environmental issues.

This easing public focus coincides with a large growth in concern over duplication and the regulatory burden on industry, which is, in many ways, a result of the pressures brought to bear on regulators during the two preceding decades. The regulatory burden issue also feeds directly into the primary international political issue in Canada today, the concern with free trade. As Canada relies on exports much more than most OECD countries to support its gross national product, competitiveness has now become, perhaps, the most significant issue within the public debate on free trade. Further, with the advent of NAFTA and the renewal of the General Agreement on Tariffs and Trade, the harmonization of international environmental standards is a theme gaining increasing strength.

The issue of free trade almost overtook all environmental considerations at the recent Summit of the Americas in Miami. According to some sources, Canadian endorsement of the environmental and labor components of future discussions with Chile and other nations on increasing the reach of hemispheric free trade required the direct intervention of the Canadian Prime Minister. The Prime Minister was able to override the powerful trade and industry ministries that had advocated avoiding these issues at the Summit.

The role of free trade as a component of the Canadian political agenda, however, should not be seen as diminished as a result of this intervention. The development of a broader set of trade disciplines that allow Canada greater protection against United States, European and Japanese extra-territorial legislation and trade unilateralism is the undisputed cen-

tral focus of Canadian foreign policy today. Within this context, environmental issues are often seen as the wolf in sheep's clothing, allowing a range of trade measures to be taken for dubious reasons and at potentially great cost to others.

The two primary domestic political issues in Canada at this moment originate outside the environmental agenda. These are the future development of federal/provincial relations and the control of the combined federal and provincial financial deficits in Canada. These two issues are now beginning to combine in a coherent way as they relate to environmental management and regulation. It should be noted that the emerging directions are not necessarily viewed as positive, from an environmental perspective, by many environmental groups.

The federal/provincial agenda today is, of course, overwhelmed by the referendum on the sovereignty of the province of Québec to be held this year. But environmental management has been a long-standing point of jurisdictional wrangling between the federal government and the provinces ever since the growth of federal environmental regulation in the 1970s. The current challenge to the federal jurisdiction of toxic substance regulation arose in Québec under the authority of a federalist government. Challenges to federal environmental assessment jurisdiction came first from other provincial governments and public corporations. It is fair to say that the provinces have never felt at ease with an expanded federal role in this area, an area they had previously considered to be almost exclusively their concern. This provincial reluctance was, until recently, counteracted by the public concern with environmental issues.

The primacy of environmentalism has largely been displaced today by the concern with deficit fighting, and the focus on the size and operations of government. For the federal government, this has meant looking for areas where the federal role can be assumed by the provinces. Environmental regulation, simply, is seen as one such area.

V. Future Policy Directions

The direction of policy development in the environmental area toward the year 2000 is now fairly clear. Flowing from

the main political concerns outlined above, the following elements are likely to be highlighted.

(1) A reduction of the federal regulatory role, especially in terms of new regulatory initiatives:

- This reduction is already foreshadowed by the regulatory initiative that the federal government is undertaking. Several environmental regulations are being reviewed for repeal.
- This process will have to be balanced within the NAAEC not to reduce current levels of environmental protection in Canada.

(2) Harmonization of federal/provincial and provincial/provincial laws and regulations:

- This harmonization provides one element in the response to the NAAEC requirements. The use of federal guidelines and non-legislative instruments may also increase, in the context of setting national standards which will be implemented through a coordinated program by the provincial and federal governments. This type of coordinated approach is now used to regulate the transportation of dangerous goods in Canada.
- Harmonization is also a key feature today of Canadian environmental assessment law. Notwithstanding that each of the federal and provincial processes are presumed to operate solely within their fields of jurisdiction, the authority to enter into joint processes is now commonplace in the environmental assessment process.
- In addition, a comprehensive harmonization framework is now being negotiated between the federal and provincial governments. This will lay out with some specificity their future roles in the environmental area.

(3) A one-window approach to enforcement, whereby provincial enforcement officers will undertake greater responsibility, increasing the enforcement of federal laws:

- CEPA already provides expressly for administrative agreements between the two levels of government for this purpose. This has been acted on three times now, with many more instances to come.
- Enforcement is a key issue in the federal/provincial harmonization negotiations.
- This direction is supported by a draft plan for the role of Environment Canada in the year 2000. This draft plan focuses on science and general policy setting. Regulation

and enforcement are clearly downplayed in favor of greater provincial roles.

(4) An increased role for the provinces in the negotiation and implementation of international agreements and the setting of the international environmental priorities for Canada:

- Canada's provinces are already accustomed to extensive federal/provincial consultation processes for international environmental negotiations and for implementing the resulting obligations.
- The draft agreement for provincial participation in the implementation of the NAAEC will take this level of cooperation to new heights from a provincial perspective, providing equal input for each participating government in most implementation decisions.
- With the provinces being closer to many of the individual industrial and resource development issues, the ability to defend the perceived economic interests can be expected to increase.
- Pursuing the harmonization of standards internationally will be a key concern. The NAAEC's, and NAFTA and World Trade Organization ("WTO") standards committees' work on upward harmonization will be central to this. Harmonization of standards will likely be seen as the best defense to United States and European unilateralism in Canada.

(5) The use of non-legislative tools and private sector standards is an emerging feature. These tools are seen as less complicated to develop, not least in that they avoid federal/provincial political negotiations. International private sector standards also provide a basis to regulate with greater certainty of avoiding trade law challenges.

(6) The final point here is the growth in profile of integrated and holistic pollution prevention as the future paradigm for environmental regulation, a key subject in the Parliamentary of CEPA. This approach highlights the broader provincial jurisdiction, in contrast to the more limited federal jurisdiction available to implement this approach. It will also highlight the role of national and international private sector standards on environmental management, which increasingly focuses on comprehensive environmental management, planning and performance criteria, rather than end-of-pipe compliance.

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