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Canadian Environmental Law – Some Recent Developments

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During the 1970s and 1980s Canada was known globally for its environmental law reforms and general progressiveness on environmental matters. Yet, in recent decades its commitment has waned and Canada's overall performance on many sustainability indicators has declined precipitously. According to a comparative survey conducted by the University of Victoria in 2001, Canada ranked twenty-eighth out of 29 developed countries on its record measured by 25 environmental indicators, outdone only by the United States.[1] Canada also fared poorly in another survey in 2005, being ranked twenty-seventh out of 30 OECD countries for overall environmental performance.[2] A variety of factors, including Canada's heavy economic dependence on extractive industries and the influence of neo-liberal philosophy in Canadian public policy, hindered efforts to curb pollution and tackle other environmental problems.[3]

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[1] D. Boyd, *Canada vs the OECD: An Environmental Comparison* (University of Victoria, 2001) (available at http://www.environmentalindicators.com). See also Organisation for Economic Cooperation & Development, *OECD Environmental Performance Reviews – Canada* (OECD, 1995).

[2] Sustainable Planning Research Group, Simon Fraser University, *The Maple Leaf in the OECD* (David Suzuki Foundation, 2005).

[3] See further D. VanNijnatten and R. Boardman, *Canadian Environmental Policy and Politics: Prospects for Leadership and Innovation,* 3rd ed. (Oxford University Press, 2009); D. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (UBC Press, 2003).

Within the last few years, however, some changing economic and political conditions have contributed to a tentative revival in environmental law reform in Canada. At both federal and provincial levels, Canadian governments have initiated measures, especially in the areas of green energy and pollution control. Canadian courts have also been active in enforcing older environmental laws.

In relation to climate policy, however, Canada's dedication is still rather patchy. The current federal administration under Prime Minister Stephen Harper has not shown much national leadership in this area. In 2008 the government published *Turning the Corner*, a plan for a future regulatory framework to control greenhouse gas (GHG) emissions and taking other measures to mitigate climate change.[4] The plan, which aims to reduce GHGs by 20 percent from 2006 levels by 2020, includes requiring GHG polluting "oil sands" projects to capture and store carbon, and a ban on new "dirty" coal plants by 2012. The plan thus openly abandons Canada's obligation under the Kyoto Protocol to reduce its GHG emissions to 6 percent below 1990 levels by 2012.

On the other hand, several provincial governments have committed themselves to more comprehensive and stringent actions in the area of climate policy. In 2008 the Manitoban government enacted the *Climate Change and Emissions Reductions Act*, which aims to reduce the province's share of GHGs in accordance with Canada's Kyoto obligations. The governments of Quebec and British Columbia introduced carbon taxes in 2007 and 2008 respectively.[5] Quebec's levy is modest, amounting to just under one cent for a litre of petrol, with funds earmarked for energy-saving initiatives such as improvements to public transport. British Columbia's tax is more comprehensive, initially set at C$10 per tonne and covering virtually all fossil fuels. Another type of reform is Ontario's *Green Energy Act* of 2009, which introduces a variety of tools to subsidise and encourage the use of green energy and more efficient energy consumption. Its core components include: the requirement that energy providers privilege green energy sources for purchase; advanced renewable energy tariffs (based on German and French models); priority access to the electricity grid for renewable energy projects; a green energy finance program; new user pricing

[4] Government of Canada, *Turning the Corner: Regulatory Framework for Industrial Greenhouse Gas Emissions* (Ministry of Supply and Services, March 2008).
[5] 'Carbon Taxes: Cash Grab or Climate Saviour?' *CBC News* (June 18, 2008).

that reflects the true cost of energy; and streamlined regulatory approvals to enable renewable energy projects to be implemented more quickly.

Ontario, Quebec, British Columbia and Manitoba have also joined a regional agreement involving several states from the United States, known as the Western Climate Initiative (WCI), to cooperate in cutting GHGs.[6] Formed in February 2007, the WCI requires partners to set an overall regional goal to reduce GHG emissions and to develop a cross-border cap-and-trade scheme to allow participants to meet this goal. The WCI's current goal is to reduce GHG emissions by 15 percent from 2005 levels by 2020.

A number of Canadian governments are also institutionalising the concept of "sustainable development" more firmly as the guiding framework for environmental regulation and policy-making. Canada's new *Federal Sustainable Development Act* of 2008 is one example. It requires the federal government to create and implement a government-wide sustainability strategy, including scientifically-measurable sustainability targets, and to regularly evaluate and report on the environmental consequences of its actions. The Act also establishes the Committee on Sustainable Development, the Sustainable Development Office, and the Sustainable Development Advisory Council to achieve this mandate. This legislation complements several similar laws adopted at a provincial level. One example is Nova Scotia's *Environmental Goals and Sustainable Prosperity Act*, of 2007.[7] It enumerates 21 long-term environmental objectives for the province, ranging from reduced air emissions to greater reliance on renewable energy, and states that the long-term environmental and economic objective of Nova Scotia is to "fully integrate environmental sustainability and economic prosperity."[8] The language of sustainability also appears in many strategic policies and plans in Canada; examples include Quebec's *Government Sustainable Development Strategy 2008-2013*,[9] to give effect to the province's ambitious *Sustainable Development Act* of 2006, and

[6] See http://www.westernclimateinitiative.org.
[7] See J. Brazner, 'Legislating Sustainability: - Nova Scotia's New Law Marries Environmental Sustainability and Economic Prosperity' (2008) 34(4) *Alternatives* 16.
[8] Section 4(1).
[9] Government of Quebec, *Government Sustainable Development Strategy 2008-2013* (Government of Quebec, 2007).

British Columbia's *Water Sustainability Action Plan* of 2004.[10]

Although pollution control is one of the oldest domains of environmental law, with regulation of air and water pollution in Canada dating from at least the 1950s, in recent years a new frontier of controls has emerged to curb the sinister but often less visible pollutants such as toxic contaminants. Ontario's *Toxics Reduction Act* of 2009 is described by the government as the "cornerstone" of Ontario's *Toxics Reductions Strategy*, aiming to reduce various toxic substances in air, land, water, and consumer products.[11] The legislation requires industrial facilities to account for all toxic substances they use or produce, to create plans managing and mitigating the production/use of such substances, and to disclose publicly this information. Another Canadian example of this new regulatory focus is Ontario's *Cosmetic Pesticides Ban Act* of 2008; it prohibits the use of pesticides for cosmetic purposes on residential lawns, gardens, patios, driveways, in cemeteries, parks and schoolyards. The Act provides no exceptions for use of such pesticides except to manage pest infestations.

Canadian courts have also dealt with some major environmental disputes in recent years. In the case of *MiningWatch Canada v. Canada (Fisheries and Oceans)* determined in January 2010,[12] the Supreme Court of Canada held that the federal government violated the *Canadian Environmental Assessment Act* of 1992 by dividing the development project in question into several separate assessments in such a way as to avoid the full scope of the assessment mandated by the legislation. The proposed open-pit gold and copper mine in British Columbia poses serious environmental consequences, which the federal government's approach to environmental screening sought to down-play. The case was brought by MiningWatch Canada (an environmental non-governmental organisation), which sought judicial review of the federal government's actions. While in this case the Supreme Court is allowing the Red Chris mine project to continue without re-doing significant parts of the assessment, it is likely the Court's decision will require similar projects to come under greater environmental scrutiny in the future.

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[10] British Columbia Water and Waste Association (BCWWA), *Water Sustainability Action Plan* (BCWWA, 2004).

[11] See Ontario Ministry of the Environment (available at http://www.ene.gov.on.ca/en/toxics/index.php).

[12] 2010 S.C.C. 2.

Another seminal recent case in Canada is *Friends of the Earth v. Canada (Governor in Council)*.[13] The Federal Court dismissed a judicial review application brought by Friends of the Earth Canada seeking to enforce the *Kyoto Protocol Implementation Act* of 2007. This unusual statute was passed by a coalition of opposition political parties against the will of the minority Harper government. Its requirements include that the government publish, within 60 days, a plan to comply with the country's Kyoto commitments including promulgation of necessary GHG reduction regulations. The Harper government had shunned aspects of the legislation, as it is largely at odds with its view that Canada cannot comply with the Kyoto Protocol and must instead pursue less stringent GHG emission control targets that are less economically burdensome.[14] The Federal Court held that it could not deal with the issue of whether the federal Minister of the Environment had failed to comply with the duties imposed on him under the *Kyoto Protocol Implementation Act*, because the issues under the legislation were considered not justiciable. On subsequent appeal in 2009 the case was again dismissed for largely the same reason.[15]

While Canada is again demonstrating some initiative in tacking pressing environmental problems, in general the inspiration for reform is coming from pioneering precedents set in other jurisdictions especially in the European Community. Also, what improvements that have been seen in environmental conditions in Canada often can 'almost be entirely attributed to the residual effects of more ambitious initiatives undertaken during the last major wave of public concern for the environment, now nearly 20 years ago, rather than the impact of any recent initiatives.'[16]

[13] 2008 F.C. 1183.
[14] L. Cass, 'A Climate of Obstinacy: Symbolic Politics in Australian and Canadian Policy' (2008) 21(4) *Cambridge Review of International Affairs* 465.

[15] *Friends of the Earth v Minister of the Environment*, Federal Court of Appeal, October 15 2009, A-572-08. Although the Government of Canada has published plans in fulfillment of the *Kyoto Protocol Implementation Act,* the plans are not regarded by environmental groups as rigorous and lack the necessary regulations to enforce action: see, e.g., http://www.ec.gc.ca/doc/ed-es/KPIA2009/tdm-toc_eng.htm.
[16] M. Winfield, '***An Unimaginative People: Instrument Choice in Canadian Environmental Law and Policy' (2008) 71*** **Annual Saskatchewan Law Review** ***79 at*** 82.