



## Canadian Environmental Law – Some Recent Developments

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### Introduction

Owing to Canada's federal system of government, Canadian environmental law comprises a complex array of often overlapping federal and provincial rules and policies. Both tiers of government, pursuant to the *Constitution Act* of 1867, share responsibility for environmental issues, although the 'environment' itself is not explicitly identified as a head of power.<sup>1</sup> This system can also lead to variable approaches, where some governments demonstrate considerable reform and commitment to robust environmental laws, while others lag.<sup>2</sup> Presently, the federal government controlled by the Conservative Party has tended to be indifferent or even hostile to environmental regulation, especially in relation to climate change. Conversely, some of the provinces such as Ontario have shown increasing zeal for environmental law reform.

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<sup>1</sup> See further: N. Hawke, 'Canadian Federalism and Environmental Protection' (2002) 14(2) *Journal of Environmental Law* 185.

<sup>2</sup> For an overview of the development of Canadian environmental law, see: S. Wood, G. Tanner and B. Richardson, 'What Ever Happened to Canadian Environmental Law' (2010) 37(4) *Ecology Law Quarterly*, 101.

## Federal Sustainable Development Strategy

At a national level, Environment Canada (the principal federal environmental authority) recently released a federal sustainable development strategy titled *Planning for a Sustainable Future*,<sup>3</sup> pursuant to the *Federal Sustainable Development Act* (2008).<sup>4</sup> The strategy focuses on promoting an 'an integrated, whole-of-government picture of actions and results to achieve environmental sustainability'; linking 'sustainable development planning and reporting and the Government's core expenditure planning and reporting system'; and improving 'measurement, monitoring and reporting in order to track and report on progress' on sustainability.<sup>5</sup> Much of the strategy touches on climate change, and after reiterating the federal target to reduce Canada's greenhouse gas (GHG) emissions by 17 per cent below 2005 levels by 2020, the strategy lists various implementation strategies. In particular, it highlights: research and development initiatives, especially with regard to reducing emissions from land use and transportation; Canada's continued support for a clean energy dialogue and regulatory coordination with the United States; and ongoing involvement in the Asia-Pacific Partnership on Clean Development and Climate, which does not impose binding emission limits on its members.

The federal government, however, has resisted some efforts to accept legally accountable targets to reduce Canada's GHG emissions more stringently. In November 2010 the federal Senate, controlled by the Conservative Party, rejected the *Climate Change Accountability Act* proposed by the Opposition parties in the House of Commons.<sup>6</sup> The ambitious legislation had mandated a reduction of GHGs in Canada by 25 per cent from 1990 levels. Environment Canada's new sustainability strategy is not a satisfactory alternative, because it adopts a much less onerous target and does not include any specific measures that would put a nationwide price on GHG emissions.

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<sup>3</sup> Environment Canada, *Planning for a Sustainable Future: A Federal Sustainable Development Strategy for Canada* (2010) Environment Canada.

<sup>4</sup> *Ibid.*, at vii.

<sup>5</sup> S.C. 2008, c. 33. This legislation was sponsored by the Opposition parties, not the Conservative Party Government.

<sup>6</sup> See further: 'Canada Senate Kills Climate Bill Ahead of UN Summit', BBC News online (18 November 2010), available at <http://www.bbc.co.uk/news/world-us-canada-11781175>.

## Climate Change Regulation

One discrete area of climate policy where the federal government has been willing to regulate is with regard to coal-fired power plants. In June 2010, Environment Minister Jim Prentice announced forthcoming regulations that would require, by 2015, all new coal-fired generation units, and all coal-fired units that have reached the end of their economic life, to achieve more stringent environmental performance standards.<sup>7</sup> Notably, a large portion of these reductions would result from Ontario's existing regulations requiring the closure of the province's four coal-fired generators by the end of 2014. In 2010, Environment Canada also published the new *Renewable Fuels Regulations*, which will come into effect on December 15 2010. These regulations mandate that all producers and importers of gasoline in Canada ensure that they maintain a renewable fuel content of at least 5 per cent on the average annual volume. To improve the flexibility of the scheme, the regulations allow for the use of 'compliance units', which can be traded where surpluses or shortcomings occur annually.<sup>8</sup> Environment Canada also recently issued new emission regulations for light-duty vehicles, in an effort to reduce GHGs. The regulations establish average emission standards for any new such vehicles that companies would manufacture in or import to Canada in 2011.<sup>9</sup>

At a provincial level, a variety of measures have been adopted or proposed to address global warming. One recent example is that of the Quebec and Ontario governments agreeing to implement a GHG cap-and-trade system.<sup>10</sup> British Columbia's Ministry of the Environment also has plans to participate in such a

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<sup>7</sup> Environment Canada, 'Government of Canada to Regulate Emissions from Electricity Sector,' News Release (23 June 2010), available at <http://www.ec.gc.ca/default.asp?lang=En&n=714D9AAE-1&news=E5B59675-BE60-4759-8FC3-D3513EAA841C>.

<sup>8</sup> Environment Canada, 'Government of Canada Releases Final Regulations for Renewable Fuel Content in Gasoline', News release (1 September 2010), available at <http://www.ec.gc.ca/default.asp?lang=En&n=714D9AAE-1&news=2D84D5D6-F152-4F5F-A4B9-BE973BE6821B>.

<sup>9</sup> *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations*, enacted pursuant to the *Canada Environmental Protection Act* (1999), available at <http://www.gazette.gc.ca/rp-pr/p1/2010/2010-04-17/html/reg1-eng.html>.

<sup>10</sup> Government of Ontario, 'Cooperation Between Ontario and Québec is Yielding Tangible Results', News Release (16 June 2010), available at <http://news.ontario.ca/opo/en/2010/06/cooperation-between-ontario-and-quebec-is-yielding-tangible-results.html>.

scheme, pursuant to the province's *Greenhouse Gas Reduction (Cap and Trade) Act* (2008).<sup>11</sup> Together, these provinces are working with United States members of the Western Climate Initiative<sup>12</sup> to implement a regional cap-and-trade system by 2012. Also, Ontario has proposed amendments to its *Greenhouse Gas Emissions Reporting Regulation*<sup>13</sup> to streamline its reporting requirements, bringing them into line with those used by the Western Climate Initiative. British Columbia's *Clean Energy Act*<sup>14</sup> came into effect in July 2010. This ambitious legislation enumerates numerous objectives, such as: developing renewable energy sources in the province; achieving self-sufficiency; increasing the export of energy; conservation; and improving the participation of Aboriginal peoples in energy developments.

Some provincial initiatives to address climate change have faced opposition. One instance is Ontario's new *Green Energy Act* (2009), which has triggered community concern about the projected increase in wind farms and other renewable energy projects in the vicinity of scenic landscapes or residential areas. In *Hanna v Ontario*, a case currently being heard, the applicant sought judicial review of sections of the *Green Energy Act* relating to the required set-back distances of wind turbines from residences. The litigation aims to obtain a moratorium on government approval of all wind energy projects in Ontario where turbines would be sited close to residences, until proper epidemiological studies of safe set-back distances are completed.<sup>15</sup>

### **Steps to Minimize Environmental 'Red-tape'**

In the context of an economic recession which has intensified pressure to limit compliance costs with environmental regulation, most governments in Canada have continued to explore reforms to stream-line and minimize so-called environmental

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<sup>11</sup> S. Anderson, 'Towards an Emissions Trading System: B.C. Releases Consultation Papers for Cap and Trade Regulations', *Blakes Bulletin* (27 October 2010).

<sup>12</sup> Western Climate Initiative: <http://www.westernclimateinitiative.org/resources/cap-and-trade>.

<sup>13</sup> Ontario Reg. 492/09; Government of Ontario, 'Amendments to Greenhouse Gas Emissions Reporting Regulation', (10 September 2010), available at <http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTEwMDQ2&statusId=MTY1MTgy&language=en>.

<sup>14</sup> S.B.C. 2010, c. 22.

<sup>15</sup> Wind Concerns Ontario, 'Ian Hanna v Ontario – Legal Action Update' (12 May 2010), available at <http://windconcernsontario.wordpress.com/2010/05/12/ian-hanna-v-ontario-legal-action-update>.

'red-tape'. One recent example is Ontario's new environmental approvals system. In 2010, the *Open for Business Act* was passed, which amended some 50 pieces of provincial legislation administered by different ministries, the most significant of which are the *Environmental Protection Act* and the *Ontario Water Resources Act*. The *Open for Business Act* replaces much of the existing certificate of approvals system with a more streamlined risk-based, approvals model. The previous system required air, land and water pollution permits to go through the same approvals process regardless of the complexity or environmental risk of the proposed activity. The new legislation streamlines the system into one of two avenues, depending on the type of activity for which approval is sought: (i) a 'Registry System' for low-risk activities and; (ii) a new 'Environmental Compliance Approval' system for higher-risk activities. Several environmental law and advocacy groups in the province voiced their opposition to the *Open for Business Act*, as it diminishes public rights under the *Environmental Bill of Rights*. Significantly, the legislation removes the requirement for public notice and opportunity for public comment for some industrial activities. Citizens also forego their right to seek leave to appeal the approval of these activities to the Environmental Review Tribunal.<sup>16</sup>

### **Environmental Impact Assessment**

Environmental impact assessment is another key part of the regulatory system in Canada that has often proved controversial - to developers for the costs and delays it can add to projects; and to environmentalists for the occasional perceived leniency of the process. Both the federal and provincial governments have environmental assessment procedures for major developments. While the vast majority of projects are ultimately approved, albeit with conditions to mitigate foreseen environmental impacts, occasionally the likely impacts are so significant that projects are prohibited. One such example in 2010 was the federal government's rejection of the proposed Prosperity Mine, an open pit gold-copper operation. The mine, which would have been developed in the British Columbia interior, was vetoed because 'of concerns

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<sup>16</sup> Canadian Institute for Environmental Law and Policy, Canadian Environmental Law Association, and Ecojustice Canada, 'Environmental Groups Challenge Ontario Government's *Open for Business Act*', Media Release (18 May 2010), available at [http://www.cielap.org/pdf/May18OntENGO\\_ChallengeAct.pdf](http://www.cielap.org/pdf/May18OntENGO_ChallengeAct.pdf).

about the significant adverse environmental effects',<sup>17</sup> including the conversion of the Fish Lake, home to thousands of rainbow trout, to a toxic tailings pond, as well as adverse impacts on Aboriginal rights, and boat navigation.<sup>18</sup> But more commonly the federal government has sought to limit the scope and impact of the environmental assessment process. The Auditor General of Canada, in its 2010 report to the House of Commons, found that 93 per cent of the project proposals reviewed under the Government's Infrastructure Stimulus Fund (a response to the recent economic recession) were exempted from the environmental assessment process.<sup>19</sup>

### **Albertan Oil Sands**

The Albertan oil sands are the site of some of the most environmentally controversial developments in Canada presently, especially with regard to their implications for climate change. In September 2010 Environment Canada established an Oilsands Advisory Panel to provide recommendations with regard to the scientific research and monitoring of the environmental effects of oil sands projects.<sup>20</sup> Some specific developments have engendered litigation regarding their environmental effects. In the recent case of *R. v. Syncrude Canada Ltd*,<sup>21</sup> Syncrude Canada was successfully prosecuted for failing to maintain its hazardous tailing ponds to ensure it would not come into contact with any animals, in violation of section 155 of the *Alberta Environmental Protection and Enhancement Act*. The court also found the company guilty of depositing a substance harmful to migratory birds in an area frequented by them, contrary to section 5.1(1) of the *Canada Migratory Birds Convention Act*. About 1600 birds died as result of contact with the tailings pond, which could have been avoided had Syncrude taken reasonable steps to ensure the effective operation of a

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<sup>17</sup> Environment Canada, 'Government of Canada Announces Decisions on Mount Milligan and Prosperity Gold-Copper Mines,' News Release (2 November 2010), available at <http://www.ec.gc.ca/default.asp?lang=En&n=714D9AAE-1&news=59F03FA9-63AD-4EED-A14F-04BBF32906CF>.

<sup>18</sup> Ecojustice Canada, 'Ecojustice Commends Federal Government for Rejecting Prosperity Mine' (2010), available at <http://www.ecojustice.ca/media-centre/press-releases/ecojustice-commends-federal-government-for-rejecting-prosperity-mine>.

<sup>19</sup> L. Whittington, 'Stimulus Projects Approved without Environment Study: Auditor,' *Toronto Star* (26 October 2010).

<sup>20</sup> Environment Canada, 'Environment Minister Appoints Oilsands Advisory Panel,' News Release (30 September 2010), available at <http://www.ec.gc.ca/default.asp?lang=En&n=714D9AAE-1&news=981D86D0-D3DB-4D71-8957-8EF52F85A05E>.

<sup>21</sup> [2010] A.J. No. 730.

bird deterrent system. The company was fined C\$3 million - a relatively high penalty.<sup>22</sup>

## Toxic Chemicals

Exposure to toxic chemicals has generated considerable public concern in Canada in recent years,<sup>23</sup> and several governments and courts have enacted measures in response. In the case of *Smith v. Inco Ltd*,<sup>24</sup> a group of residents in Ontario was awarded C\$36 million for the contamination of their lands with airborne metals (nickel). The case is significant as it is 'one of the first class actions in Canada to go through a full common-issues trial' and is a rare example of the certification of an environmental class action in any province other than Québec.<sup>25</sup> Among legislative responses, effective 1 January 2010, Ontario's new *Toxics Reduction Act* and accompanying regulations came into force. The legislation applies to facilities at which certain manufacturing activities or mineral processing activities take place involving toxic substances that are specified in a schedule to the Federal National Pollutant Release Inventory and which meet applicable thresholds. The legislation relies on three main methods of control: (i) to undertake toxic substance accounting; (ii) prepare a toxic substance reduction plan for each reportable substance; and (iii) report results to the government and the public. The federal government has also regulated the controversial bisphenol A, a chemical often used in plastics. On 16 October 2010 the chemical was officially declared a 'toxic substance' by Environment Canada, and was added to the Toxic Substances List pursuant to the *Canadian Environmental Protection Act*.<sup>26</sup> But there have also been some regressive steps, owing to public opposition to any increased costs associated with toxic chemicals controls. Notably, on 1 July 2010, the Ontario government discontinued a retail fee it imposed in 2008 on potentially hazardous items such as fire extinguishers, paint and

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<sup>22</sup> 'Syncrude to Pay \$3M Penalty for Duck Deaths', *CBC News* (22 October 2010), available at <http://www.cbc.ca/canada/edmonton/story/2010/10/22/edmonton-syncrude-dead-ducks-sentencing.html>.

<sup>23</sup> See, for example, the Canadian bestseller, R. Smith and B. Laurie, *Slow Death by Rubber Duck: The Secret Danger of Everyday Things* (2009) Knopf Canada.

<sup>24</sup> [2010] O.J. No. 2864.

<sup>25</sup> J. Melnitzer, 'Court Awards \$36 Million in Inco Class Action', *Financial Post* (6 July 2010).

<sup>26</sup> R. Fishlock, 'The Making of a Toxic Substance in Canada – The Sad Story of Bisphenol A,' *Blakes Bulletin* (25 October 2010), available at [http://www.blakes.com/english/view\\_bulletin.asp?ID=4301](http://www.blakes.com/english/view_bulletin.asp?ID=4301).

household cleaners. The fee was regarded by many as too complex and cumbersome.<sup>27</sup>

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<sup>27</sup> 'Ontario to Drop Eco Fee', *CBC News* (19 July 2010), available at <http://www.cbc.ca/canada/toronto/story/2010/07/19/eco-fee-ontario.html>).