

ENVIRONMENTAL POLICY-MAKING IN CANADA

A. Brief History of Policy Area Development

It was not until the late 1960s, that environmental quality concerns became major social and political issues attracting national attention in Canada. Pollution horror stories such as the environmental impacts of the highly persistent pesticide DDT, mercury contamination in the St. Clair River and other Canadian waterways, and phosphates in laundry detergents polluting our lakes, made the front pages of the newspapers daily. Demonstrations were held to ban the use of DDT, stop the demolition of historic buildings, protect green space and to generally call for a halt to polluting activities¹. Public pressure on governments to clean up pollution increased dramatically and led ultimately to all levels of government undertaking legislative and regulatory actions to deal with this public concern.

At the federal level, between the fall of 1968 and the summer of 1972, in a flurry of legislative activity, nine pieces of legislation dealing with the environment were enacted, which were designed to clean up pollution of specific media -- i.e. land, air, and water. For example, the Clean Air Act² was passed to provide a legal framework for dealing with transboundary pollution problems as well as to put in place minimum national

standards for a number of contaminants. Regulations under the Motor Vehicle Safety Act³ prescribed federal limits for certain types of motor vehicle air pollutants while new amendments to the Canada Shipping Act⁴ dealt with pollution from vessels.

According to one author, this approach was Phase I of the legislation and institutional arrangements dealing with the environment⁵. It had its origins in the 1950s with the enactment of provincial legislation to deal with concerns about water pollution caused by industrial and sewage discharges and was greatly accelerated in the late 1960s and early 1970s with the passage of the new legislation mentioned above.

In Phase II, a more comprehensive approach was adopted⁶. Staff from existing government departments and agencies were integrated into a new Department of the Environment at the federal level in 1971, and into new Ministries or Departments of the Environment at the provincial level. At the federal level, the Department of the Environment was created by law in 1971 with its main role being one of coordination⁶. The Act set out the duties and powers of the new federal Minister of the Environment including the ability to undertake programs designed to promote the establishment of objectives or standards relating to environmental quality or control of pollution⁸. The Act was amended in 1979 to expand and clarify the powers of the Minister. For example, specific authority was given to the Minister to ensure that new federal projects are assessed early in the

planning process for potential adverse affects on the environment⁹.

However, due to constitutional constraints discussed below, the Department moved cautiously in trying to grapple with the emerging environmental issues of the 1970s.

Phase II has been described as involving the consolidation of existing legislation into broader statutes designed to bring a degree of uniformity to the treatment of pollution, regardless of the medium in which the pollution was found. Environmental Protection or Clean Air Acts were passed in most provinces. Yet many of these laws, which are still on the books today, were little more than a repackaging of old acts into one statute, and were in fact far from comprehensive¹⁰

Phase III consisted of the passage of laws requiring the assessment of the environmental impact of public and private projects which might have a significant negative impact on the environment. An attempt was made to move from a reactive approach to a positive role of preventing environmental pollution from occurring. In the provinces, there was a move to enact environmental assessment legislation and federally a non-statutory environmental assessment and review process was put in place¹¹.

While these three phases have not been mutually exclusive, they have unfortunately not given the protection to the environment or the remedies originally contemplated. In fact, in many cases, the polluter has been provided with statutory defences to polluting activities which were not previously available to him.

As well, environmental pollution continues to be a major issue on the public agenda. Public opinion polls show that Canadians are willing to spend more to clean up the environment¹². Environmental issues are also becoming more of a political issue as witnessed by the outcry across the country when the federal Minister of the Environment attempted to cut a world class environmental programme as part of an overall budget cut. A PCB spill near Kenora, Ontario became a major provincial environmental issue when the then Ontario Minister of the Environment quipped that only a rat would be at risk. He subsequently lost his seat in an election where the Progressive Conservative party was defeated after 43 years of uninterrupted rule.

In the late 1970s, following the revelations of Love Canal, control of toxic chemicals and hazardous wastes became major environmental issues along with acid rain. The leaky landfills on the Niagara frontier leaching deadly chemicals into the Niagara River and Lake Ontario threatening the drinking water of millions of Canadians are an issue of grave concern to Canadians. Recent developments regarding contamination of the St. Clair

River by the "toxic blob", which was caused by industries in Sarnia's chemical valley, point to problems with Canada's existing environmental legislation. Across the country, the search for hazardous waste disposal facilities is eluding solution. Environmental problems are seen now as every bit as serious as those of the late 1960s and governments are currently grappling with new legislation and policies to meet this challenge.

In light of the persistence of the environmental pollution problem nationally, this chapter will examine the framework for environmental policy-making in Canada with an emphasis on the role of the federal government.

B. The Constitutional Framework

No discussion of the framework for Canadian environmental law or policy can be complete without a brief foray into Canadian constitutional law. The Constitution, which reflected the problems and concerns of 1867 when it was enacted, did not allocate legislative authority for the environment to either the federal or provincial governments¹³. As a result, there is a large degree of overlapping jurisdiction because of the generality of the federal and provincial powers as defined in the Constitution. Broadly speaking, the federal government has the legal authority to make laws concerning matters that were considered to be national in scope at the time of Confederation,

such as navigation and shipping, seacost and inland fisheries. The federal government also has exclusive jurisdiction to pass laws in relation to criminal law, trade and commerce, interprovincial undertakings, Indians and lands reserved for Indians, national parks, the northern territories, federally owned land and other matters. The federal government also has a residual power to enact laws for the peace, order and good government of Canada.

The provinces also have a broad range of powers in relation to environmental matters. They have power over property and civil rights, natural resources and provincial lands, local works and undertakings, municipal institutions and local and private matters. Agriculture is a matter of shared jurisdiction.

The constitutional division of powers has created many problems. Deciding whether a matter of environmental concern is within provincial, federal or joint jurisdiction is often very difficult. Even the commentators cannot agree on the scope of the federal and provincial roles.

Without clear responsibility for environmental concerns, both levels of government have been able to disclaim authority for dealing with environmental problems by alleging that it is within the other's jurisdiction. This may result in "jurisdictional buck-passing". One example of this was the refusal of either the federal government or the Ontario government in the late 1970s to

close the English-Wabigoon River to sports fishing in the face of high mercury levels in the river system.

Constitutional questions frequently arise in relation to the question of which level of government will deal with emerging environmental concerns of the late 20th century. For example, questions of whether there should be national standards for hazardous waste siting; the regulation of toxic chemicals; and a water strategy. In 1984, an Inquiry on Federal Water Policy was established to make recommendations on strategies the federal government should undertake in the area of water management. Some provinces were opposed to the establishment of the Inquiry and there was even a squabble in relation to the name (Federal Inquiry on Water Policy versus Inquiry on Federal Water Policy). The issue of jurisdiction is a major one as the provinces jealously guard what they see as their territory to deal with water issues. The Pearce Inquiry, which reported in September 1985, took a very cautious constitutional approach to the federal role in developing a water policy¹⁴.

Constitutional challenges are often brought by polluters in the courts in an attempt to avoid prosecutions. For example, one company charged with offences under the federal Clean Air Act challenged the constitutionality of that statute by arguing that air pollution was a matter of provincial jurisdiction. This attempt failed¹⁵. However, there have been some successful challenges. In 1980, a section of the federal Fisheries Act,

which prohibited the dumping of logging waste into waters frequented by fish was struck down as the Court held that control of logging activities fell within exclusive provincial jurisdiction and further that the section made no attempt to link the dumping activities with an impact on fish¹⁶.

Finally, it should be noted that Canada's new Charter of Rights and Freedoms does not provide for a right to environmental quality and therefore will probably not have much impact on advancing environmental clean-up.

C. Departmental Organization and Budget

At the federal level, Environment Canada has grouped its activities into three programs: (a) administration; (b) Environmental Services (which includes a wide range of activities including the weather service and programs designed to enhance environmental quality); and (c) Parks Canada. Seventy-five percent of the employees are located in field and regional offices. The Department estimates total expenditures of \$745,349,000 in 1986-87. This is only a 2.4 percent increase in the budget over that forecasted for 1985-86. Unfortunately, environmental protection activities account for only 14 percent of the total Environmental Services program expenditures. Both the assessment and response to environmental threats and the guidance and support segments of the environmental protection activity budget have been decreased since the 1984-85 budget.

Federal contributions of 8.5 million dollars to a proposed Institute for Toxicology were cancelled due to fiscal restraint. Again, in the area of Environmental Conservation activity which accounts for approximately 32 percent of the 1986-87 total Environmetnal Services program expenditures, estimated spending less than that expended in 1984-85¹⁷. Public outcry was marked in 1985, when the government tried to dismantle a world-class environmental monitoring program in the Great Lakes, but the budgetary cuts proposed for 1986-87 were more subtle.

D. The Nature of Environmental Legislation

Canadian environmental legislation, like U.S. legislation, is still largely media or product oriented. In other words, separate laws deal with air, water, land and toxic chemical pollution. As well, becuae of our constitutional framework, there are many pieces of legislation that may deal with a specific environmental issue. For example, in the case of water pollution and management, the Pearse Inquiry listed ten main federal statutes, ten related federal statutes and ten federal departments and agencies responsible for administering such legislation.

This is similar to the approach taken in the U.S. However, our legislation tends to be broadly written with general prohibitions set out in wide terms, with discretion left in the hands of the Minister or his officials for the administration of the

legislation. Most of our legislation contains the word "may" rather than "shall", which leaves it up to government discretion as to when to act, and does not impose a duty on an official to take certain steps. Usually a broad power is given to the department or ministry to take certain actions to protect the environment. In some cases, this will take the form of legally enforceable standards, as is the case of regulations respecting the discharges of certain industries under the Fisheries Act¹⁸. However, in many cases, informal guidelines and policies are used rather than formal regulations.

For example, in the area of water quality, Canada does not have legally enforceable drinking water standards except in Quebec, and generally very few industrial emission standards. There are only federal drinking water guidelines which are usually adopted in the provinces, again as unenforceable guidelines.

E. Public Input Into The Regulatory Process

Another difference between the Canadian and American approach to environmental policy and law is the role of the public in regulation-making and permit granting.

Canada has no statute similar to the U.S. Administrative Procedure Act, which provides for minimum requirements regarding public notice and comment on regulations or rules. As well, in the United States there are many environmental statutes that go

far beyond the APA in providing for mechanisms for public input into rule or regulation-making. In Canada, on the other hand, it is only recently that steps are being taken to provide for notice and comment periods in legislation.

Further, the issuance of permits to industrial discharges in many U.S. states is again open to public scrutiny and can lead to hearings on the viability of a permit. This is not the case in Canada, as the issuance of permits and control orders is left to Ministry officials. For example, in Ontario, the Minister may issue a control order to a company who is discharging a contaminant into the environment that may impair the environment or have an adverse impact on health or property. The terms of the control order are usually negotiated between industry and Ministry officials. The public is totally locked out of the process. In recent years, the Ministry has in controversial matters held a public meeting to discuss a draft control order, but this is more of a public relations exercise than a chance for meaningful input. It is unfortunate that once a control order is put in place, it gives a company immunity from prosecution, unless terms or conditions are not followed. These orders can thus become licences to pollute.

F. Enforcement

While our legislation and fine provisions may look reasonably good on paper, it is instructive to look at the enforcement

record. One major difference between our environmental legislation and U.S. legislation is the lack of mandatory duties in Canadian environmental law. Our legislation is largely discretionary, and a citizen cannot take the Ministry to court for failure to enforce the law.

A study released in 1984, ironically done for the provincial government, found that in many cases companies find it less expensive to continue polluting than to comply with government requirements for pollution abatement¹⁹. Fines that have been levied for convictions of pollution offences have, until recently, been almost trivial. The study also noted that a polluting company has a relatively small chance of getting caught, being prosecuted, being convicted, and if convicted, sentenced with a large fine.

In addition to the problem of low fines, studies presented by the Canada-Ontario Review Board to the IJC point out the inadequacy of Ontario's enforcement record. In 1982, 45 out of 101 industries discharging into the Great Lakes were not in compliance with either provincial or federal effluent requirements²⁰. The 1984 results do not show any improvement as 45 out of 105 companies were still out of compliance²¹. Again these statistics do not take into account control orders that are being met but are still leading to pollution of water sources. Another Ministry of the Environment report showed that 23 out of the 100 major municipal waste water treatment plants in the Great

Lakes Basin were out of compliance in one or more of the conventional assessment parameters (Biological Oxygen Demand, Suspended Solids, Total Phosphorous)²².

Hopefully, this situation will change under the new provincial government, which has recently enlarged its enforcement division and has committed itself to a clean-up of Great Lakes polluters on the Ontario side.

Indeed, in July, 1986, the Ontario Minister of the Environment introduced legislation designed to increase the scope of options available to judges in sentencing polluters convicted of environmental offences²³. Maximum fines are to be increased and imprisonment of up to a year will be available for most pollution offences. One innovative reform will allow judges to assess the profits made by a polluter in violating the particular environmental statute, and to increase the fine by that amount. However, it will still be up to the judges who have been traditionally conservative in environmental sentencing to follow through on the new tools that will be available to them.

At the federal level, the Canadian Law Reform Commission recently recommended that the Criminal Code be amended to include a new offence of a "crime against the environment". The Commission found that "environmental quality is a value so fundamental, unique and threatened, that very seriously to harm or endanger it merits express prohibition in a new and distinct offence"²⁴. The

scope of the offence would include environmental pollution which seriously and directly endangers or damages the quality of the environment.

Two recent cases may reflect some change in judicial attitudes, as two companies were found in contempt of court for ignoring court orders against dumping toxic wastes into sewers and for failing to pay fines imposed for numerous violations of a municipal sewer use by-law. Their presidents were sentenced to six months and one year in jail and the companies were fined \$100,000 and \$200,000 respectively.

G. Conclusions and Future Directions

This chapter has attempted to outline briefly the history of policy development in the environmental field in Canada as well as set out the framework in which environmental laws and policies emerge. While environmental concerns remain at the top of the public's non-economic agenda, it is unclear how Phase IV will develop. On the one hand, certain provinces seem to be moving towards an ecosystem approach to dealing with pollution. Concepts such as "the solution to pollution is dilution" are now being criticized as a shortsighted approach to dealing with the pollution of our waterways and air. Multi-media standards and concepts of total loading in the setting of standards are the focus of a new approach to environmental regulation²⁶.

On the other hand, there have been conflicting messages from the federal government as to the direction they intend to pursue in protecting the Canadian environment. The government seems to be split as to whether to strengthen the federal Department of the Environment and enact more comprehensive environmental legislation or whether to leave environmental protection largely to the provinces and to other departments with a resource development mandate. These views have found their ways into recent government reports. The Royal Commission on the Economic Union and Development Prospects for Canada (the Macdonald Commission), which reported in 1985, supported an active federal role in environmental protection. The Commission concluded:

In many other places in this Report we call for less government intervention; in the area of environmental regulation, however, we are obliged to call for more. Over the long term the task of environmental regulation promises to be immense. We shall have to deal with the growth in the number and size of projects that may adversely affect the environment, with an increasing number of pollutants and hazards, with the irreversible, and sometimes unquantifiable, effects of a growing range of industrial substances and processes, and with the emerging international aspects of our environmental responsibility²⁷.

A subsequent study of Environment Canada, commissioned by the Nielson Task Force in 1985, also recommended "a stronger commitment by the federal government to environmental issues and a more effective role at the federal level for the Department of the Environment in addressing these issues". The report also concluded that the Department must serve as an environmental advocate as well as a broker of information about the

environment"²⁸. Yet a still to be published report, again commissioned by former Deputy Prime Minister Erik Nielson, is said to recommend that the federal government conduct "a comprehensive review" of Ottawa's environmental protection laws and "consider ways that such laws and regulations can be turned over to the provinces"²⁹. We are still awaiting a pronouncement on the environmental direction the federal government will pursue. However, as Mr. Nielson has just been removed from the Cabinet, and with continued public demand for strong environmental legislation, it is unclear whether the drive to decentralize federal environmental law will continue.

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Endnotes

1. Mary Anne Carswell and John Swaigen, eds., Environment on Trial (Toronto: Canadian Environmental Law Research Foundation, 1978) at X.
2. S.C. 1970-71-72, c. 47, as amended.
3. R.S.C. 1970, c. 26 (1st Supp.), as amended.
4. R.S.C. 1970, c. S-9, as amended.
5. David Estrin, "Annual Survey of Canadian Law, Part 2, Environmental Law", (1975), Ottawa Law Review 397.
6. Id. at 405-411.
7. Department of the Environment Act, R.S.C. 1970, c. 14 (2nd Supp.), as amended.
8. Id., section 6.
9. Id., section 6(1)(a)(ii).
10. Supra, note 6.
11. Supra, note 5 at 411-417.

12. See, for example, "Most Fear for Great Lakes: Poll", Toronto Star, October 3, 1982. See also L.J. D'Amore & Associates Ltd. Study of Trends in Canadian Environmental and Water Issues Concerning Ontario and the Great Lakes Region (Ottawa, Ontario: Environment Canada, July, 1983).
13. Constitution Act, 1867. See also, Dale Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 University of Toronto Law Journal 54.
14. Inquiry on Federal Water Policy. Currents of Change Final Report (Ottawa: Supply and Services, September, 1985).
15. R. v. The Canada Metal Company Limited (1972), 12 C.E.L.R. 1 (Man. Q.B.).
16. Fowler v. The Queen, [1980] 2 S.C.R. 214 (S.C.C.).
17. Environment Canada, 1987-87 Estimates (Ottawa: EC, 1986).
18. R.S.C. 1970, c. F-14, as amended.
19. Peat, Marwick and Partners, Economic Incentives Policy Instruments to Implement Pollution Control Objectives in Ontario (Toronto, Ontario: MOE, July, 1983).

20. Canada-Ontario Review Board, Inventory of Major Industrial Point Sources Dischargers in the Great Lakes Basin, Canada - 1982 (Toronto, Ontario: EC/MOE, January, 1984).
21. Canada-Ontario Review Board, Report on the 1984 Industrial Discharges into the Great Lakes Basin (Toronto, Ontario: EC/MOE, June 20, 1986).
22. Canada-Ontario Review Board. Report on the 1984 Discharges from Municipal Wastewater Treatment Facilities in the Great Lakes Basin (Toronto: EC/MOE, October, 1985).
23. Bill 112, Environment Enforcement Statute Law Amendment Act, 1986. First Reading July 3, 1986.
24. Law Reform Commission, Crimes Against the Environment, Working Paper #44 (Ottawa: LRC, 1985).
25. Paul Watson, "Plating firm's president given 6-month jail term", Toronto Star, July 21, 1986.
26. See for example, Ontario Ministry of the Environment. Municipal - Industrial Strategy for Abatement (Toronto: MOE, June 1986).

27. The Royal Commission on the Economic Union and Development Prospects for Canada. Report (Ottawa: Supply & Services, 1985) at Vol. II, p. 531.
28. Ministerial Task Force on Program Reviews. Improving Program Delivery: Environment, A Study Report to the Task Froce on Program Review (Ottawa, July, 1985).
29. Christie McLaren, "Weaken Environment Canada, study says", Globe and Mail, July 7, 1986 at 1.