



European and Canadian Environmental Law:

Best Practices and Opportunities for Co-operation

INTRODUCTION

January 2007

* This paper is the Introduction to "European and Canadian Environmental Law: Best Practices and Opportunities for Co-operation". For a complete copy of the report, please go to: <http://www.cela.ca/coreprograms/detail.shtml?x=2916>



*This report was funded by the **European Union**
and prepared by the **Canadian Environmental Law Association***

Acknowledgements

The Canadian Environmental Law Association gratefully acknowledges funding support for **European and Canadian Environmental Law: Best Practices and Opportunities for Co-operation** from the **European Commission**, represented by the Delegation of the European Commission to Canada.

Additional funding was provided by the Law for the Future Fund of the **Canadian Bar Association**, and the Health and Environment Fund of the **Canadian Auto Workers**.

This support has provided a timely opportunity for CELA to analyze the differences and similarities in Canadian and European law and policy, and to introduce an informed public interest perspective to the governmental, legal and diplomatic engagements seeking to reconcile our differing approaches.

We also thank the following individuals for providing technical information, assistance and/or comments on this report: Kathleen Cooper, Eric Darier, Fe De Leon, Richard Denison, Paul Muldoon, Ramani Nadarajah, Charlene Rogers, and Michelle Swenarchuk.

This report was researched and written by Anne Wordsworth, John Jackson, Jessica Ginsburg and Ken Traynor. Jennifer Agnolin provided legal research for the chapter on food biotechnology.

~ INTRODUCTION ~

European and Canadian Environmental Law: Best Practices and Opportunities for Co-operation

The Canadian Environmental Law Association (CELA) has conducted a comparative study of European and Canadian policy, law and regulation, including the consideration of relevant American law where applicable, in four areas that are critical to the protection of human health and the environment.

Purpose

The purpose of this report is to identify similarities, divergences and best practices in legislation and public policy related to chemicals, product stewardship, the sustainable use of natural resources and food biotechnology. This analysis is intended to enable governments to evaluate their current policies and legislation, and make revisions to provide the optimal protection of human health and the environment. It is our view that a deepened understanding of European approaches and advances over the last decade in environmental regulation can play an important role in improving public protections both in Canada and Europe.

Objectives

The objectives are:

- To conduct a comparative study of European and Canadian regulation and policy, with consideration of relevant American law, to identify similarities, differences and best practices to provide optimal protection of human health in four areas – chemicals law and policy, product stewardship, the sustainable use of natural resources and food biotechnology.
- To develop recommendations on regulatory best practices and opportunities for Canada-European Union co-operation that would play a role in improving law and public policy.
- To introduce these recommendations for consideration in Canada during the review of the *Canadian Environmental Protection Act*, the development of the proposed *Canadian Health Protection Act*, the implementation of the “Smart Regulation” initiative, the discussions on Canada-US Regulatory Co-operation, and the development of product stewardship programs in Canada at the federal and provincial levels.
- To disseminate information regarding European Union regulatory approaches widely in Canada and the United States through electronic publication and public events involving government decision-makers, academics, business representatives and civil society.
- To influence Canadian parliamentarians and decision-makers through targeted briefing sessions.
- To establish links between Canadians and Europeans in civil society working in these areas.

Methodology

The research methodology consisted of first, a review of the relevant legislation and published academic studies, particularly those that compared Canadian, European and American law in the four subject areas, and extensive Internet searches of government documents, public policy and legal analyses by academics, governments and non-governmental organizations. Second, interviews were conducted with key informants, including academics, public officials and representatives of non-governmental organizations.

Background

The original impetus for this work changed to some extent when trade discussions between Canada and the European Union were suspended in early 2006. One of the initial objectives was to produce a comparative review of legislation that could be considered during the negotiation of the Canada-European Union (EU) Trade and Investment Enhancement Agreement (TIEA) and during the discussions between Canada and the United States with respect to regulatory co-operation.

The negotiation of the TIEA, launched in May 2005, focused attention on regulatory trends and differences on the two continents. At the World Trade Organization (WTO), disputes between Canada and the EU showed that three of the major cases - beef hormones, asbestos, and biotechnology measures - all involved differences in regulatory approaches. As the EU carried out implementation of the End-of-Life Vehicles Directive and developed the REACH proposal on chemicals, Canada raised concerns about the impacts on Canadian commodity exports. These conflicts highlighted the need for better understanding of the regulatory approaches in Canada and Europe and the ways in which these differences might be reconciled, possibly resulting in better policies and regulation world-wide.

Although the suspension of the TIEA negotiations altered the context for this research, other significant opportunities became available to present our work comparing Canadian and European approaches and promoting best practices identified in each jurisdiction. The analysis of chemical law and policy has been used to inform the Parliamentary review of the *Canadian Environmental Protection Act* and the National Policy Consultation sponsored by the Canadian Partnership for Children's Health and the Environment. Second, the Extended Producer Responsibility research has been presented to the Extended Producer Responsibility (EPR) Committee of the Canadian Council of Ministers of the Environment (CCME). It also supports a collaborative effort with the Canadian Autoworkers (CAW) and their campaign for EPR for End-of-Life vehicles. Third, the research on food biotechnology will be used as part of CELA's ongoing input into Canada's Biotechnology Strategy and a possible review being called for by the Canadian Biotechnology Advisory Committee.

Trade Practices and Environmental Policies

In North America, environmental regulation expanded rapidly in the 1980's but largely ground to a halt in the 1990's. As the improvement of environmental regulation stalled, governments

were aggressively pursuing trade liberalization, corporate deregulation and voluntary approaches advocated under free trade agreements.

At the same time, in Europe the late 1990s saw a revival of environmental commitment that propelled the European Union into the forefront of environmental and public health initiatives internationally. These initiatives included the updating of existing legislative programs such as the chemicals review that led to the REACH Regulation, the enactment of a comprehensive legislative framework governing genetically modified feed and foods, and the establishment of producer responsibility legislation that required industry to take responsibility for major items such as cars and electronic equipment after their use.

This wave of environmental regulation has challenged both Canada and the United States (U.S.) to consider their own regulatory frameworks, the impact of European initiatives on their ability to export goods to Europe and the implications for international trade.

Currently, Canada's economy has become one of the most trade-dependent in the world, relying primarily on the United States and Europe for both exports and imports. In Canada, exports represent 38.1% of economic activity and imports 33.7%. Both exports and imports are highly concentrated on only two markets: 81.6% of exports go to the U.S. and 6% to the EU. With respect to imports, 68.9% came from the U.S. and 10% from the EU in 2005.¹

Although Canada's trade with the United States is greater, the European Union is a significant part of Canada's economy. Canada's Ambassador to the EU, Jeremy Kinsman, points out that Canada is now part of a "wider North Atlantic Economy".² Taken together the NAFTA-EU market represents 83% of Canada's global activity. He also makes the point that while the US will always be Canada's "number one target of opportunity and preoccupation", the EU is very significant for Canada with recent trade in goods plus services plus affiliate sales equal to \$217 billion in Canadian dollars, compared to U.S. totals of almost \$1.3 billion. Kinsman calls the Canadian stake in the EU "vital to Canadian business, finances and our success in the world".³

The Canadian government has noted that:

Most EU-Canada trade and investment disputes/irritants are regulatory in nature and our attempt to address these irritants, for example through Mutual Recognition Agreements (MRA) and the European Union-Canada Trade Initiative (ECTI) [1998], have had mixed results. A review of the effectiveness of these approaches would be timely.⁴

One of Canada's first attempts to resolve trade differences, including differences in environmental regulation, began in 1999 with the formation of the Canada – Europe Roundtable

¹ Department of Foreign Affairs and International Trade, *Sixth Annual Report on Canada's State of Trade: Trade Update April 2005*, online: Trade and Investment Reports <http://www.dfait-maeci.gc.ca/eet/trade/state-of-trade-en.asp>.

² Kinsman, Jeremy "State of the European Union", Panel Session at the Canadian Institute of International Affairs, Toronto, April 26, 2006 [unpublished]

³ Ibid.

⁴ Joint [EU-Canada] Action Plan for Regulatory Co-operation, Section IV, Para. iii, Accessible at: Canada Europa <<http://www.dfait-maeci.gc.ca/canada-europa/mundi/summit-athens2003-regulatorydialogue-en.asp>>.

(CERT). Senior business leaders⁵ from both sides of the Atlantic formed the Roundtable as a permanent association for “dialogue on major trade and investment matters between business leaders and governments”.⁶

The Canada-Europe Roundtable worked hard to influence governments on issues such as better integration of transatlantic capital markets, more predictable rules for mergers and acquisitions, preventing the rise of non-tariff barriers to trade and investment flows, and the design of a complementary regulatory cooperation framework between Canada and the EU.⁷

In March 2004 at a meeting held just before the formal launch of the TIEA negotiations, Pascal Lamy, then EU Trade Commissioner and now Director-General of the World Trade Organization, highlighted his view that “the real obstacles to trade and investment (between Canada and the EU) are differences in regulation. This is a message that started with CERT.”

However, the negotiations lost momentum after just three rounds and were suspended even before all of the topics identified had been introduced into the negotiations. In a presentation to the Canadian Institute for International Affairs in April 2006, Ambassador Otto Ditz, the Austrian Ambassador to Canada, said that the real negotiations should be a triangular affair between Canada, the European Union and the United States. He said that to get the interest of the business community it was necessary to have a NAFTA – EU conversation.

The Canadian Environmental Law Association set out in November 2005 to look at Canadian and EU regulatory differences in four major areas – chemicals, extended producer responsibility, sustainable use of natural resources and food biotechnology. Our aim was to act on the Canadian government’s assertion that the “review of the effectiveness of these approaches would be timely”.⁸ This report is intended to characterize the differences in transatlantic approaches to environmental issues.

One of the first considerations in comparing European legislation with equivalent Canadian and U.S. legislation is the adoption in Europe of the “precautionary principle”. In a 2003 paper, “Comparing Environmental Governance: Risk regulation in the EU and the US”, David Vogel suggests that “the substantive differences between European and US regulatory policies do not stem from the fact that the EU and several Member States have formally adopted the precautionary principle, while the US has not. ... It is rather because political support for more stringent health, safety and environmental regulations is now greater in Europe than in the United States that a number of regulations enacted by the EU are now more risk averse or “precautionary” than in the US.”⁹

⁵ CERT membership at the time included: Alcan, Interbrew, Bombardier, GPC International, Tractebel (Suez) TSX Group, Novartis, MDS, NOVA Chemicals, CGI, Blake, Cassels & Graydon LLP, SNC Lavalin, Canadian Manufacturers & Exporters, Monsanto, Forest Products of Canada, Spirits Canada, Canadian Chamber of Commerce, EU Chamber of Commerce in Toronto and the American European Community Association.

⁶ CERT High Level Meeting with Canadian Trade Minister and European Trade Commissioner on Canada-EU Trade and Investment Enhancement Agreement, Press Release, 18 March 2004, online: Canada Europa <www.canada-europe.org>.

⁷ Ibid.

⁸ DFAIT, *Supra* Note 4.

⁹ Vogel, David, “Comparing Environmental Governance: Risk Regulation in the EU and the US” (September 1, 2003). *Center for Responsible Business. Working Paper Series*. Paper 2. 25, 26. online: e-Scholarship Repository, University of California <<http://repositories.cdlib.org/crb/wps/2>>.

Vogel highlights how recent European policies have been introduced following a “series of regulatory failures” such as mad-cow disease which have undermined public confidence in the regulatory process and the capacity of science to identify harm. A recent collection of essays sponsored by the European Environment Agency reviewed twelve examples of “regulatory failures” in both Europe and the US.¹⁰ In every case, these failures were due to the fact that policy-makers had been insufficiently proactive. The Agency was unable to come up with a single example of public welfare being undermined by too stringent regulations.¹¹

The political support for more stringent health, safety and environmental regulation in Europe has been at the root of new policies for chemicals, food biotechnology and products that have generated significant conflicts with the less risk-averse character of current regulatory policy in North America.

Another important area of difference between Europe and North America lies within differences in corporate culture regarding environmental issues.

These differences were highlighted in the findings of a year long study that assessed the international state-of-the-art in Environmentally Benign Manufacturing (EBM), conducted by an interdisciplinary panel sponsored by the United States National Science Foundation. During the course of its study, the panel visited 50 sites in Japan, Europe and the United States. In the introduction, they state: “US manufacturing might be characterized as the most wasteful industrial activity in the most wasteful nation.”¹² Although the panel did not directly address Canada, Canada’s environmental record and manufacturing orientation can be considered similar to the United States.

The panel concluded that:

Each region that we visited, the US, Europe and Japan, has different approaches to developing an environmentally benign manufacturing strategy. Each region has different drivers. In the US, the drivers are the correlation between cost-savings and the environmental benefit. In Europe, the high-population density, a recycle mindset, and the take-back provisions drive environmental policy. In Japan, the drivers are the export economy, high population density and ISO 14000. For American firms [*and by extension Canadian ones*] with a majority of sales abroad, responding to the US drivers alone is not sufficient.¹³

The cultural and social differences between Europe and North America are significant, and they have generated different regulatory responses to the current environmental challenges. This

¹⁰ European Environment Agency, “Late Lessons from Early Warnings: The precautionary principle 1896-2000” (2001). *Environmental Issue Report No. 22*. online: European Environment Agency <http://reports.eea.europa.eu/environmental_issue_report_2001_22/en/Issue_Report_No_22.pdf>.

¹¹ Ibid. p. 23.

¹² Bras, Bert et al. “Environmentally Benign Manufacturing: Trends in Europe, Japan, and the USA” (2002) 124 Transactions of the American Society of Mechanical Engineers 908.

¹³ Ibid., p. 920.

report investigates European and Canadian approaches and draws out ideas and recommendations that can be used to improve public protections in each of the four areas.



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