Canada-United States Law Journal

Volume 18 | Issue Article 10

January 1992

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## I. INTRODUCTION

The purpose of this paper is to provide the reader with a broad overview of environmental law in Canada. Although it is clearly impossible to thoroughly discuss such a vast subject in a single article, it is hoped that the topics discussed will provide the reader with a brief guide so that areas of specific interest may later be explored.

## II. ENVIRONMENTAL LAW IN CANADA

### *A. The Constitutional Framework*

Like the United States and Australia, Canada is a federal state. Governmental authority is divided between a national government (the Parliament in Ottawa) and twelve regional governments (the ten provinces and two territories). Both levels of government have jurisdiction over a wide variety of areas, and, at least in theory, each level is supposed to be "supreme within its own defined sphere and area."[1] The federal and provincial heads of power are delineated by Sections 91, 92 and 92A of the Constitution Act, 1867.[2]

The environment, however, is not assigned exclusively to either the federal or provincial governments as a head of power; in fact, the environment and pollution are not, *per se*, listed in the Constitution. Rather, they can best be described as "aggregates of matters, which come within various classes of subjects, some within federal jurisdiction and others within provincial jurisdiction."[3]

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Please note that at the time of publication of this article, certain amendments have been made to the legislation cited herein, and accordingly, section numbers may not correspond exactly with those presently codified.

[1] Re Resolution to Amend the Constitution of Canada, S.C.R. 753, 821 (1981) (Can.), *citing*, Murphy v. C.P.R. Co., S.C.R. 626, 643 (1958) (Can.). The concept of federalism has been described as "the method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent." KENNETH CLINTON WHEARE, FEDERAL GOVERNMENT (4th ed. 1963). For an excellent summary of federalism in the Canadian context, see PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 79-109 (2d ed. 1985).

[2] Constitution Act, 1867, 30 & 31 Victoria, ch. 3 (1867) (U.K.).

[3] HOGG, *supra* note 1, at 598.

### 1. Federal Jurisdiction

The federal government derives its authority to legislate with respect to the environment from several subsections of Section 91 of the Constitution Act, 1867. Perhaps the most important of these is Section 91(27), which deals with criminal law, including procedure in criminal matters.[4] Jurisdiction over navigation and shipping (§ 91(10)), fisheries (§ 91(12)), federal lands (§ 91(1A)) and lands reserved for native peoples (§ 91(24)) also allows the federal government to legislate with respect to a wide array of environmental matters. It has even been noted that the federal taxing power (§ 91(13)) can be invoked by the federal government to discourage polluting activities through higher taxes, and to ". . . encourage the installation of anti-pollution equipment through accelerated capital cost allowance and other deductions."[5]

Of equal importance is the residual power of the federal government to make law for the "Peace, Order and good Government of Canada" (commonly known as the "POGG power"). This power allows the federal government to legislate in areas of national concern or in cases of national emergency.[6]

### 2. Provincial Jurisdiction

Pursuant to Section 92(13) of the Constitution Act, 1867, the provinces are given jurisdiction to enact laws respecting property and civil rights in the province. Under this power, a province may regulate "land use and most aspects of mining, manufacturing and other business activity, including the regulation of emissions that could pollute the environment."[7]

The provinces are also given the power to legislate with respect to the management and sale of provincial land and the timber and wood thereon (§ 92(5)), municipal institutions (§ 92(8)) and "generally all matters of a merely local or private nature in the province" (§ 92(16)). Like the federal government, the provinces also have the power to raise taxes

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[4] This power over criminal matters is extremely broad. As enunciated by Lord Atkin in *Proprietary Articles Trade Association v. A.G. Canada*, A.C. 310 (1931) (P.C. U.K.): " 'Criminal Law' means 'the criminal law in its widest sense' . . . . The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?"

[5] HOGG, *supra* note 1, at 599.

[6] In the case of *Re Anti-Inflation Act*, 2 S.C.R. 373 (1976) (Can.), the Supreme Court of Canada upheld wage and price controls under the emergency branch of the POGG power in an effort to stem the effects of inflation at the time. However, some of the judges in the decision indicated that the legislation could also have been upheld under the national concern branch of the POGG power. *See* W. R. Lederman, *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation*, 53 CAN. B. REV. 597 (1975). *See also* HOGG, *supra* note 1, at 392.

[7] HOGG, *supra* note 1, at 599. Thus, for example, it was held in Ontario that a provincial law prohibiting the emission of contaminants was validly enacted. *See* R. v. Lake Ontario Cement, 2 O.R. 247 (1973) (H.C. Ont.).

and thus encourage environmental friendliness through tax incentives (§ 92(2)).

In fact, it is the provinces that have historically taken the lead with respect to environmental initiatives. However, the federal government is increasing its role in this area.

### *B. Federal Legislation*

#### 1. Canadian Environmental Protection Act[8]

Proclaimed in force on June 30, 1988,[9] the Canadian Environmental Protection Act ("CEPA") governs activities within the federal jurisdiction such as cross-border air pollution, the dumping of substances into the oceans and navigable waterways and the regulation of toxic substances. It is the federal government's main environmental statute, although, as will be seen *infra*, there are several others.

In summary, CEPA is divided into a number of broad categories which are defined either by their function or by their focus. Sections 1-6 describe the title of the statute and the administrative duties of the Government of Canada, as well as set out a series of interpretive definitions, establish that the statute is binding on both federal and provincial crowns,[10] and provide for the establishment of advisory committees.[11]

Part I of CEPA is entitled "Environmental Quality Objectives, Guidelines and Codes of Practice". It provides for, *inter alia*, the collection of environmental data and research through monitoring, research and publications, and guidelines and codes of practice for the Ministry of the Environment and the Ministry of National Health and Welfare.[12]

Part II of CEPA deals with the issue of toxic substances. After defining "toxic substances" in a broad manner,[13] this Part provides for the establishment of a number of lists of domestic, toxic, prohibited and hazardous substances.[14] This Part also deals with the release of toxic substances, the import and export of toxic substances and waste materials, and the regulation of the production and use of fuels in Canada.

Part III of CEPA is concerned with the broad category of nutrients, which includes cleaning agents and water conditioners. The power to create prohibitions and regulation with respect to these chemicals is also

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[8] Canadian Environmental Protection Act, S.C. ch. 22 (1988) (Can.), *as amended.*

[9] With the exception of Sections 26-30, 146 and 147(2), which are not yet in force.

[10] Canadian Environmental Protection Act, S.C., ch. 22 § 4 (1988) (Can.), *as amended.*

[11] *Id.* at §§ 5-6.

[12] *Id.* at §§ 7-10.

[13] *Id.* at § 11. The Act defines a subject as toxic if ". . . it is entering or may enter the environment in a quantity or concentration or under conditions (a) having or that may have an immediate effect on the environment; (b) constituting or that may constitute a danger to the environment on which human life depends; or (c) constituting or that may constitute a danger in Canada to human life or health."

[14] These substances are set out in schedules appended at the end of the statute.

established.[15]

Part IV of the Act deals with the category of federal departments, agencies, Crown corporations, works, undertakings and lands. This Part provides for the creation of regulations with respect to these federal activities. It also deals with the handling of plans and specifications pursuant to which agencies may deal with substances which are harmful to the environment, and provides appropriate procedures in case of the release of a contaminant in contravention of a regulation.[16]

Part V of CEPA covers international air pollution. It replaces the old Clean Air Act.[17] It also deals with the significant issues surrounding required consultations with provincial and territorial governments and for the non-application of federal regulations to cases where provincial regulations have already covered the field. It provides for equivalency agreements to be entered into between the federal government and the government of any province or territory.[18]

Part VI of the Act deals with oceans and dumping, and replaces the former Ocean Dumping Control Act.[19] It has its own interpretational and definitional sections, and prohibits the dumping of substances into the ocean without a special permit.[20]

Part VI also covers the issue of inspections by federal employees to ensure compliance, and entitles the Crown to recover its costs and expenses in dealing with dumping issues. This Part is significant in that it provides for the detention of ships where offenses have occurred, and for the seizure and forfeiture of ships or cargo in the case of dumping offenses.[21]

Parts VII through IX provide for such matters as the general exercise of regulation-making powers, procedures for Board of Review hearings and amendments to CEPA.[22]

### 2. Fisheries Act[23]

Under the Fisheries Act, it is an offence for anyone to carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.[24] Furthermore, it is an offence to deposit or permit the deposit of any type of deleterious substance in water fre-

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15 *Id.* at §§ 49-50.

16 *Id.* at §§ 52-60.

17 R.S.C., ch. C-32 (1985) (Can.).

18 Canadian Environmental Protection Act, S.C., ch. 22, §§ 61-65 (1988) (Can.), *as amended.*

19 R.S.C., ch. O-2 (1985)(Can.).

20 Section 68 of the Act does provide, however, that dumping without a permit is allowed if it is necessary to avoid danger to human life, to a ship or to a plane.

21 Canadian Environmental Protection Act, S.C., ch. 22, §§ 66-86 (1988) (Can.), *as amended.*

22 *Id.* at §§ 87-149.

23 R.S.C., ch. F-14 (1985) (Can.), *as amended.*

24 *Id.* at § 35(1).

quented by fish.[25] The "depositing" aspect of the offence is concerned with direct acts of pollution; the "permitting" aspect of the offence occurs when there is a passive lack of interference, or a failure to prevent an occurrence which ought to have been foreseen.[26]

Anyone who wishes to engage in any work which may result in the disruption or destruction of a fish habitat, or who desires to deposit a deleterious substance in water frequented by fish, must provide the Minister with plans, specifications, studies and details of the proposed procedures. Upon reviewing these, the Minister can order changes to the plan.[27]

If there is a discharge of a deleterious substance into water frequented by fish, or if there is a serious and imminent threat of such a discharge occurring, the persons responsible are obligated to forthwith notify the Ministry.[28] Additionally, those persons must take all reasonable measures to prevent the discharge from occurring, or to mitigate any damage if a discharge has already occurred.[29]

Penalties for contravening the provisions of the Fisheries Act are significant. In addition, the court can order the violator to refrain from engaging in the activity which is the cause of a discharge or deposit into waters frequented by fish.[30] In some cases, this could mean the closing down of a particular business or industry. Offenders may also be held liable to indemnify the government for all expenses incurred to remedy the effects of a violation of the Act,[31] and to compensate licensed commercial fishermen for all loss of income.[32]

If there is an unauthorized deposit of a deleterious substance in water frequented by fish, the persons who own the substance or have charge, management or control thereof will be held absolutely liable unless they can show that the deposit was caused by such things as an act of God, an act of war or an act of deliberate sabotage by someone for whose actions they are not responsible.[33]

### 3. Canada Shipping Act[34]

The Canada Shipping Act is a voluminous statute that regulates the business of shipping in Canada. Regulations enacted under the Canada Shipping Act establish criteria for such things as fuel, ballast and the safe

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[25] *Id.* at § 36(3).

[26] R. v. Vespra (Township), 9 W.C.B.2d 166 (1989) (Ont. Prov. Ct.).

[27] Fisheries Act, R.S.C., ch. F-14, § 37 (1985) (Can.), *as amended.*

[28] *Id.* at § 38(4).

[29] *Id.* at § 38(5).

[30] *Id.* at § 41(2).

[31] *Id.* at § 42(1).

[32] *Id.* at § 42(3).

[33] *Id.* at § 42(4).

[34] R.S.C., ch. S-9 (1985)(Can.), *as amended.*

handling of cargo.[35] Authorized officials may board any ship in Canadian waters and fishing zones.

The Act requires that, in certain circumstances, a ship have sufficient insurance to cover the costs of any spill. The Act makes provision for cases in which a ship owner does not or cannot pay the full costs of a clean-up and any ordered compensation. In such instances, monies owing may be paid by the International Oil Pollution Compensation Fund or the Canadian Ship Source Oil Pollution Fund.[36]

### 4. Transportation of Dangerous Goods Act[37]

The Transportation of Dangerous Goods Act forbids any person from handling, offering for transport or transporting any dangerous goods (a defined term) unless all applicable safety requirements are complied with, and unless all containers, packaging and means of transport comply with all applicable prescribed safety standards and display all applicable prescribed safety standards.[38] Those persons caught handling, transporting or offering to transport dangerous goods without satisfying all necessary requirements face significant maximum fines. If the Crown elects to proceed by way of indictment, a prison term is possible.[39]

An important aspect of the Act for company officials is the provision which stipulates that if a corporation commits an offence, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence may be punished, whether or not the corporation is prosecuted or convicted.[40] Where an authorized inspector believes that there has been a discharge of dangerous goods, or that there is a serious and imminent danger of such discharge occurring, he can seize the goods, containers or means of transport if he feels it necessary to do so in order to prevent or reduce danger to life, health, property or the environment.[41]

### 5. Arctic Waters Pollution Prevention Act[42]

The Arctic is a region of both proven economic value and untapped potential. In the last decade, there has been a substantial increase in

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35 C.R.C., ch. 1454, Part III, (1978) (Can.), *as amended*. Other regulations promulgated under the Canada Shipping Act deal with such matters as smoke emissions form a ship's stack and the discharge of sewage into the Great Lakes. *See* Air Pollution Regulations, C.R.C., ch. 1404, (1978) (Can.), *as amended*; Great Lakes Sewage Pollution Prevention Regulations, C.R.C., ch. 1429, (1978) (Can.), *as amended*; Garbage Pollution Prevention Regulations, C.R.C., ch. 1424 (1978) (Can.), *as amended*.

36 *See generally* Canada Shipping Act, R.S.C., ch. S-9, §§ 673-723 (1985) (Can.), *as amended*.

37 R.S.C., ch. T-19 (1985) (Can.), *as amended*.

38 *Id.* at § 4.

39 *Id.* at § 11.

40 *Id.* at § 11.

41 *Id.* at § 15.

42 R.S.C., ch. A-12 (1985) (Can.), *as amended*.

petroleum exploration in the Arctic Ocean, and many scientists believe that the polar continental shelf contains vast amounts of hydrocarbons which could go a long way toward satisfying both Canadian and global energy requirements.[43] However, the recent environmental disaster caused by the oil tanker Exxon Valdez in Alaska has also focussed world attention on the unique biological ecosystem of the Arctic and its extreme fragility.

Geographic location has placed Canada in a special position among nations with respect to the Arctic. Realizing the number of important and often competing interests which are at stake in the Arctic, the federal government enacted the Arctic Waters Pollution Prevention Act ("AWPPA").[44]

The AWPPA provides that no person or ship shall deposit or permit the deposit of waste of any type in the arctic waters or on the mainland or islands of the Canadian arctic under conditions where the waste, or other waste resulting from the initial waste, could enter arctic waters.[45] There is an obligation to report a deposit of waste or a danger thereof.[46] Any person engaged in exploring for, developing or exploiting any land adjacent to arctic waters is liable for costs incurred by the government to clean up waste and for damages to other persons.[47]

### 6. Additional Federal Legislation

In addition to the main federal environmental statutes already discussed, there are several others which may be relevant for a particular undertaking or investment. They include the Atomic Energy Control Act,[48] the Hazardous Products Act,[49] the Navigable Waters Protection Act,[50] the Migratory Birds Convention Act[51] and the Pest Control Prod-

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43 CANADIAN ARCTIC RESOURCES COMMITTEE, OCEAN POLICY AND MANAGEMENT IN THE ARCTIC (1984).

44 The preamble of AWPPA shows the delicate balance which the federal government must maintain when dealing with issues involving the Arctic environment. It reads, in part, as follows: "Whereas Parliament recognizes that recent developments in relation to the exploitation of the natural resources of arctic areas, including the natural resources of the Canadian arctic, and the transportation of those resources to the markets of the world are of potentially great significance to international trade and commerce and to the economy of Canada in particular; and whereas Parliament at the same time recognizes and is determined to fulfil its obligation to see that the natural resources of the Canadian arctic are developed and exploited and the arctic waters adjacent to the mainland and islands of the Canadian arctic are navigated only in a manner that takes cognizance of Canada's responsibility for the welfare of the Inuit and other inhabitants of the Canadian arctic and the preservation of the peculiar ecological balance that now exists in the water, ice and land areas of the Canadian arctic . . . ." Arctic Waters Pollution Prevention Act, R.S.C., ch. A-12, preamble (1985) (Can.), *as amended.*

45 *Id.* at § 4(1).

46 *Id.* at § 5.

47 *Id.* at § 6.

48 R.S.C., ch. A-16 (1985) (Can.), *as amended.*

49 R.S.C., ch. H-3 (1985) (Can.), *as amended.*

50 R.S.C., ch. N-22 (1985) (Can.), *as amended.*

ucts Act.[52]

### C. *Provincial Legislation*

There exist in Canada numerous provincial and territorial statutes which are concerned, directly or indirectly, with the protection of the environment. An examination of them all is well beyond the scope of this paper; however, a review of the most important is useful.

#### 1. British Columbia

The principal environmental statute in British Columbia is the Waste Management Act.[53] It defines waste in a brad manner, and prohibits the introduction of waste into the environment in such a manner or quantity as to cause pollution.[54] "Pollution" is defined as the presencc in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment.

Penalties under the Act are substantial. For example, a person who has obtained a permit to discharge waste into the environment, and who discharges into the environment without having complied with the requirements of the permit, faces a maximum penalty of CAN $11 million.[55] Where a person has been found to have intentionally caused damage to the environment, or to have shown reckless and wanton disregard for the lives or safety of persons thus creating a risk of death or harm to those persons, the maximum fine is CAN $3 million.[56]

Under the Waste Management Act, a permit from the regional waste manager is required in order to deposit or discharge waste into the environment.[57] Special approval is also required for those wishing to collect and dispose of waste.

#### 2. Alberta, Saskatchewan and Manitoba

The main environmental statutes in Alberta are the Clean Air Act[58] and the Clean Water Act.[59] The Clean Air Act requires persons who construct or alter their facilities in a manner which is likely to create air pollution to first obtain a permit for the construction and a license for the operation.[60] Specific plans must be submitted to the Director, and approval may be subject to terms and conditions.

Likewise, under the Clean Water Act, permits and licenses are re-

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51 R.S.C., ch. M-7 (1985) (Can.), *as amended.*

52 R.S.C., ch. P-9 (1985) (Can.), *as amended.*

53 S.B.C., 1982, ch. 41 (1982) (B.C.), *as amended.*

54 *Id.* at § 3.

55 *Id.* at § 34(5).

56 *Id.* at § 34.2.

57 *Id.* at § 3. Waste includes effluent, air contaminants and litter.

58 R.S.A., ch. C-12 (1980) (Alta.), *as amended.*

59 R.S.A., ch. C-13 (1980) (Alta.), *as amended.*

60 R.S.A., ch. C-12, §§ 3-5 (1980) (Alta.), *as amended.*

quired for the construction and operation of anything which is likely to produce water pollution. This includes everything from sewers and waste treatment facilities to pulp and paper plants.

In Saskatchewan, the main environmental statute is the Environmental Management and Protection Act.[61] Under the Act, no person shall cause or allow without a permit any contaminant to be discharged or released where there is a reasonable possibility that the discharge or release may change the quality of any water or cause water pollution.[62] Permits may be issued subject to terms and conditions. The Municipal Refuse Management Regulations[63] have been enacted pursuant to the Act and govern the establishment of waste disposal sites.

In Manitoba, the Environment Act[64] is the main provincial environmental statute. The purpose of the Act is to ". . . develop and maintain an environmental management system in Manitoba which will ensure that the environment is maintained in such a manner as to sustain a high quality of life, including social and economic development, recreation and leisure for this and future generations."[65] Pursuant to the Act, licenses are required for all major projects. Additionally, the Act creates the Clean Environment Commission, the duties of which include the conducting of public meetings, hearings and investigations into specific environmental concerns and acting as a mediator between two or more parties to an environmental dispute.[66]

### 3. Ontario

There are two main statutes in Ontario which are concerned with the protection of the environment: the Environmental Protection Act ("EPA")[67] and the Ontario Water Resources Act ("OWRA").[68] The purpose of the EPA is to provide for the protection of the natural environment.[69] As its name implies, the OWRA is concerned with the protection of all surface waters and ground waters in Ontario.[70]

Section 13(1) of the EPA provides that notwithstanding any other provision of the EPA or any regulation enacted pursuant to the EPA, ". . . no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is

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61 S.S., ch. E-10.2 (1983-84) (Sask.), *as amended.*

62 *Id.* at § 17.

63 R.R.S., ch. E-10.2, Reg. 4 (1986) (Sask.).

64 S.M., ch. 26 (1987-88) (Man.), *as amended.*

65 *Id.* at § 1(1).

66 *Id.* at §§ 6(1), 6(5).

67 R.S.O., ch. 141 (1980) (Ont.), *as amended.*

68 R.S.O., ch. 361 (1980) (Ont.), *as amended.*

69 R.S.O., ch. 141 § 2 (1980) (Ont.), *as amended.* "Natural environment" is defined very broadly and means the "air, land and water, or any combination or part thereof, of the Province of Ontario." *Id.*

70 Ontario Water Resources Act, R.S.O., ch. 361 § 15 (1980) (Ont.), *as amended.*

likely to cause an adverse effect."[71] Section 16(1) of the OWRA is similar in that it provides that "[e]very person that discharges or causes or permits the discharge of any material of any kind into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters is guilty of an offence."[72]

Both the EPA and the OWRA contain mandatory self-reporting provisions. These provisions require every person who discharges, or causes or permits the discharge of (i) a contaminant into the natural environment (EPA), or (ii) any material into any waters, or on any shore, or in any place that might impair the quality of any waters (OWRA), to forthwith notify the Ontario Ministry of the Environment.[73]

Both the EPA and the OWRA provide that every director or officer of a corporation that engages in an activity which may result in the discharge of a contaminant into the environment must take all reasonable care to prevent the corporation from causing or permitting the unlawful discharge. Failure to exercise such due diligence is an offence.[74]

One of the most important regulations promulgated under the EPA is Regulation 309,[75] which provides for the designation and classification of wastes such as hazardous waste, pathological waste and industrial waste. The regulation establishes standards for waste disposal sites,[76] the management of asbestos waste,[77] registration requirements for "generators",[78] documentation requirements for waste generators and waste carriers, and the transportation of waste into, out of and within Ontario.[79]

Under the EPA, a person may not construct, alter or replace any plant, structure, mechanism, equipment or thing that may discharge a

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[71] Environmental Protection Act, R.S.O., ch. 141, § 13(1) (1980) (Ont.), *as amended*. Under § 1(1)(ca) of the EPA, "discharge", when used as a verb, includes "add", "deposit", "leak", or "emit". "Contaminant" is broadly defined and means any solid, liquid, gas, odor, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that may cause an adverse effect (§ 1(1)(c)). "Adverse effect" means one or more of (i) impairment of the quality of the natural environment for any use that can be made of it; (ii) injury or damage to property or to plant or animal life; (iii) harm or material discomfort to any person; (iv) adverse effect on the health of any person; (v) impairment of the safety of any person; (vi) rendering any property or plant or animal life unfit for use by man; (vii) loss of enjoyment of normal use of property; and (viii) interference with the normal conduct of business (§ 1(1)(a)).

[72] Ontario Water Resources Act, R.S.O., ch. 361 § 16(1) (1980) (Ont.), *as amended*. "Waters" is defined in the OWRA as a well, lake, river, pond, spring, stream, reservoir, artificial watercourse, intermittent watercourse, ground water or other water or watercourse.

[73] R.S.O., ch. 141, § 14(1) (1980) (Ont.), *as amended*; Ontario Water Resources Act, R.S.O., ch. 361, § 16(2) (1980) (Ont.), *as amended*.

[74] Environmental Protection Act, R.S.O., ch. 141, § 147a (1980) (Ont.), *as amended*; Ontario Water Resources Act, R.S.O., ch. 361 § 75(1) (1980) (Ont.), *as amended*.

[75] Environmental Protection Act Regulations, R.R.O., Reg. 309 (1980) (Ont.), *as amended*.

[76] *Id.* at §§ 8-13.

[77] *Id.* at § 14.

[78] *Id.* at § 15. A "generator" is defined as the operator of a waste generation facility. A "waste generation facility" means the facilities, equipment and operations that are involved in the production, collection, handling or storage of subject waste at a site.

[79] *Id.* at §§ 16-23.

contaminant into the natural environment (other than water) without first obtaining a certificate of approval.[80] An applicant for a certificate of approval may be required to submit plans and to conduct tests with respect to the proposed undertaking.[81] An appeal from a non-issuance of an approval, or of its terms and conditions, can be made to the Environmental Appeal Board, an independent tribunal.

4. Québec

The principal environmental statute in Québec, the Environment Quality Act ("EQA)",[82] stipulates that "[e]very person has a right to a healthy environment and to its protection, and to the protection of the living species inhabiting it . . . ."[83] The Act further provides that a judge of the Québec Superior Court may grant an injunction to prohibit any act or operation which interferes or might interfere with the exercise of a right as set out above.[84]

The EQA prohibits anyone from discharging or allowing the discharge of a contaminant into the environment in a greater quantity or concentration than that provided for in the regulations accompanying the EQA.[85] Where the Québec Minister of the Environment has reasonable grounds to believe that a contaminant is present in the environment in a greater quantity or concentration than that established by regulation, he may order whoever has released or discharged all or some of the contaminant to provide the Ministry with a characterization study, a program of decontamination or restoration of the environment, and a timetable for the execution of the work.[86]

5. New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island

The Canadian Atlantic Provinces each have a principal environmental statute and several related statutes. Like the main environmental statutes in the other provinces, these statutes regulate the discharge of contaminants in the environment by requiring permits for certain discharges and by invoking penalties in the case of others.

In New Brunswick, the main statute is the Clean Environment Act.[87] The Act contains the Air Quality Regulations,[88] which require approval by the Minister of the Environment before a source of air contaminant is constructed or operated. Also contained within the Act are

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80 Environmental Protection Act, R.S.O., ch. 141, § 8(1)(a) (1980) (Ont.), *as amended.*

81 *Id.* at § 8(2).

82 R.S.Q., ch. Q-2 (1977) (Que.), *as amended.*

83 *Id.* at § 19.1.

84 *Id.* at § 19.2.

85 *Id.* at § 20.

86 *Id.* at § 31.42.

87 R.S.N.B., ch. C-6 (1973) (N.B.), *as amended.*

88 N.B. Reg. 83-208, *as amended.*

the Water Quality Regulations,[89] which require similar approval in the case of water contaminants.

In Newfoundland, the Department of Environment Act[90] is the principal environmental statute. It governs such matters as the construction of sewage works and the establishment of air emission regulations. The Waste Material (Disposal) Act[91] establishes rules with respect to waste disposal sites and waste management facilities.

The Environmental Protection Act[92] is the main environmental statute in Nova Scotia. The operation of a facility which discharges waste into the natural environment can only be done if a permit is obtained under this Act.

In Prince Edward Island, the Environmental Protection Act[93] is the main environmental statute. Its purpose is to "manage, protect and enhance the environment."[94] The Act empowers the provincial Minister of Community and Cultural Affairs to take such action as he considers necessary in order to protect such things as all surface, ground and shore waters, sand dunes and beaches.[95]

### *D. Common Law*

In addition to the legislation which exists in order to ensure compliance with environmental standards, there are also a host of remedies available to litigants who wish to seek redress in the civil courts from those who have caused them environmental damage. Indeed, these civil remedies are among the most effective ways of dealing with the interference of the use or enjoyment of one's environment.[96] The main civil causes of action are trespass, nuisance, strict liability and negligence.

### *E. Environmental Assessment*

The purpose of an environmental assessment is to ensure that those persons who wish to undertake significant commercial, business or governmental activities ". . . build into their decision-making process, beginning at the earliest possible point, an appropriate and careful consideration of the environmental aspects of proposed action in order that adverse environmental effects may be avoided or minimized and en-

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89 N.B. Reg. 82-126, *as amended.*

90 S.N., ch. 10 (1989) (Nfld.), *as amended.*

91 S.N., ch. No. 82 (1973) (Nfld.), *as amended.*

92 R.S.N.S., ch. 150 (1989) (N.S.), *as amended.*

93 R.S.P.E.I., ch. E-9 (1988) (P.E.I.), *as amended.*

94 *Id.* at § 2.

95 *Id.* at § 31(1).

96 *See* John Swaigen, *The Role of the Civil Courts in Resolving Risk and Uncertainty in Environmental Law*, 1 J. ENVTL. L. & PRAC. 199 (1990) ("Where legislative reform is slow to respond, the common law provides a tool for dealing with a situation before irreparable damage is done.").

vironmental quality previously lost may be restored."[97]

In Canada, there is both federal and provincial legislation to ensure that projects are undertaken in an environmentally friendly manner. As has been noted, the approval process varies greatly from jurisdiction to jurisdiction across the country.[98]

1. Federal Environmental Assessment

The federal Environmental Assessment and Review Process ("EARP") was established not by legislation, but by Cabinet Directives in 1972 and 1973. Since that time, EARP has undergone substantial modification. It is administered by the Federal Environmental Assessment Review Office ("FEARO"), and applies to all boards, departments, Crown corporations and agencies of the federal government, as well as to all federal projects and activities.[99]

In 1984, EARP was modified by the issuance of the Environmental Assessment and Review Process Guidelines Order (the "Guidelines").[100] The Guidelines declare EARP to be:

> . . . a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.[101]

Under the Guidelines, a proposal may be classified as (a) one which would not produce any adverse environmental effects and that would, accordingly, be excluded from the assessment process; or (b) one which would produce significant adverse environmental effects, and that would be automatically referred to the Minister for public review by a panel.[102]

The Guidelines have long been viewed as being flawed and in need of major revision. However, recent judicial decisions have placed the

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[97] Chelsea Neighborhood Ass'ns. v. United States Postal Service, 389 F. Supp. 1171, 1182 (S.D.N.Y., 1975).

[98] MICHAEL I. JEFFERY, ENVIRONMENTAL APPROVALS IN CANADA § 1.5, at 1.2 (1989). "[T]he extent of the approvals process varies considerably among jurisdictions both in terms of the environment regulated and the manner by which that regulation takes place. The generic term 'environment' often includes the social, economic and cultural environment as well as the natural or biological environment consisting primarily of those resources referred to as the air, land and water."

[99] "The application of EARP is triggered when a federal department, board, agency or Crown corporation initiates a proposal of its own or has the authority to make a decision concerning the proposal of some other organization that: (a) might have an environmental effect on an area of federal government responsibility; (b) would require a federal government financial commitment; or (c) would be undertaken on lands administered by the federal government, including the offshore." *Id.* at § 1.14, at 1.4.

[100] SOR/84-467 (1984) (Can.).

[101] *Id.* at § 3.

[102] *Id.* at § 11.

Guidelines and their effectiveness at the forefront of environmental debate in Canada. The decisions involve the Rafferty/Alameda dam project in Saskatchewan and the Oldman River dam project in Alberta. The controversy surrounding these projects has prompted the federal government to develop changes to the federal environmental assessment process.

On April 10, 1989, the Federal Court of Canada (Trial Division) quashed the license of the Saskatchewan Water Corporation (a Crown corporation) to build the Rafferty and Alameda dams across rivers in Southern Saskatchewan. The federal government had issued the license without applying the provisions of the Guidelines. The court ordered the federal government to comply without the Guidelines before issuing a new license.[103]

This decision was upheld on appeal.[104] The Federal Court of Appeal held that there is nothing in the Guidelines to indicate that they are not mandatory; in fact, the repeated use of the word "shall" throughout the Guidelines indicates that they are binding on those to whom they are directed, including the Minister of the Environment.[105]

Construction of the Rafferty dam was accordingly suspended. The federal Ministry of the Environment then held public meetings as required by the Guidelines and, in August 1989, issued a new license to allow construction of the Rafferty dam to continue.

In December 1989, another action was commenced in the Federal Court to quash the second license and to require the Minister of the Environment to comply with the Guidelines with respect to the Saskatchewan Water Corporation's application for a license under the International River Improvements Act.[106] Mr. Justice Muldoon ruled that Saskatchewan's new license to proceed with construction would be quashed unless a federal environmental assessment review panel was appointed by January 30, 1990.[107]

A review panel was then appointed as required by the Federal Court, but in October 1990, the panel suspended its work amid complaints that Saskatchewan was breaching the terms of reference for the review by continuing downstream excavation work at the Rafferty dam site. The Saskatchewan government alleged that it had an agreement with the federal government to allow construction on the project to go ahead while the review was being completed.

On October 22, 1990, the federal government applied for an injunc-

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[103] Canadian Wildlife Fed'n, Inc. v. Canada (Minister of the Environment), 3 F.C. 309 (1989) (T.D. Can.).

[104] Canadian Wildlife Fed'n, Inc. v. Canada (Minister of the Environment), 4 C.E.L.R. (n.s.) 1 (1989) (Fed. C.A. Can.).

[105] *Id.* at 3.

[106] R.S.C., ch. I-20 (1985) (Can.), *as amended.*

[107] Canadian Wildlife Fed'n Inc. v. Canada (Minister of the Environment), 4 C.E.L.R. 201 (1989) (F.C.T.D. Can.).

tion to stop work on the Rafferty and Alameda dams until the completion of the federal environmental assessment review of the project's impact. On November 15, 1990, the Chief Justice of the Trial Division of the Saskatchewan Court of Queen's Bench denied the federal government's application.[108] He ruled that an injunction cannot be issued against an agent of the Crown (the Rafferty dam is being built by a Saskatchewan Crown Corporation). He also stated that he saw no merit in preventing the continuation of the dam projects in order to preserve a "badly flawed" federal environmental review process.[109]

The federal government appealed this decision. In addition, an appeal is being brought by two individuals before the Federal Court of Appeal to revoke the licenses that were issued for the projects. The Federal Court has heard argument on this appeal and has also reserved its decision.

In Alberta, environmental groups have carried on a fourteen year battle to halt the construction of this dam in Southern Alberta. In March 1990, the Federal Court of Appeal ruled in favor of the Friends of the Oldman River Society and quashed a construction license for the project, because no environmental impact study had been done.[110]

The court followed its earlier decision in *Canadian Wildlife Federation Inc.* and held the EARP Guidelines to be a law of general application, and that federal ministries have a duty to invoke the Guidelines if they have responsibility for making a decision with respect to an activity that may have an environmental effect on an area of federal responsibility.

The effect of this decision was to broaden the application of the EARP Guidelines. It introduced considerable uncertainty by imposing on federal ministers a duty to invoke the EARP Guidelines where a project may have an environmental effect on an area of federal responsibility, even if no federal permit or approval was required.

On appeal, the Supreme Court of Canada substantially restricted the decision of the Federal Court of Appeal. The Supreme Court narrowed the application of the EARP Guidelines, stating that the Guidelines are only applicable when the government has "an affirmative regulatory duty pursuant to an act of Parliament which relates to the proposed project."

The EARP Guidelines are not applicable every time there is a potential environmental effect on a matter of federal jurisdiction. They are applicable only when a federal permit or approval is necessary. The EARP Guidelines may not be used by the federal government to invade areas of provincial jurisdiction.

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108 Canada (Attorney-General) v. Saskatchewan Water Corp., 5 C.E.L.R. (n.s.) 252 (1990) (Sask. Q.B.).

109 *Id.* at 286.

110 Friends of the Oldman River Soc'y v. Canada (Minister of Transport), 2 F.C. 18 (1990) (Can.).

The wide-ranging application of the Guidelines is particularly complex when one takes into account provincial environmental assessment legislation. For example, a project may have to satisfy *both* provincial environmental assessment requirements and the Guidelines. Needless to say, this could significantly increase and possibly duplicate the regulatory requirements that a proponent of a project would have to satisfy. Conversely, opponents of a project now have both a federal and provincial environmental assessment scheme with which to attack a proposed project.[111]

2. Federal Environmental Assessment Reform

In an attempt to bring some order to the uncertainty of the present application of the Guidelines, and in response to the recent court decisions discussed above, the federal government introduced Bill C-78, which has since been renamed Bill C-13.[112] The Bill was tabled in the House of Commons on June 18, 1990, and will create the Canadian Environmental Assessment Act. Commenting on the impact which the new law will have, then Minister of the Environment Robert de Cotret stated:

> A major value of this legislation is that it will bring an end to the uncertainty created by recent court decisions based on the 1984 Guidelines Order. However, I want to emphasize that the new Act will go much further than the original Guidelines. In fact, this legislation and Reform Package will result in an environmental assessment process which is more powerful in its impact on decision-making than any other environmental assessment legislation in the world.[113]

The Canadian Environmental Assessment Act will, for the first time, entrench in federal legislation a comprehensive regime for the monitoring of projects which will have an environmental impact. The new Act will be structured to include the following features: (i) increased accountability to the public for environmental assessments; (ii) improved public participation in all phases of environmental assessments; (iii) the establishment of firm procedural rules; (iv) the promotion of joint panels with provincial jurisdictions to avoid duplication; (v) the introduction of mediation as an option where it is possible to dispense with a full public review panel; (vi) the establishment of follow-up and monitoring plans for major projects; (vii) the creation of a new agency devoted to assisting and advising the Minister of the Environment in the administration of the federal environmental assessment process; and (viii) the creation of special procedures for assessments in relation to such matters as native

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111 The likelihood is that joint federal and provincial reviews will result, although the exact process is subject to some debate.

112 Bill C-13, An Act to establish a federal environmental assessment process, 34th Parl. 38-39 Eliz. II, 2d Sess. (1989-90) (first reading June 18, 1990; second reading October 30, 1990; currently under review by a Special Committee of the House of Commons).

113 Canada, Minister of the Environment, Statement by the Honorable Robert de Cotret introducing the Canadian Environmental Assessment Act (June 18, 1990) (speech, on file with authors).

lands, foreign aid and Crown corporations.[114]

The proposals contained in Bill C-13 may assist in the development of a more orderly federal environmental assessment process than has been seen to date in the Rafferty/Alameda and Oldman River controversies. However, individuals, groups or companies involved in projects that could come within the scope of this process will be interested in watching developments that will affect them as Bill C-13 proceeds through the House of Commons.

### 3. Provincial Environmental Assessment (Ontario)

Many provinces have regimes to govern the way in which environmental assessment is carried out. For the purposes of this article, the authors will only examine the relevant statute in the province of Ontario, given that Ontario has the most extensive and innovative environmental assessment process in Canada.

In Ontario, the relevant legislation is the Environmental Assessment Act.[115] The stated purpose of the Act is "the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment."[116] Whereas the federal environmental assessment process has been described as being most representative of an administrative and informal hearing, the process in Ontario may be characterized as a quasi-judicial proceeding with a more structured system, defined rules of practice, the giving of evidence under oath and the challenging of that evidence under cross-examination.[117]

Under the Act, a proponent of an undertaking must submit to the provincial Minister of the Environment an environmental assessment of the proposed project. The project may not be commenced until the Minister accepts the assessment and gives his approval.[118]

The environmental assessment must contain a detailed description of the undertaking and the purpose for it, alternatives to the undertaking, alternative methods of carrying out the undertaking, description of the environment that will be affected or that might reasonably be expected to be affected, a description of the steps which may have to be taken to mitigate or remedy any possible effects on the environment, and an evaluation of the advantages and disadvantages to the environment of the undertaking.[119]

Upon receipt of the environmental assessment from a proponent, the

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[114] Canada, Minister of the Environment, Federal Government Unveils Environmental Assessment Reform Package (June 18, 1990) (press release, on file with authors).

[115] R.S.O., ch. 140 (1980) (Ont.), *as amended.*

[116] *Id.* at § 2.

[117] JEFFERY, *supra* note 98, at § 1.5, at 1.2-1.10.

[118] Environmental Assessment Act, R.S.O., ch. 140, § 5(1) (1980) (Ont.), *as amended.*

[119] *Id.* at § 5(3).

Minister will review the assessment and will give notice to the proponent, the clerk of each municipality in which the undertaking is proposed to be carried out, and the general public of the receipt and review of the assessment and of the place in which the assessment and review may be inspected.[120] Once such notice has been given, any person may inspect the notice and review, make written submissions to the Minister with respect to the undertaking, assessment and/or review, and require a hearing by the Environmental Assessment Board ("EAB").[121]

The EAB is an independent administrative tribunal established by the Cabinet. The EAB has authority to conduct hearings and render decisions with respect to the approval of environmental assessments.[122] Under the Environmental Assessment Act, the Minister of the Environment is entitled, through counsel or otherwise, to take part in any proceedings before the EAB.[123]

In response to submissions to "level the playing field", the Ontario government enacted the Intervenor Funding Project Act, 1988.[124] The Act provides that a person or group of persons who have been granted status as an intervenor in a proceeding before a board such as the EAB may apply for financial assistance with respect to the hearing before the board. A funding panel is established to conduct a hearing of the application, and may make an award of intervenor funding against the proponent of the undertaking.[125]

Intervenor funding may be awarded only with respect to issues which affect a significant segment of the public, and which affect the public interest and not just private interests.[126] In deciding whether to grant an intervenor financial assistance, the funding panel will consider such factors as whether the intervenor has sufficient financial resources to enable it to adequately represent the interest; whether the intervenor has an established record of concern for and commitment to the interest; and whether the intervenor has a clear proposal for its use of any funds which might be awarded.[127]

Awards under the Act can be significant. In a recent hearing with respect to the future nature of the provision of electric power in Ontario, the funding panel ordered the proponent to pay CAN $27 million to a group of intervenors.

Given the broad mandate of the Environmental Assessment Act and

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120 *Id.* at § 7(1).

121 *Id.* at § 7(2).

122 *Id.* at §§ 18-23.

123 *Id.* at § 18(16).

124 S.O., ch. 71 (1988) (Ont.), *as amended.*

125 *Id.* at § 8.

126 *Id.* at § 7(1).

127 *Id.* at § 7(2). For a discussion of intervenor funding in the environmental process, see Raj Anand & Ian Scott, *Financing Public Participation in Environmental Decision Making*, 60 CAN. B. REV. 81 (1982).

the wide range of powers of the EAB, concern has been expressed over the length and complexity of hearings. Such hearings have imposed inordinate delays and heavy financial burdens on proponents, particularly smaller municipalities and the private sector.

In response to these concerns, an Environmental Assessment Task Force has advanced several recommendations with respect to improving the environmental assessment process in Ontario. These include strict time limits for the review and decision phases of a hearing; mandatory planning and consultation stages with public participation; the ongoing reporting of activities to the Ministry of the Environment; and the preparation of generic guidelines concerning specific types of environmental assessments such as municipal landfills. It is hoped that reforms such as these will make the assessment process more efficient while still providing all interested parties an opportunity to receive a full and fair hearing.

### *F. Canadian Environmental Jurisprudence*

Canadian environmental jurisprudence has evolved dramatically over the past fifteen years. Emerging from relative obscurity, environmental decisions are increasingly finding their way onto the front pages of newspapers across the country.

It would be impossible to give a complete overview of the case law with respect to the environmental legal regime in Canada. Hundreds of cases covering as many environmental subjects do not make for a simple analysis. Nevertheless, some of the most significant jurisprudential developments are worthy of a brief review.

#### 1. Due Diligence as a Defence

One of the leading Canadian cases in the area of environmental law (and, indeed, criminal and quasi-criminal law) is *R. v. Sault Ste. Marie.*[128] The respondent city of Sault Ste. Marie had entered into an agreement with a company for the disposal of all garbage generated in the city. The company was supposed to provide a site, labor and equipment for this purpose. The site bordered a creek which ran into a river. As a result of dumping, both of these watercourses became polluted, and the city was charged under what was then Section 32(1) of the Ontario Water Resources Act.[129]

Writing on behalf of the unanimous nine-member bench, Mr. Justice Dickson, as he then was, thoroughly reviewed the law with respect to what were until that point the only two types of offenses in the field of criminal law: (i) those offenses which are truly criminal and for which the Crown must establish a mental element or *mens rea*; and (ii) absolute

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[128] 2 S.C.R. 1299 (1978) (Can.).

[129] R.S.O., ch. 332, § 32(1) (1970) (Ont.). Section 32(1) provided, *inter alia*, that every municipality or person that discharges, deposits, causes or permits the discharge or deposit of any material of any kind into any river or other watercourse is guilty of an offense.

liability offenses which entailed conviction on proof merely that the defendant committed the prohibited act constituting the *actus reus* of the offense. However, for the court, neither of these two standards was appropriate for public welfare offenses, which include pollution offenses.[130]

After a thorough review of the authorities, Mr. Justice Dickson concluded that there were "compelling grounds for the recognition of three categories of offenses rather than the traditional two."[131] They are (i) offenses which require a full *mens rea*; (ii) offenses of absolute liability; and (iii) offenses of strict liability in which it will be open to the accused to show that he exercised due diligence even though the offense occurred.[132]

Thus, for years following the decision of the Supreme Court of Canada in *Sault Ste. Marie*, it was open for an accused charged with violating a public welfare offense to prove, on the balance of probabilities, that he exercised due diligence. However, the advent of the Canadian Charter of Rights and Freedoms (the "Charter")[133] and a recent decision of the Ontario Court of Appeal have seen a significant amendment to this common law rule.

The Charter provides that any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.[134] In the recent decision of *R. v. Ellis-Don Ltd.*,[135] it was held that the onus established by *Sault Ste. Marie*, that an accused prove, on a balance of probabilities, that he exercised due diligence, violated Section 11(d) of the Charter in a manner that could not be justified under Section 1.[136]

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130 "Public welfare offenses obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent." *See* R. V. Sault Ste. Marie, 2 S.C.R. at 1310 (1978).

131 *Id.* at 1325.

132 Mr. Justice Dickson described the strict liability offenses as follows: "Offenses in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability." *Id.* at 1326. For an analysis of the decision in *Sault Ste. Marie*, see Michael I. Jeffery, *Environmental Enforcement and Regulation in the 1980's: Regina v. Sault Ste. Marie Revisited*, 10 QUEEN'S L.J. 43 (1984); Ann Hutchinson, *Sault Ste. Marie, Mens Rea and the Halfway House: Public Welfare Offenses get a Home of Their Own*, 17 OSGOODE HALL L.J. 415 (1979).

133 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982, U.K., ch. 11 (1982).

134 *Id.* at § 11(d).

135 1 O.R.I.3d 193 (1991) (C.A. Ont.).

136 As stated by Mr. Justice Galligan, "It is now settled that s. 11(d) of the *Charter* implies proof of guilt beyond reasonable doubt. The effect of the onus created by . . . the common law in *Sault Ste. Marie*, to prove the defence of due diligence on the balance of probabilities means that a

However, a recent decision of the Supreme Court of Canada has seen the law revert to what it was after *Sault Ste. Marie*. In *R. v. Wholesale Travel Group Inc.*,[137] the court held that it is not unreasonable to expect an accused to be required to prove, on the balance of probabilities, that he was acting with due diligence. To do otherwise "would effectively eviscerate the regulatory power of government by rendering the enforcement of regulatory offenses impossible in practical terms."[138]

2. Cleanup of Contamination

Unlike the United States, Canada and its provinces do not have "Superfund-type" legislation which provides for the cleanup of environmental contamination. Instead, reliance is placed on orders form both judges and quasi-judicial bodies.

The Divisional Court of Ontario has recently issued a significant decision regarding the liabilities of owners and operators for the cleanup of contamination. In the case of *Northern Wood Preservers v. Ministry of the Environment*,[139] the court limited the scope of an order requiring study of the potential remediation of the site in question to the current operator of the plant. The previous operator of the plant was excluded on factual findings by the Environmental Appeal Board, as upheld by the court.

However, the much more significant finding was the restriction of liability regarding the owner of the site. The site was owned by the Canadian National Railway Company ("C.N.") and was leased to Northern Wood Preservers. The Court found that C.N. was not liable, because it was not an owner of the source of the contaminant. Rather, C.N. owned the soil which was the natural environment into which the contaminant had been discharged. The fact that the contaminant had spread through C.N.'s property into an adjacent harbor made no difference once it had entered the soil on the property.

The Environmental Protection Act of Ontario has subsequently been amended to specifically include previous owners of properties,

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court is required to convict an accused if it is not satisfied on a balance of probabilities that the accused has exercised due diligence even though it may have a reasonable doubt on the issue. It is a commonplace that it is unacceptable for someone to be convicted of an offence when there is a reasonable doubt about guilt . . . . It is a very serious thing indeed to take away the right of an accused to the benefit of a reasonable doubt at the end of the case." *Id.* at 202-203.

137 R. v. Wholesale Travel Group Inc., 67 C.C.C. 193 (1991) (S.C. Can.).

138 *Id.* at 256. Mr. Justice Cory went on to state as follows: "It is difficult to conceive of a situation in which a regulated accused would not be able to adduce *some* evidence giving rise to the possibility that due diligence was exercised. For instance, an environmental polluter would often be able to point to *some* measures it had adopted in order to prevent the type of harm which ultimately resulted. This might raise a reasonable doubt that it acted with due diligence no matter how inadequate those measures were for the control of a dangerous situation. To impose such a limited onus is inappropriate and insufficient in the regulatory context." *Id.*

139 Unreported (May 3, 1991) (Div. Ct. Ont.).

whether or not they caused the contamination.[140] However, that amendment may not deal with the interpretation by the court. The legislation still applies with respect to contaminants discharged into the natural environment rather than contaminated properties directly. The *Northern Woods* decision is under appeal. It also remains to be seen whether there will be any legislative response.

Given the trend in legislation with respect to these types of orders, there appears to be a battle beginning between the legislatures and the courts. There seems to be little doubt that the ultimate intent of the government is t include as many parties as possible as potential deep pockets to pay for cleanups. However, courts have shown that they will interpret such legislation strictly, and will not willingly extend liability any further than is absolutely required by the wording of the legislation. While it may be that we are seeing the beginnings of a Canadian move toward the equivalent of the American "Superfund" legislation, Canadian governments may face significant judicial hurdles in putting that type of legislation into effect.

## III. CONCLUSION

From the above brief overview, it is clear the environmental regulation in Canada is comprehensive in its scope. Several challenges lie ahead in the area of environmental law for the government and for both lawyers and their clients. Among the most significant of these will be the handling and safe disposal of toxic waste, the level of public and intervenor participation in environmental approvals and assessments, and the clean-up and decommissioning of contaminated lands.

Another important challenge for lawyers is the fact that the entire area of environmental law s still in its infancy. To this end, solicitors must constantly keep informed of new developments as they happen. Additionally, in many areas of environmental law, there have been no decisions at all that help resolve basic environmental issues. Indeed, one of the most challenging aspects of the field of environmental legal practice is the inherent uncertainty that exists as a result of a lack of judicial interpretation with respect to many important pieces of legislation.

[140] Environmental Protection Act, R.S.O., ch. 141, § 7 (1990) (Ont.), *as amended.*