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There have been a number of important developments in environmental law that should be of interest to U.S. counsel who are following the Canadian legal scene. This article summarizes selected legislative developments and key court decisions.

Legislative Developments

Canada's Proposed Clean Air Act

On October 19, 2006, the government of Canada introduced Bill C-30, *Canada's Clean Air Act*, which would amend the *Canadian Environmental Protection Act, 1999*,¹ and other statutes in order to address emissions of greenhouse gases ("GHG") and other air pollutants such as SO₂ and NO_x. In conjunction with the announcement of the bill, the government issued a Notice of Intent to Develop and Implement Regulations and Other Measures to Reduce Air Emissions. Highlights of the new strategy include:

- GHG emissions reduction target of 45%–65% from 2003 levels by 2050;
- emissions-intensity standards (i.e., limits on emissions per unit of output rather than fixed caps) for large GHG emitters by 2010;
- harmonization of motor vehicle emission standards with those of the U.S. EPA;
- industry-specific regulations with fixed caps for emissions of smog-causing pollution by 2010;
- national air quality objectives for respirable particulate matter and ozone;
- regulations to reduce emissions of volatile organic compounds ("VOCs") from various consumer and commercial products (e.g., paints and cleaning products);
- working with provinces to create harmonized emissions reporting system; and
- implementing national guidelines on indoor radon.

It is important to note that the bill merely establishes a framework for regulating GHGs and other pollutants. The implications for industry and individuals will not be known until the proposed regulations are

released over the course of the next few years. For example, it remains to be seen whether there will be an emissions trading regime. And this is assuming that the bill even makes it into law—the government currently has a minority in the House of Commons, and the opposition parties have so far given the bill a cool reception.

One thing that seems clear is that the bill would not bring Canada into compliance with its obligations under the Kyoto Protocol (i.e., a 6% reduction of GHG emissions below 1990 levels by the 2008–12 compliance period). The government made no mention of Kyoto in its announcement of the bill. The new strategy, with no overall GHG targets until 2050, encompasses a much longer time horizon than that contemplated under Kyoto. That said, a long-term 45%–65% reduction is not trivial. We will not know until the regulations are unveiled just how the government intends to achieve that target.

Ontario's Environmental Penalty Regime

In June 2005, Bill 133² received Royal Assent and became law in the province of Ontario.³ The bill amended the *Environmental Protection Act*⁴ and the *Ontario Water Resources Act*⁵ (Ontario's key environmental statutes) to allow a Ministry of the Environment ("MOE") regional director to impose financial penalties (known as Environmental Penalties or "EPs") in response to spills, unlawful discharges and other violations. The statutory provisions that relate to EPs will be proclaimed into law following the promulgation of regulations; certain other provisions are already in force.

Bill 133 has a number of features that are of concern for Ontario businesses:

- The EP regime provides for absolute liability for contraventions of environmental law. The legislation provides for significant penalties, with the right to appeal to an administrative tribunal on the issue of quantum. Due diligence is not a defense.
- The MOE is free to issue an EP and to lay charges in relation to the same contravention, exposing offenders to "double jeopardy."
- Spills-reporting requirements have been strengthened to require a spill of a pollutant to be reported to the au-

thorities regardless of whether there is an actual or likely adverse effect.

- Directors and officers face expanded liability and a reverse onus—they have the duty to take all reasonable care to ensure their corporation's compliance with a number of specific regulatory provisions in both the EPA and OWRA, and, once charged, must prove that they have met the requirements of the law.

On October 6, 2006, the MOE released proposed draft regulations and guidance documents that support the implementation of EPs.

EPs will be issued to "regulated persons" for violations set out in the proposed EP regulations. Generally, "regulated persons" are those companies that operate in one of the Municipal Industrial Strategy for Abatement ("MISA") sectors: organic chemical manufacturing, inorganic chemical manufacturing, industrial minerals, electric power generation, pulp and paper, petroleum, metal casting, iron and steel manufacturing, metal mining. Of course, the definition of "regulated persons" may be changed and likely expanded over time. It is proposed that implementation of the EP regulations will take place in two phases. During phase 1, anticipated to begin May 1, 2007, EPs will only be issued in respect of unlawful discharges to water or land. Phase 2, which would come into force 18 months later, would introduce EPs for violations related to constructing works, conditions of operation, sampling, reporting and record-keeping violations.

The draft regulations and guidance documents detail an elaborate scheme to determine the quantum of the EP. An EP is comprised of a gravity component (the portion that relates to the seriousness of the violation) and a monetary benefit component (the portion that relates to financial benefits resulting from avoiding or delaying costs associated with not complying with legal requirements).

- **Monetary benefit component:** The method for determining monetary benefit is described in a separate draft document entitled "Procedure for the Calculation of the Monetary Benefit Component of Environmental Penalties."

- **Gravity component:** The gravity component of an EP amount is calculated using a gravity matrix assessment approach, where the MOE director will consider the “type” of violation that has occurred and its “seriousness.” The “seriousness” of a violation will in part depend on whether the violation relates to a “toxic substance.” The MOE has issued a draft guidance document entitled “Procedure Governing the Determination of Whether a Contaminant is a ‘Toxic Substance.’” The gravity component of the EP can be reduced if the regulated person took preventive actions or had an environmental management system. It may also be reduced if the regulated person and the director enter into a settlement agreement. A settlement agreement would require the regulated person to take steps beyond those required by law to prevent, eliminate or reduce the discharge of a contaminant into the natural environment from the industrial plant.

Bill 133 establishes a special purpose account (“SPA”) into which revenue from EPs will be deposited. The draft regulations propose that the money in the SPA be used to provide financial assistance to persons or bodies who undertake environmental restoration and rehabilitation projects, research and development projects, education and outreach programs.

The MOE has released two additional draft regulations: *Spill Prevention and Contingency Plans Regulation*, and amendments to the *Classification and Exemption of Spills Regulation* (O. Reg. 675/98). The first applies to persons covered by the EP regulation, requiring them to develop and implement spill-prevention and contingency plans for their facilities. The draft regulation sets out the specific information that must be included in such plans. It is proposed that these requirements will take effect the later of February 1, 2008, and the first date a plant is in operation. The *Classification and Exemption of Spills Regulation* applies to all persons required to give notice of a spill or unlawful discharge, and provides for reporting exemptions for certain spills that are covered by spill-prevention and contingency plans, as long as the discharge is not to water, is not deliberate, is in a quantity less than the reportable

threshold specified in the plan, does not cause an adverse effect and is remediated. This regulation also sets out specific information that must be provided for all spills notifications, including the pollutant name, quantity, location, date, time and any adverse effects that were caused or may be caused by the discharge.

Businesses within Ontario and their counsel will have to grapple with these recent developments. While Bill 133 does not apply outside Ontario, it is being followed with interest in other Canadian provinces. Ontario’s decision to enact legislation authorizing EPs has important implications for the rest of Canada, as it may indicate a trend toward enforcing compliance through administrative penalties rather than through prosecution.

Case Law Developments

Cross-Border Environmental Liability

The *Pakootas v. Teck Cominco Metals, Ltd.* decision of the U.S. District Court for the Eastern District of Washington is of importance to environmental law practitioners on both sides of the border. Teck Cominco owns and operates a smelter in Trail, British Columbia, about 15 kilometers north of the border to the U.S. The U.S. EPA issued an order to Teck Cominco requiring it to investigate and determine the extent and nature of contamination in the U.S. portion of the Columbia River caused by its disposal of metals into that river. Initially, Teck Cominco and the EPA tried to settle the issues without resorting to the courts.

However, when little progress was made, the Confederated Tribes of the Colville Reservation brought a legal action against Teck Cominco to enforce the order. Teck Cominco brought a motion to dismiss the action. The district court refused to dismiss the action in a decision dated November 8, 2004. The district court acknowledged that federal or state legislation is presumed not to have extraterritorial application. However, the Superfund’s intent was to remedy “domestic conditions.” Where “domestic conditions” are caused by activities outside the U.S., the Superfund law can extend outside the U.S. and into Canada. The court stated:

In other words, plaintiffs are not attempting to tell Canada how to regulate defendant’s disposal of hazardous substances into the Columbia

River, simply that they expect defendants to assist in cleaning up a mess in the United States which has allegedly been caused by those substances. Plaintiffs’ use of CERCLA is not intended to supersede Canadian environmental regulation of the defendant. Canada’s environmental laws are intended to protect Canadian territory, including the ten miles from Trail, B.C., to the U.S. border. Those laws do nothing to remedy the damage that has already occurred in U.S. territory as a result of the defendant’s disposal of hazardous substances into the Columbia River.

Teck Cominco appealed to the U.S. Court of Appeals for the Ninth Circuit. On July 3, 2006, the court of appeals affirmed the decision of the district court, effectively extending the reach of U.S. law to Canadian companies that are alleged to have caused pollution in the U.S. even when their activities take place entirely within Canada.

This case leaves unanswered a number of questions. What if Teck Cominco does not comply with the U.S. EPA order? Will Canadian courts enforce the order? If U.S. companies cause environmental impacts in Canada, can we expect to see similar action from Canadian regulators?

Companies operating in Canada and the U.S. would be prudent to assess the potential cross-border impacts of their operations and consider the extent to which regulatory authorities and other individuals and groups in bordering countries could undertake enforcement and assert claims under their domestic law.

Environmental Class Actions

There has been considerable activity in the area of environmental class actions in Canada in the past year. Historically, Canadian courts have acknowledged that class proceedings can be important vehicles in pursuing environmental claims but were nonetheless reluctant to certify such proceedings. The tide appears to be changing, although of course, the statutory criteria for certifying a class must always be met.

Ontario

In late 2005, the Ontario Court of Appeal agreed to certify the class in *Pearson v. Inco Ltd.*⁶ The defendant operated a

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nickel-processing refinery in Port Colborne that released nickel oxide for over half a century into the Port Colborne environment. Inco's refinery emitted some 20,000 tons of nickel oxide into the air. In 2000, the Ontario Ministry of the Environment released a report in which it stated that Inco had discharged contaminants that posed a risk to the natural environment and to human health. The plaintiffs alleged that the report had a major impact on property values in the Port Colborne area. Initially they also claimed a variety of health effects as a result of the contamination.

Both the Superior Court of Justice and the divisional court refused to certify the action as a class proceeding, concluding that the statutory criteria in the *Class Proceedings Act, 1992*,⁷ were not met (i.e., no identifiable class, a class proceeding was not the preferable vehicle, and the representative plaintiff could not represent the class effectively). However, the Ontario Court of Appeal concluded otherwise, in large part as a result of the fact that the plaintiffs had abandoned their claims of adverse human health effects. As the lawsuit was limited to loss of property value, the court of appeal was more inclined to certify the class proceeding. Inco was denied leave to appeal to the Supreme Court of Canada. While this decision breathes new life into environmental class actions for property damage in Ontario, it remains to be seen whether courts will certify claims for health effects where individual questions of causation may need to be determined.

Quebec

In the province of Quebec, the court of appeal rendered its decision in *Paquin v. Compagnie de chemin de fer Canadien Pacifique*⁸ also in late 2005. The court of appeal reversed a Superior Court decision denying leave to bring a class action seeking damages and an injunction against Canadian Pacific Railway on behalf of residents of Outremont, a Montreal neighborhood, as a result of alleged abnormal neighborhood annoyances caused by the operation of a marshalling yard.

The court of appeal held that the plaintiffs' burden at this stage of the proceedings was merely to demonstrate that their claims raise similar questions of law or fact and that these questions are serious. The court also concluded that the

other three criteria for a class action were met—i.e., the plaintiffs' claims raise identical, similar or related questions of law or fact, the composition of the group makes the application of Article 59 or 67 of the *Code of Civil Procedure* (permitting individuals with a common interest to join actions) difficult or impracticable, and the representative plaintiff can represent the members of the class adequately.

Alberta

Two recent decisions from Alberta are also instructive on the issue of class certifications: *Windsor v. Canadian Pacific Railway*⁹ and *Paron v. Alberta (Environmental Protection)*.¹⁰ The court certified the class in *Windsor* but not in *Paron*, decisions that were released only days apart.

In *Paron*, the court denied certification because the members' interests could not be represented adequately through class proceedings. The proposed class was seeking damages and an injunction in relation to thermal pollution of Wabamun Lake. Some of the proposed class members wanted the water level in the lake to be increased, but this would flood other proposed class members' properties. This is an undesirable result and as such, a class action was not the preferable vehicle. The presiding judge noted:

Success for one class member must mean success for all; all members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. If one class member is successful on a common issue, either all class members are successful or some class members are indifferent to that issue. There is no common issue if success for one member of the class means loss for another.

The court decided that a class proceeding would not advance the proposed class members' claims fairly or efficiently.

In *Windsor*, neighbors of a Canadian Pacific Railway ("CPR") rail yard successfully applied to have their class action certified. CPR had used trichloroethylene ("TCE") at the yard for many years. When CPR discovered TCE in the groundwater, it notified the neighbors and began extensive remediation. The neighbors sued,

claiming lost property value, property damage, utility costs, inconvenience and exemplary damages.

The proposed class comprised property owners within proposed class boundaries in the vicinity of the rail yards. The Alberta court concluded that all of the elements required for a class proceeding to be certified existed. Certification does not depend on whether the claim is likely to succeed. Rather, it depends on whether the suit is appropriately prosecuted as a class action.

Defense of Officially Induced Error

The Supreme Court of Canada released a decision confirming that the defense of officially induced error is available as a defense to regulatory charges. In *Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec Inc.*,¹¹ the corporate accused was charged with operating a motor vehicle without having paid registration fees. The company raised the defense of officially induced error, alleging that it was told by an employee of the Société de l'assurance automobile du Québec that it would receive a renewal notice prior to expiration of the registration period. The notice was never received, the registration fees went unpaid, and charges were laid.

While ignorance of the law is no excuse, courts have accepted a limited exception to this rule where the accused relies on the erroneous advice of a state official. As Lamer C.J.C. noted in *R. v. Jorgensen*:¹²

Officially induced error of law exists as an exception to the rule that ignorance of the law does not excuse. As several of the cases where this rule has been discussed note, the complexity of contemporary regulation makes the assumption that a responsible citizen will have a comprehensive knowledge of the law unreasonable. This complexity, however, does not justify rejecting a rule which encourages a responsible citizenry, encourages government to publicize enactments, and is an essential foundation to the rule of law. Rather, extensive regulation is one motive for creating a limited exception to the rule that *ignorantia juris neminem excusat*.

Until this case, however, the Supreme Court had never explicitly accepted the defense of officially induced error, although lower courts had already recognized the defense.

The Supreme Court confirmed that officially induced error will be available as a defense where the accused can prove the following six elements on a balance of probabilities:

- an error of law or of mixed law and fact was made;
- the person who committed the act

considered the legal consequences of his or her actions;

- the advice obtained came from an appropriate official;
- the advice was reasonable;
- the advice was erroneous; and
- the person relied on the advice in committing the act.

If these six elements are met, an accused will be entitled to a stay of proceedings rather than an acquittal. The court will consider other factors as well, including “the efforts made by the accused to obtain

information, the clarity or obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definitiveness and reasonableness of the information or opinion.”

In this particular case, the Supreme Court of Canada held that on the facts, the corporate accused had not established the six elements of the defense. The case is instructive and helpful, however, for future cases involving reliance on official advice, including in the defense of environmental prosecutions. ■

¹ S.C. 1999, c. 33.

² Bill 133, *Environmental Enforcement Statute Law Amendment Act*, 1st Sess., 38th Leg., Ontario, 2005 (assented to June 13, 2005, S.O. 2005, c. 12).

³ In Canada, the key environmental statutes and enforcement occur at the provincial level. Federal environmen-

tal law is concerned primarily with toxic substances, import and export of hazardous substances and wastes and federally regulated activities and industries (such as airports, inter-provincial transportation and nuclear power plants).

⁴ R.S.O. 1990, c. E.19 (“*EPA*”).

⁵ R.S.O. 1990, c. O.40 (“*OWRA*”).

⁶ [2005] O.J. No. 4918 (Ont. C.A.).

⁷ S.O. 1992, c. 6.

⁸ [2005] Q.C.C.A. 1109.

⁹ [2006] A.B.Q.B. 348 (“*Windsor*”).

¹⁰ [2006] A.B.Q.B. 375 (“*Paron*”).

¹¹ [2006] S.C.J. No. 12.

¹² [1995] 4 S.C.R. 55.



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