The Canadian Environmental Legal Regime: A Road Map for the Foreign Investor

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INTRODUCTION

What are we to do? It is axiomatic that we as individuals or groups of individuals share territory in resources. We need to define common norms of behaviour. This is true whether we are speaking of a family, small town, a province or country, or the world community. However, the definition of common norms of behaviour is not in itself sufficient for the creation of a body of rules and regulations.

To operate effectively, certain basic conditions must be fulfilled: the existence of a general will among members of the community to accept and adhere to regulations; the existence of a political framework not only for defining and quantifying common behaviour or norms, but also for adopting existing rules to change within the community; a means of determining compliance with international rules and regulations; and, finally, the means for enforcement.¹

Never before have the nations of the world been so preoccupied with the state of the environment. In response to the sense of a growing environmental crisis, governments have endeavoured to respond to the concerns of their constituents by enacting environmental legislation and regulations at an unprecedented rate and are prosecuting polluters with more vigour than ever. In addition, civil environmental
lawsuits are becoming more and more common in courtrooms around the world.

The result has been a proliferation of environmental laws to the extent that one needs a road map to work through the legal maze of any jurisdiction. Canada is no exception to this recent phenomenon. Governments at all levels in Canada have placed the environment among their top priorities. As the general population becomes more aware of the fragile state of the environment and more insistent that offenders of environmental laws be held accountable, government activity in this area is sure to increase.

Because the environment has become such an important issue, anyone wishing to undertake a business venture must be fully informed of what the relevant environmental laws allow and prohibit. The foreign investor, who is not likely to be familiar with the Canadian environmental legal regime, will especially want assurance that the project in which he has invested significant time, energy, and money is in compliance with all applicable laws, to the extent possible.

The purpose of this article is to provide the potential foreign investor and the general reader with a broad overview of the Canadian environmental legal regime. The authors recognize that it is clearly impossible to thoroughly discuss such a vast subject in a single article. It is hoped, however, that the topics discussed will allow the reader to understand what further research may be needed in areas of specific interest. Thus, what has been sacrificed in detail will hopefully be compensated for by the breadth of the discussion.

To this end, the paper first includes a brief review of foreign investment in Canada and the current investment priorities of the government. Next, the environmental regime in Canada will be examined. The constitutional basis for environmental legislation will be analyzed. Also, the principal pieces of federal and provincial legislation will be canvassed in an attempt to show the wide variety of activities that are regulated. The authors then review the principal bases for commencing a civil environmental lawsuit in Canada. The important areas of environmental assessment and environmental packaging and labelling guidelines will also be covered. Additionally, selected major developments in Canadian environmental caselaw will be canvassed. Finally, some conclusions will be drawn and some suggestions will be offered for potential foreign investors who wish to ensure that their investments remain secure.
I. FOREIGN INVESTMENT IN CANADA: A BRIEF OVERVIEW

A. Recent History of Investment in Canada

In Canada, the late 1960s and early 1970s witnessed a fundamental re-thinking of the extent of foreign investment and its concomitant benefits and disadvantages. In 1963, the Liberal Party was elected to power and brought to the government strongly held nationalistic ideals. The advent of the Liberals signaled a noticeable shift towards protectionism in foreign investment. The government began to move away from a position of "benign acquiescence" to one of "systematic screening and interventionism."²

 Eventually, the beliefs of those in power were translated into action. The government introduced numerous pieces of legislation to increase Canadian ownership and control of business enterprises. Measures included amendments to the tax system and the limiting of foreign ownership of banks, trust companies, newspapers and periodicals, and other institutions.³ However, the most significant piece of legislation enacted was the Foreign Investment Review Act (FIRA).⁴

FIRA's stated purpose was to ensure, *inter alia*, that non-Canadians acquire control of Canadian business enterprises and establish

². R. Bothwell, I. Drummond & J. English, Canada Since 1945: Power, Politics, and Provincialism 415 (1981) [hereinafter R. Bothwell]. The political debate over the level of foreign investment had been raging in Canada throughout the 1960s. One of the most outspoken critics of increased foreign investment in Canada was Walter Gordon, the Minister of Finance in the Liberal government of Lester B. Pearson. Gordon was extremely concerned over the amount of foreign (and especially United States) direct investment in Canada. He advocated greater Canadian control over industry in Canada. His most notable work on the subject was W. Gordon, Troubled Canada: The Need for New Domestic Policies (1961). For a similar point of view on the subject, see K. Levitt, Silent Surrender (1970).


⁴. Ch. 46, 1973-1974 Can. Stat. 1. Enacted by the Liberal government of Pierre Trudeau, FIRA was largely the result of two major studies conducted under the auspices of the federal government: Ottawa, Privy Council Office, Report of the Task Force on the Structure of Canadian Industry, Foreign Ownership and the Structure of Canadian Industry (January 1968); Ottawa, Information Canada, Canada, Foreign Direct Investment in Canada (1972) (more commonly known as "The Gray Report"). With its recommendations that the government intervene more forcefully in areas such as takeovers, licensing and franchising, new foreign-owned enterprises, and investments by existing foreign-owned enterprises, the ardently nationalistic Gray Report was the real driving force behind the creation of FIRA. See R. Bothwell, *supra* note 2, at 416.
new businesses in Canada "only if it has been assessed that the acquisition of control of those enterprises or the establishment of those new businesses . . . is or is likely to be of significant benefit to Canada."5

Whether or not FIRA ever succeeded in fulfilling its mandate is questionable. Often referred to as a paper tiger, many believe that FIRA was nothing more than a harmless regulatory agency which actually did more to promote foreign investment in Canada than prevent it.6

In 1984, the Liberal government of John Turner was defeated by the Progressive Conservatives under the leadership of Brian Mulroney. Soon after his election victory, Prime Minister Mulroney gave a speech to the Economic Club of New York in which he declared that Canada was once again open for business with the rest of the world.7 Shortly after this speech, on June 30, 1985, the Investment Canada Act (ICA)8 was proclaimed in force by the Canadian government. The following day, FIRA was repealed and the ICA became the only Canadian law of general application for reviewing foreign investment.9

The stated purpose of the ICA stands in sharp contrast to that of FIRA. Where as FIRA was created as a response to the growing alarm about the level of foreign investment in Canada, the ICA recognizes that increased capital and technology will benefit Canada. Thus the stated purpose of the ICA is to "encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities and to provide for the review of significant investments in Canada by non-Canadians in order to ensure such benefit to Canada."10

The ICA differs from FIRA in a number of other respects. One of the most significant is the creation of monetary thresholds as prerequisites of the reviewability of a proposed investment. For example,

5. Foreign Investment Review Act, § 2(1). The criteria to be considered when determining whether a proposed foreign investment would be acceptable included the following: (a) the effect on economic activity in Canada, including the effect on unemployment, on resource processing, on the utilization of parts, components, and services produced in Canada; (b) the degree and significance which Canadians would have in the proposed enterprise; (c) the effect of the acquisition or enterprise on technological development, product innovation, and productivity in Canada; (d) the effect on competition within any Canadian industries; and (e) the compatibility of the acquisition or enterprise with national and provincial industrial and economic policies. Id. § 2(2).


10. Investment Canada Act, § 2.
when enacted, the ICA stipulated that the direct acquisition of a Canadian business by a non-Canadian was reviewable only if the assets of the acquired business entity had a value of $5 million or more.\(^\text{11}\) If the assets of the acquired business were worth less than $5 million, the non-Canadian acquirer had only to notify Investment Canada\(^\text{12}\) of the acquisition.\(^\text{13}\) Since the enactment of the ICA, these thresholds have been increased.\(^\text{14}\) Practically speaking, this eliminates the review procedure for approximately 90% of acquisitions and new business establishments by non-Canadians.\(^\text{15}\)

**B. Investment Priorities of the Canadian Government**

The Mulroney government has been guided in its approach to investment in Canada by two primary considerations: (i) a commitment to stimulating investment, encouraging the transfer of ideas and technology, creating employment, and fostering entrepreneurship; and (ii) the firm belief that investment in its broadest sense is critical if Canada is to remain competitive.\(^\text{16}\) The government has stated that the level of business investment in Canada must increase if Canada is to become more internationally competitive.\(^\text{17}\)

Nevertheless, despite the direct correlation which the government has drawn between investment and competitiveness, the ICA recognizes the need for retaining the right to intervene at any time "to ensure that foreign control of major economic and culturally sensitive activities is in the Canadian interest."\(^\text{18}\) These culturally sensitive activities include the publication, distribution, exhibition, and

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11. Id. \(\S\) 14(3)(a).
12. Investment Canada is the government department set up under the ICA to regulate foreign investment in Canada.
13. Investment Canada Act, \(\S\) 11.
14. In 1988, the ICA was amended to provide, \textit{inter alia}, that if a Canadian business is acquired by an American or by a non-Canadian other than an American, where the Canadian business that is the subject of the investment is, immediately prior to the implementation of the investment, controlled by an American, that acquisition is reviewable only if the assets of the acquired business have a value of: (a) \$25 million if the investment was implemented in 1989; (b) \$50 million if the investment was implemented in 1990; (c) \$100 million if the investment is implemented in 1991; (d) \$150 million if the investment is implemented in 1992; and (e) at any time in each year after 1992, an amount for that year equivalent to \$150 million in constant 1992 dollars. Id. \(\S\) 14.
17. Id. at 3.
18. Id.
sale of the following: (i) books, magazines, periodicals, or newspapers; (ii) film or video products; and (iii) audio or video music recordings.19

With respect to the publishing and distribution industry, the government announced that it will review all proposed projects involving the initiation of new book publishing or distribution companies or the acquisition, directly or indirectly, of existing firms operating in the field. The government will only allow the direct foreign acquisition of Canadian publishing companies if the investment is made through a joint venture with Canadian control.20 Indirect foreign acquisitions21 will be permitted provided: (i) the acquisition does not significantly lessen effective competition by Canadians in any segment of the Canadian market for books; and (ii) the acquiring company undertakes to divest control to Canadians within two years at a fair market price.22

Other limitations on foreign investment are found in the areas of banking,23 broadcasting,24 insurance,25 trust companies,26 and loan companies.27 Additionally, some provinces have laws which limit the amount of foreign ownership in certain business activities. The limitations vary from province to province and span such areas as the acquisition of agricultural land and the ownership of nursing homes.28

19. Id. at 4. On July 6, 1985, the Minister of Communications issued a policy statement regarding foreign investment in the book publishing and distribution industry. The Minister noted that despite the fact that the estimated value of Canada’s internal publishing and book distribution market was $1.1 billion (in 1985), only 18% of the English language books and only 26% of the French language works sold, came from publishing houses controlled by Canadians. The minister of communication also noted that during the preceding 10 years, the profit margins of small and medium-sized businesses in publishing and distribution had remained unchanged or had deteriorated. Practically speaking, Canadian publishing houses were publishing and distributing 85% of original works by Canadian authors and receiving only 20% of the revenues emanating from the domestic market. Id. at 20-21.

20. Id. at 21.

21. An indirect foreign acquisition is one in which a foreign company acquires another foreign company which has a Canadian company as a subsidiary.


23. Canadian banks can have no more than 25% foreign ownership. Foreign-owned banks operating in Canada are limited as a group to 16% of the total domestic assets of the entire Canadian banking system. INVESTMENT POLICY, supra note 16, at 5.

24. Foreign ownership in facilities such as television stations, radio stations, and networks of stations is limited to 20%. Id.

25. Non-resident ownership in an existing Canadian-owned life insurance company is limited to 26% of the aggregate. Shareholdings by individual non-residents are limited to 10%. Id.

26. Foreign ownership is limited to 25% of the capital stock. No single foreign shareholder may own more than 10% of the capital stock. Id.

27. The limits on foreign ownership of loan companies are the same as those for trust companies. Id.

28. Id.
II. THE CANADIAN ENVIRONMENTAL LEGAL REGIME

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 to be “supreme within its own defined sphere and area.” The federal and provincial heads of power are delineated by sections 91, 92, and 92A of the Constitution Act, 1867.

However, the environment 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 “aggregate[s] of matters, which come within various classes of subjects, some within federal jurisdiction and others within provincial jurisdiction.”

1. Federal Jurisdiction

The federal government derives its authority to create environmental legislation from several subsections of section 91 of the Constitution Act, 1867. Perhaps the most important of these is section 91(27) which deals with the criminal law, including procedure in criminal matters. The federal government can also legislate with...
respect to a wide array of environmental matters through its jurisdiction over navigation and shipping, fisheries, federal lands, and lands reserved for native peoples. It has even been noted that the federal taxing power 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."

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.

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." The provinces are also given the power to legislate on the management and sale of provincial land and the timber and wood thereon, municipal institutions, and "generally all matters of a merely local or private nature in the province." Like the federal government, the provinces also have the power to raise taxes and thus encourage environmental friendliness through tax incentives. In fact, it is the proper sphere of the provincial legislature by simply adopting the guise or disguise of criminal legislation."

See also Boggs v. The Queen [1981] 1 S.C.R. 49, 60.

33. Constitution Act, 1867, § 91(10).
34. Id. § 91(12).
35. Id. § 91(1A).
36. Id. § 91(24).
37. Id. § 91(13).
38. P. Hogg, supra note 29, at 599.
39. In the case Re: Anti-Inflation Act, [1976] 2 S.C.R. 373, 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 Lederman, Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation, 1975 CAN. B. REV. 597, 610; see also P. Hogg, supra note 29, at 392.
40. P. Hogg, supra note 29, at 599. For example, the court held in Ontario that a provincial law prohibiting the emission of contaminants was validly enacted. See Regina v. Lake Ontario Cement, [1973] 2 O.R. 247 (H.C.).
41. Constitution Act, 1867, § 92(5).
42. Id. § 92(8).
43. Id. § 92(16).
44. Id. § 92(2).
provinces which 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

The Canadian Environmental Protection Act (CEPA), which took effect on June 30, 1988, 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. Although there are several others, CEPA is the federal government’s main environmental statute.

In short, CEPA is divided into a number of broad categories which are defined either by their function or by their focus. Sections one through six describe the title of the statute, describe the administrative duties of the government of Canada, set out a series of interpretive definitions, establish that the statute is binding on both federal and provincial crowns, and provide for the establishment of advisory committees.

Part I of CEPA, entitled “Environmental Quality Objectives, Guidelines and Codes of Practice,” 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.

Part II of CEPA deals with the issue of toxic substances. After defining “toxic substances” in a broad manner, Part II provides for
the establishment of a number of lists of domestic, toxic, prohibited and hazardous substances.\textsuperscript{54} Part II of the statute also deals with the information functions, notices to the Minister concerning substances and controls on the communication, and disclosure of information for specific purposes of this statute and by way of application of the Access to Information Act.\textsuperscript{66} Part II also deals with the release of toxic substances,\textsuperscript{66} the import and export of toxic substances and waste materials,\textsuperscript{67} and the regulation of fuels production and use in Canada.\textsuperscript{68}

Part III of CEPA is concerned with the broad category of nutrients which includes cleaning agents and water conditioners.\textsuperscript{69} The power to create prohibitions and regulations with respect to these chemicals is also established.\textsuperscript{69}

Part IV of the Act deals with the category of federal departments, agencies, Crown corporations, works, undertakings, and lands.\textsuperscript{61} Part IV provides for the creation of regulations for these federal activities.\textsuperscript{62} It also deals with the handling of plans and specifications pursuant to which federal 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.\textsuperscript{63}

Part V of CEPA covers international air pollution. It replaces the old Clean Air Act.\textsuperscript{64} Part V 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.\textsuperscript{65} Part V also provides for equivalency agreements to be entered into as between the federal government and the government of any province or territory.\textsuperscript{66}

Part VI of the statute deals with oceans and dumping\textsuperscript{67} and replaces the former Ocean Dumping Control Act.\textsuperscript{68} It has its own interpretational and definitional sections and prohibits the dumping of

\textsuperscript{54} These substances are set out in a schedule appended at the end of the statute.\textsuperscript{Id. Schedule I.}
\textsuperscript{56} Canadian Environmental Protection Act, §§ 36-40.
\textsuperscript{57} Id. §§ 41-45.
\textsuperscript{58} Id. §§ 46-47.
\textsuperscript{59} See id. § 49.
\textsuperscript{60} Id. §§ 49-50.
\textsuperscript{61} See id. §§ 52-60.
\textsuperscript{62} Id. § 54.
\textsuperscript{63} Id. §§ 52-60.
\textsuperscript{64} R.S.C. ch. C-32 (1985).
\textsuperscript{65} See Canadian Environmental Protection Act, § 61(2).
\textsuperscript{66} Id. §§ 61-65.
\textsuperscript{67} See id. §§ 66-72.
\textsuperscript{68} R.S.C. ch. 0-2 (1985).
substances into the ocean without a special permit. 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. Most significantly, Part VI provides for the detention of ships where offences have occurred and for the seizure and forfeiture of ships or cargo in the case of dumping offences.

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.

Maximum potential penalties under CEPA are substantial. For example, anyone who fails to give reasonable assistance to an inspector, or who misleads or obstructs an inspector in the performance of his duties under the Act, faces a maximum sentence of $200,000 and six months in jail. Anyone who manufactures or imports a substance which is known to be prohibited under the Act faces a maximum sentence of $1,000,000 and three years in jail. Every person who "intentionally or recklessly causes a disaster that results in a loss of the use of the environment is guilty of an indictable offence and is liable to a fine," imprisonment for up to five years, or both.

2. Fisheries Act

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." Furthermore, it is an offence to deposit or permit the deposit of any type of deleterious substance in water frequented by fish. The "depositing" aspect of the offence is concerned with direct acts of pollution. The "permitting" aspect of

69. Section 68 of the Canadian Environmental Protection Act does provide, however, that dumping without a permit is allowed if it is necessary to avoid danger to human life or to a ship or plane.
70. Id. § 76.
71. Id. § 77.
72. Id. §§ 66-86.
73. Id. § 87.
74. Id. § 89.
75. Id. §§ 140-49.
76. Id. § 111.
77. Id. §§ 113(d), (p).
78. Id. §§ 115(1)(a).
80. Id. § 35(1).
81. Id. § 36(3).
the offence occurs when there is a passive lack of interference or a failure to prevent an occurrence which ought to have been foreseen.\textsuperscript{82}

If a person wishes to engage in any work which may result in the disruption or destruction of a fish habitat or desires to deposit a deleterious substance in water frequented by fish, that individual must provide the Minister with plans, specifications, studies, and details of the proposed procedures.\textsuperscript{83} Upon reviewing these, the Minister can order changes to the plan.\textsuperscript{84}

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 immediately notify the Ministry.\textsuperscript{85} 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.\textsuperscript{86}

Penalties for contravening the provisions of the Fisheries Act are significant. First time offenders are subject to a maximum fine of $50,000 for each day that there is a violation. Repeat offenders face a maximum fine of $100,000 per day. 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. 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 occurred to remedy the effects of a violation of the Fisheries Act\textsuperscript{87} and to compensate licensed commercial fishermen for all loss of income.\textsuperscript{88}

If there is an unauthorized deposit of a deleterious substance in water frequented by fish, the persons who own, manage, control, or have charge of the substance 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.\textsuperscript{89}

3. \textit{Canada Shipping Act}

The Canada Shipping Act\textsuperscript{90} is a voluminous statute that regulates the business of shipping in Canada. Pursuant to the Act, "any person or ship that discharges a pollutant in contravention of any regulation
made pursuant to” the Act is liable on summary conviction to a maximum fine of $250,000.\textsuperscript{91} Regulations enacted under the Canada Shipping Act establish criteria for such things as fuel, ballast, and the safe handling of cargo.\textsuperscript{92} Authorized officials may board any ship in Canadian waters and fishing zones.

Any ship carrying a cargo of more than 2,040 tonnes of oil must have sufficient insurance to cover the costs of any spill.\textsuperscript{93} The Canada Shipping Act includes provisions 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 owed may be paid by the International Oil Pollution Compensation Fund or the Canadian Ship-Source Oil Pollution Fund.\textsuperscript{94}

4. Transportation of Dangerous Goods Act

The Transportation of Dangerous Goods Act\textsuperscript{98} 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 “all containers, packaging and means of transport comply with all applicable prescribed safety standards and display all applicable prescribed safety marks.”\textsuperscript{96} Those persons caught handling, transporting, or offering to transport dangerous goods without satisfying all necessary requirements face a maximum fine of $50,000 for a summary conviction of a first offence and $100,000 for a summary conviction of each subsequent offence.\textsuperscript{97} If the Crown elects to proceed by way of indictment, the maximum penalty is one year in prison.\textsuperscript{98}

An important aspect of the Transportation of Dangerous Goods Act for company officials is the provision which stipulates that if a corporation commits an offence, any officer, director, or agent of the

\textsuperscript{91} R.S.C. ch. 6, § 84 (3d Supp. 1985).
\textsuperscript{92} Oil Pollution Prevention Regulations, CAN. CONS. REGS. ch. 1454, Part III (1978). Other regulations promulgated under the Canada Shipping Act deal with such matters as smoke emissions from a ship’s stack and the discharge of sewage into the Great Lakes. See Air Pollution Regulations, CAN. CONS. REGS. ch. 1404 (1978); Great Lakes Sewage Pollution Prevention Regulations, CAN. CONS. REGS. ch. 1429 (1978); Garbage Pollution Prevention Regulations, CAN. CONS. REGS. ch. 1424 (1978).
\textsuperscript{94} See generally Canada Shipping Act, R.S.C. ch. S-9, §§ 673-723.
\textsuperscript{96} Id. § 4.
\textsuperscript{97} Id. § 6(1)(a).
\textsuperscript{98} Id. § 6(1)(b).
corporation who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence is liable to punishment, whether or not the corporation is prosecuted or convicted. 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, the inspector can seize the goods, containers, or means of transport if the inspector feels it necessary to do so in order to prevent or reduce danger to life, health, property, or the environment.

5. Arctic Waters Pollution Prevention Act

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

The AWPPA provides that "no person or ship shall deposit or permit the deposit of waste of any type in the arctic waters or in any place on the mainland or islands of the Canadian arctic under any
conditions where the waste or any other waste that results from the deposit of the waste may enter arctic waters. There is an obligation to report a deposit of waste or a danger thereof. 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.

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, the Hazardous Products Act, the Navigable Waters Protection Act, the Migratory Birds Convention Act, and the Pest Control Products Act.

C. Provincial Legislation

There are numerous Canadian provincial and territorial statutes which are concerned, directly or indirectly, with the protection of the environment. An examination of all of these statutes 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. It defines waste in a broad manner and prohibits the introduction of waste into the environment in such a manner or quantity as to cause pollution. “Pollution” is defined as “the presence in the environment of substances or contaminants

103. Id. § 4(1).
104. Id. § 5(1).
105. Id. § 6.
111. For an excellent summary of provincial and federal environmental legislation in Canada, see D. Saxe, ENVIRONMENTAL OFFENCES: CORPORATE RESPONSIBILITY AND EXECUTIVE LIABILITY 209-31 (1990).
113. Id. § 1.
114. Id. § 3(2).
that substantially alter or impair the usefulness of the environment.”

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

Penalties under the Waste Management Act are substantial. For example, if a person has obtained a permit to discharge waste into the environment and discharges into the environment without complying with the requirements of the permit, that person faces a maximum penalty of $1,000,000. If a person is found to have intentionally caused damage to the environment, or to have shown reckless and wanton disregard for the lives or safety of persons which creates a risk of death or harm to those persons, the maximum fine is $3,000,000.

Other environmental statutes in British Columbia include the Environment Management Act, the Health Act, the Pesticide Control Act, and the Litter Act.

2. Alberta, Saskatchewan, and Manitoba

The main environmental statutes in Alberta are the Clean Air Act and the Clean Water Act. 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 licence for the operation. 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 licences are required for the construction and operation of anything which is likely to produce water pollution. This includes everything from

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115. Id. § 1(1).
116. Id. § 3(2)(a). Waste includes effluent, air contaminants, and litter. Id. § 1(1).
117. Id. § 34(5).
118. Id. § 34.2.
119. Ch. 14, 1981 B.C. Stat. Under § 5(2) of this act, the provincial Minister of the Environment may, when he considers that there is an environmental emergency, formally declare an environmental emergency and “order any person to provide labour, services, material, equipment or facilities or to allow the use of land for the purpose of preventing, lessening or controlling the hazard presented by the emergency.”
123. ALTA REV. STAT. ch. C-12 (1980).
125. Clean Air Act, §§ 3-5.
126. Id.
sewers and waste treatment facilities to pulp and paper plants.\textsuperscript{128}

In Saskatchewan, the main environmental statute is the Environmental Management and Protection Act.\textsuperscript{129} Under the Environmental Management and Protection Act, no person shall, without a permit, cause or allow 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.\textsuperscript{130} Permits may be issued subject to terms and conditions. The Municipal Refuse Management Regulations\textsuperscript{131} have been enacted pursuant to this Act and govern the establishment of waste disposal sites.\textsuperscript{132}

Other important environmental statutes in Saskatchewan include the Air Pollution Control Act\textsuperscript{133} and the Dangerous Goods Transportation Act.\textsuperscript{134} Additionally, there are the Water Pollution Control and Waterworks Regulations\textsuperscript{135} which regulate the operation of sewage works.

In Manitoba, the Environment Act\textsuperscript{136} is the main provincial environmental statute. The purpose of the Environment 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."\textsuperscript{137} Pursuant to the Environment Act, licences are required for all major projects.\textsuperscript{138} Additionally, the Environment Act creates the Clean Environment Commission, whose duties include conducting public meetings, hearings, and investigations into specific environmental concerns and acting as a mediator between two or more parties to an environmental dispute.\textsuperscript{139}

Other environmentally related statutes include the Dangerous

\textsuperscript{128} Id. § 3(1).
\textsuperscript{130} Id. § 17.
\textsuperscript{132} See id. § 3.
\textsuperscript{133} SASK. REV. STAT. ch. A-17 (1978).
\textsuperscript{134} Ch. D-1.2, 1984-1986 Sask. Stat.
\textsuperscript{137} Id. § 1(1).
\textsuperscript{138} Id. §§ 10(1), 11(1), 12(1).
\textsuperscript{139} Id. §§ 6(1), (5).
Goods Handling and Transportation Act, the Pesticides and Fertilizers Control Act, and the Public Health Act.

3. Ontario

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

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 likely to cause an adverse effect.” 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 or any waters is guilty of an offence.” It has been noted that the burden of proof on the prosecutor is lower under section 16(1) of the OWRA than under section 13(1) of the EPA because under the OWRA “it is not necessary for the Crown to prove that an adverse effect occurred, or was likely, as a result of the discharge.”

Both the EPA and the OWRA contain mandatory self-reporting...
provisions. These provisions require persons to immediately notify the Ontario Ministry of the Environment if they discharge or cause or permit the discharge of a contaminant into the natural environment (EPA) or any material into any waters, or on any shore, or in any place that might impair the quality of any waters (OWRA).\textsuperscript{150}

The EPA provides that "[e]very director [or] officer of a corporation that engages in an activity that may result in the discharge of a contaminant into the natural environment contrary to this Act has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful discharge."\textsuperscript{151} Failure to exercise such due diligence is an offence.\textsuperscript{152}

One of the most important regulations promulgated under the EPA is Regulation 309\textsuperscript{153} 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,\textsuperscript{154} the management of asbestos waste,\textsuperscript{155} registration requirements for "generators,"\textsuperscript{156} documentation requirements for waste generators and waste carriers, and for the transportation of waste into, out of, and within Ontario.\textsuperscript{157}

Under the EPA, a person may not construct, alter, or replace any plant, structure, mechanism, equipment, or thing that may discharge a contaminant into the natural environment (other than water) without first obtaining a certificate of approval.\textsuperscript{158} An applicant for a certificate of approval may be required to submit plans and to conduct tests with respect to the proposed undertaking.\textsuperscript{159} 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.

Among the other environmentally related statutes in Ontario are the Pesticides Act,\textsuperscript{160} the Gasoline Handling Act,\textsuperscript{161} the Municipal

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\textsuperscript{150} Environmental Protection Act, § 14(1); Ontario Water Resources Act, § 16(2).
\textsuperscript{151} Environmental Protection Act, § 14a(1).
\textsuperscript{152} Id. § 14a(2).
\textsuperscript{153} Environmental Protection Act Regulations, ONT. REV. REGS. Reg. 309 (1980).
\textsuperscript{154} Id. §§ 8-12.
\textsuperscript{155} Id. § 14.
\textsuperscript{156} Id. § 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.
\textsuperscript{157} Id. §§ 16-23.
\textsuperscript{158} Environmental Protection Act, § 8(1)(a).
\textsuperscript{159} Id. § 8(2).
\textsuperscript{160} ONT. REV. STAT. ch. 376 (1980).
Act,\textsuperscript{162} and the Conservation Authorities Act.\textsuperscript{163}

4. Quebec

The principal environmental statute in Quebec, the Environment Quality Act (EQA),\textsuperscript{164} 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."\textsuperscript{165} The EQA further provides that a judge of the Quebec 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.\textsuperscript{166}

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.\textsuperscript{167} If the Quebec 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 programme of decontamination or restoration of the environment, and a timetable for the execution of the work.\textsuperscript{168}

Other relevant statutes in Quebec include the Pesticides Act,\textsuperscript{169} the Public Health Protection Act,\textsuperscript{170} and the Transport Act.\textsuperscript{171}

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 invoking penalties in the case of others.

In New Brunswick, the main statute is the Clean Environment

\begin{thebibliography}{9}
\bibitem{161}
\bibitem{162}
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\bibitem{165}
\textit{Id.} § 19.1.
\bibitem{166}
\textit{Id.} § 19.2.
\bibitem{167}
\textit{Id.} § 20.
\bibitem{168}
\bibitem{169}
Ch. 29, 1987 Que. Stat.
\bibitem{170}
\bibitem{171}
\end{thebibliography}
The Clean Environment Act contains the Air Quality Regulations which require approval by the Minister of the Environment before a source of air contaminant is constructed or operated. Also contained within the Clean Environment Act are the Water Quality Regulations which require similar approval in the case of water contaminants. Regulations promulgated under the Clean Environment Act also include the Petroleum Product and Storage Handling Regulation and the Pulp and Paper Industry Emission Regulation.

Additional environmental statutes in New Brunswick include the Endangered Species Act and the Ecological Reserves Act.

In Newfoundland, the Department of Environment Act 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 establishes rules with respect to waste disposal sites and waste management facilities.

The Environmental Protection Act 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. Other relevant statutes include the Water Act and the Dangerous Goods Transportation Act.

In Prince Edward Island, the Environmental Protection Act is the main environmental statute. Its purpose is to "manage, protect and enhance the environment." The Environmental Protection Act empowers the provincial Minister of Community and Cultural Affairs to take such action as he considers necessary in order to protect

174. See generally id. § 3.
175. N.B. Reg. 82-126 (1982).
176. See generally id. § 3.
182. See id. § 24.
184. See id. § 5 (power of Minister to establish rules).
189. Id. § 2.
such things as all surface, ground, and shore waters, sand dunes, and beaches.\textsuperscript{190} Other environmentally related statutes include the Public Health Act\textsuperscript{191} and the Water and Sewerage Act.\textsuperscript{192}

6. The Yukon and Northwest Territories

Both the Yukon and the Northwest territories have a statute called the Area Development Act.\textsuperscript{193} Each of these statutes provides for the creation of development areas which are regulated by a Commissioner.\textsuperscript{194} Additionally, the federal Northern Inland Waters Act\textsuperscript{195} regulates all activities, in both territories, which involve the use of water resources. Licences for such activities are required.\textsuperscript{196}

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. These civil remedies are among the most effective ways of dealing with the interference of the use or enjoyment of one's environment.\textsuperscript{197} Four of the main common law causes of action with respect to civil environmental litigation are discussed below.

1. Trespass

The common law offence of trespass to land involves the entering upon another's land without lawful justification\textsuperscript{198} or the placing of some material object on the land of another without the legal right to do so.\textsuperscript{199} The interference must be intentional and direct.\textsuperscript{200} It is difficult to succeed in an action based on trespass because of the evidentiary burden of proving intention on the part of the defendant.

\textsuperscript{190} Id. § 3(1).
\textsuperscript{191} P.E.I. REV. STAT. ch. P-30 (1988).
\textsuperscript{193} Area Development Act, YUK. REV. STAT. ch. 9 (1986); Area Development Act, N.W.T. REV. STAT. ch. A-8 (1988).
\textsuperscript{194} YUK. REV. STAT. ch. 9, § 3(1); N.W.T. REV. STAT. ch. A-5, § 2(1).
\textsuperscript{196} Id. § 11.
\textsuperscript{199} Mann v. Saulnier, 19 D.L.R.2d 130 (N.B.C.A. 1959).
\textsuperscript{200} It has been said that consequential injury is not a trespass. Thus, if a person builds a fence which, months later, bends under the weight of snow and causes damage to the property of another, no action in trespass will lie because such damage is consequential and not direct. See 32 C.E.D. (Ont. 3d) 142-35, at § 1 (June 1992). See also Southport Corp. v. Esso Petroleum Co. Ltd., [1954] 2 Q.B. 182, 195-96 (C.A.).
 Often, a trespass to land occurs as a result of an isolated incident. However, at common law there can be a continuing or continuous trespass. “This occurs when there is a repetition of acts or omissions of the same kind as that for which the original action was or could have been brought.”

2. Nuisance

Nuisance has been described as a “field of liability” because it describes a type of harm that is suffered rather than a type of prohibited activity.

In general, a nuisance is an unreasonable interference with the use and enjoyment of land by its occupier or with the use and enjoyment of a public right to use and enjoy public rights of way. For the most part, whether the intrusion resulted from intentional, negligent or non-faulty conduct is of no consequence, as long as the harm can be categorized as a nuisance.

The common law makes it very clear that one may not use his property in a manner that is detrimental to another. This principal is embodied in the Latin maxim *sic utere tuo ut alienum non laedas.*

The most common examples of nuisance are those in which the defendant, through his activities, interferes with the plaintiff’s use and enjoyment of his land by producing such things as noise, smoke, odours and noxious fumes.

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201. G. Fridman, *The Law of Torts in Canada* 13 (1989). Thus, in the case of Hole v. Chard Union, [1894] 1 Ch. 293, the plaintiffs were successful in their action against the defendants for having discharged sewage and refuse into a stream which ran directly through the plaintiff’s property. *Id.* at 293. The pollution continued for three years after the original judgment. *Id.* at 294. It was held that the plaintiffs had a continuing cause of action and damages were assessed for the entire duration of the pollution. *Id.* at 296.


203. *Id.*

204. It was equally well expressed by Mr. Justice Taschereau in Chandler Electric Co. v. H.H. Fuller & Co., 21 S.C.R. 337, 339 (1892): “[The law] will not permit anyone, even on his own land, to do an act, lawful in itself, which yet, being done in that place, necessarily does damage to another.”


In *Groat v. City of Edmonton*, Mr. Justice Rinfret stated, 

The right of a riparian proprietor to drain his land into a natural stream is an undoubted common law right, but it may not be exercised to the injury and damage of the riparian proprietor below, and it can afford no defence to an action for polluting the water in the stream. Pollution is always unlawful and, in itself, constitutes a nuisance.

In *K.V.P. Co. Ltd. v. McKie*, the plaintiffs were lower riparian owners whose waters had been polluted by the discharges from the defendant pulp and paper mill situated upstream. Both the trial judge and the Ontario Court of Appeal found for the plaintiffs and the defendant appealed to the Supreme Court of Canada. In a unanimous decision, the Court dismissed the appeal and reiterated the fact that "[t]he rights of riparian owners have always been zealously guarded by the [c]ourt."

Nuisance can be public or private. Essentially, the difference between public and private nuisance lies in the size of the interest which is affected. If a discharge of smoke or toxic fumes is so massive as to affect an entire neighbourhood, an action in public nuisance will usually lie. A public nuisance has been defined as

a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

However, it has been judicially noted in Canada that what constitutes a public nuisance to the many may also be a private nuisance to the few.

3. **Strict Liability and the Rule in *Rylands v. Fletcher***

An English case from the 1860s is the cornerstone of a civil cause of action frequently used in environmental litigation. In *Rylands v. Fletcher*, the defendants had constructed a water reservoir on their land for the purpose of supplying water to their mills. The plaintiff operated a coal mine on property that was separated from...
the defendants' land by intervening property.\textsuperscript{219} Unbeknownst to the defendants, a mine shaft ran underneath the ground on which the reservoir was situated.\textsuperscript{220} The shaft also ran underneath the intervening land and was connected to the plaintiff's mine.\textsuperscript{221} When the reservoir burst the plaintiff's mine was flooded.\textsuperscript{222}

In finding the defendants liable, Mr. Justice Blackburn stated what was to become a fundamental rule of law:

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is \textit{prima facie} answerable for all the damage which is the natural consequence of its escape.\textsuperscript{223}

This statement of the law was reaffirmed in the House of Lords by Lord Cranworth who stated that if a person brings or accumulates on his land anything which might cause damage to his neighbour if it should escape, then that person is responsible if the thing escapes, no matter how careful he may have been and despite all precautions which he may have taken.\textsuperscript{224}

However, in a concurring opinion, Lord Cairns added a qualifier to the rule. He stated that in order for a defendant to be found liable, the use of the defendant's land must have been "non-natural."\textsuperscript{225} Just what constitutes a "non-natural" use of land has been the subject of judicial and scholarly debate ever since.\textsuperscript{226} One of the most useful comments on point was made by Lord Moulton in \textit{Richards v. Lothian},\textsuperscript{227} wherein he stated as follows:

It is not every use to which land is put that brings into play that principle [of \textit{Rylands v. Fletcher}]. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of land or such a use as is proper for the general benefit of the community.\textsuperscript{228}

In Canada, the rule in \textit{Rylands v. Fletcher} has been used in a wide variety of circumstances, such as the indoor storage of gasoline

\begin{itemize}
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id.
\item \textsuperscript{222} Id. at 332.
\item \textsuperscript{223} L.R. 1 Ex. at 279.
\item \textsuperscript{224} L.R. 3 H.L. 330, 340 (1866).
\item \textsuperscript{225} Id. at 339.
\item \textsuperscript{227} [1913] A.C. 263.
\item \textsuperscript{228} Id. at 280.
\end{itemize}
in drums,\textsuperscript{229} the use of explosives,\textsuperscript{230} the death of a cow caused by arsenic from a smelter,\textsuperscript{231} the escape of sewage,\textsuperscript{232} and the use of an airplane to spray herbicide resulting in damage to neighbouring crops.\textsuperscript{233}

Importantly, liability under the rule in \textit{Rylands v. Fletcher} is only strict and not absolute. Accordingly, a defendant may avoid liability by showing that the event in question occurred: (i) because of an act of God; (ii) with the plaintiff's consent or default; (iii) because of the deliberate act of a third person; or (iv) pursuant to legislative authority.

\section*{4. Negligence}

If a plaintiff suffers damage from the activities of the defendant, he can allege negligence on the part of the defendant. In order to succeed, the plaintiff must show that the defendant owed him a duty of care, that the defendant failed to fulfill that duty, that the plaintiff suffered damages as a result, and that the damages are not remote.

For example, in one case the defendants were found to have been negligent when an improperly constructed sewer resulted in the contamination of the plaintiff's well.\textsuperscript{234} In another case, the defendant municipality had been using organic matter as landfill in a residential neighbourhood.\textsuperscript{235} As the matter decomposed, it generated methane gas.\textsuperscript{236} The gas escaped into the plaintiff's garage and began to accumulate.\textsuperscript{237} Later, the plaintiff started his car in the garage,\textsuperscript{238} An explosion ensued, damaging both car and garage, and injuring the plaintiff.\textsuperscript{239} The judge found for the plaintiff based on the negligence of the defendant.\textsuperscript{240}

\begin{itemize}
\item \textsuperscript{229} Chamberlin v. Sperry, [1934] 1 D.L.R. 189 (Man. K.B.).
\item \textsuperscript{231} Cairns v. Canada Refining Co., 6 O.W.N. 562 (C.A. 1914).
\item \textsuperscript{232} Lawrysyn v. Town of Kipling, 50 W.W.R. 430 (Sask. Q.B. 1964), aff'd, 55 W.W.R. 108 (Sask. C.A. 1965).
\item \textsuperscript{233} Mihalchuck v. Ratke, 57 D.L.R. 2d 269 (Sask. Q.B. 1966).
\item \textsuperscript{235} Gertsen v. Municipality of Metro. Toronto, [1974] 2 O.R. 2d 1, 2-3 (H.C.J.).
\item \textsuperscript{236} \textit{Id.}
\item \textsuperscript{237} \textit{Id.} at 3.
\item \textsuperscript{238} \textit{Id.}
\item \textsuperscript{239} \textit{Id.}
\item \textsuperscript{240} \textit{Id.} at 27-28. It is important to note that the Judge also found for the plaintiff on the basis of nuisance and the rule in \textit{Rylands v. Fletcher}. \textit{Id.} at 36.
\end{itemize}

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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 environmental quality previously lost may be restored."\(^{241}\)

In Canada, there is both federal and provincial legislation to ensure that projects are undertaken in an environmentally friendly manner. As previously noted, the approval process varies greatly from jurisdiction to jurisdiction across the country.\(^{242}\)

I. 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, and to all federal projects and activities.\(^{243}\)

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242. [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.

M. JEFFERY, ENVIRONMENTAL APPROVALS IN CANADA § 1.5 at 1.2 (1989).

243. 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. § 1.14 at 1.4.
In 1984, EARP was modified by the issuance of the Environmental Assessment and Review Process Guidelines Order (Guidelines). 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.

Under the Guidelines, a proposal may be classified in two ways. The first type of proposal would not produce any adverse environmental effects and would accordingly be excluded from the assessment process. The second type of proposal would produce significant adverse environmental effects and would be automatically referred to the Minister for public review by a panel.

The Guidelines have long been viewed as being flawed and in need of major revision. However, two recent decisions by the Federal Court of Canada have placed the Guidelines and their effectiveness at the forefront of environmental debate in Canada. The two cases 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 licence 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 licence without applying the provisions of the Guidelines. The Court ordered the federal government to comply with the Guidelines before issuing a new licence.

This decision was upheld on appeal. The Federal Court of Appeal held that nothing in the Guidelines indicates 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.

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244. SOR/84-467, § 1 (June 22, 1984), reprinted in 118 Canada Gazette 2794 (No. 14, Nov. 7, 1984).
245. Id. § 3.
246. Id. § 11(a).
247. Id. § 11(b).
249. Id. at 327.
250. Id. at 327-28.
252. Id. at 3.
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 licence to allow construction of the Rafferty dam to continue.

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

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 breached 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 this construction on the project to go ahead while the review was being completed.

On October 22, 1990, the federal government applied for an injunction 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. 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.

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 licences 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 favour of the "Friends of the Oldman River Society" and quashed a construction licence for the project because no environmental impact study had been done.\textsuperscript{257} The court followed its earlier decision in \textit{Canadian Wildlife Fed'n, Inc.} The court held that the EARP Guidelines are a law of general application and that federal ministers have a duty to invoke the Guidelines if they have responsibility for making a decision on an activity that may environmentally affect an area of federal responsibility.\textsuperscript{258} An appeal to the Supreme Court of Canada was heard, but as of the writing of this article, no decision has been released.

The legal battles over these projects in Alberta and Saskatchewan have created an uncertain federal regulatory climate for environmental matters by turning what were previously considered to be only guidelines for environmental assessment into mandatory laws requiring such assessments. The above-mentioned decisions illustrate the perils involved for any government activity that purports to be carried out without addressing the Guidelines.

The Guidelines can be read very broadly to encompass a variety of activities, including activities carried on by someone other than a federal government agency. For example, the Rafferty/Alameda and Oldman River dam projects were initiated and constructed by provincial governments or agencies. Because various federal licensing requirements had to be met by these agencies, the courts ruled that the projects were governed by the Guidelines. However, the Guidelines may even apply to projects which do not require the federal government to make a decision on licensing or some other regulatory activity if the project affects an area of federal responsibility.

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 \textit{both} provincial environmental assessment requirements and the Guidelines. 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.\textsuperscript{259}

\textsuperscript{257} Friends of the Oldman River Soc'y v. Canada (Minister of Transp.), [1990] 2 F.C. 18 (C.A.).
\textsuperscript{258} \textit{Id.} at 33-34.
\textsuperscript{259} The likelihood is that joint federal and provincial reviews will result, although the exact process is subject to some debate.
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,\textsuperscript{260} the federal government introduced Bill C-78, which has since been renamed Bill C-13.\textsuperscript{261} 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 as follows:

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.\textsuperscript{262}

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 lands, foreign aid, and Crown corporations.\textsuperscript{263}

Recently, the federal government issued a list of the types of

\textsuperscript{260} See supra notes 248-58 and accompanying text.


\textsuperscript{262} Honourable Robert de Cotret, Minister of the Environment, statement introducing the Canadian Environmental Assessment Act (June 18, 1990).

\textsuperscript{263} Canada, Minister of the Environment Release, Federal Government Unveils Environmental Assessment Reform Package 1-2 (June 18, 1990).
projects which will likely require a comprehensive environmental assessment. Some of the projects which fall in this category are those which involve: (i) the damming or diversion of rivers with an average annual flow of more than 100 cubic metres per second; (ii) the creating or affecting of an artificial lake, reservoir, or wetland with an area greater than 300 hectares; (iii) offshore production development in marine or fresh water; (iv) significant amounts of oil, natural gas, or liquefied petroleum gas; (iv) asbestos mines; (v) the construction of a military base; (vi) certain types of pulp and paper mills; and (vii) permanent facilities for the storage, treatment, incineration, or disposal of hazardous waste, including biomedical and infectious waste. The list, however, is not exhaustive and Bill C-13 gives the federal Minister of the Environment overriding authority to require any project to be subject to the environmental assessment process.

At all stages of the process, the project is to be assessed to determine if it is likely to cause significant and adverse environmental effects. If it is judged that the project is likely to cause significant and adverse environmental effects, the project must be rejected unless the effects can be mitigated or justified in the circumstances.

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, only the relevant statute in the province of Ontario will be examined because Ontario has the most extensive and innovative environmental assessment process in Canada.

In Ontario, the relevant legislation is the Environmental Assessment Act. The stated purpose of the Environmental Assessment 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." Whereas the federal environmental assessment process has been described as being most representative of an administrative and informal hearing, the process

265. ONT. REV. STAT. ch. 140 (1980).
266. Id. § 2.
in Ontario may be characterized as a quasi-judicial proceeding with
a more structured system, defined rules of practice, the giving of evi-
dence under oath, and the challenging of that evidence under cross-
examination.267

Under the Environmental Assessment Act, a proponent of an un-
dertaking 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.268

The environmental assessment must contain a detailed description
of the undertaking and the purpose for it, alternatives to the under-
taking, alternative methods of carrying out the undertaking, a
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.269

Upon receipt of the environmental assessment, the Minister will
review the assessment and 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 assess-
ment and the place in which the assessment and review may be in-
spected.270 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, or review, and require a
hearing by the Environmental Assessment Board (the EAB).271

The EAB is an independent administrative tribunal established by
the Cabinet which has authority to conduct hearings and render de-
cisions with respect to the approval of environmental assessments.272
Under the Environmental Assessment Act, the Minister of the Envi-
ronment is entitled, through counsel or otherwise, to take part in any
proceedings before the EAB.273

In response to submissions to “level the playing field,” the Ontario
government enacted the Intervenor Funding Project Act, 1988.274

267. M. Jeffery, supra note 242, at §§ 1.2-1.10.
269. Id. § 5(3).
270. Id. § 7(1).
271. Id. § 7(2).
272. Id. §§ 18-23.
273. Id. § 18(16).
The Intervenor Funding Project 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 for the hearing before the board.277 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.278

Intervenor funding may be awarded only for issues which affect a significant segment of the public and which affect the public interest and not just private interests.277 In deciding whether to grant financial assistance to an intervenor, 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.278

Awards under the Intervenor Funding Project Act can be significant. In a recent hearing on the future nature of the provision of electric power in Ontario, the funding panel ordered the proponent to pay $27,000,000 to a group of intervenors.

Given the broad mandate of the Environmental Assessment Act and 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.

275. Id. § 3.
276. Id. § 8.
277. Id. § 7(1).
278. Id. § 7(2). For a discussion of intervenor funding in the environmental process, see Anand & Scott, Financing Public Participation in Environmental Decision Making, 60 Can. B. Rev. 81 (1982).
F. Environmental Labelling and Advertising

A positive effect of the environmental crisis has been the growing awareness among Canadians that, more than ever, it is imperative that people act in an environmentally conscious manner. One of the most significant ways in which the general public can accomplish this is by purchasing “environmentally friendly” products. The various sectors of the marketplace have been quick to seize upon consumers’ desires for products and packages which place the least possible burden on the environment. The result has been a proliferation of “green” products on the shelves of stores across the country.279

The Ministry of Consumer and Corporate Affairs realized that “this market dynamic is predicated on the availability of objective, credible and truthful information which can be readily acquired and understood”280 and “[w]ith the emergence of a broad range of descriptors, logos, vignettes and other representations used to describe or imply environmental features of consumer products, action [was] required to ensure responsible labelling and advertising.”281 In conjunction with a broad range of interest groups, industries, and environmental groups, the Ministry of Consumer and Corporate Affairs has therefore issued a set of guidelines for environmental labelling and advertising.

The federal initiative contains the following four guiding principles:

1) Industry is responsible for ensuring that any claims and/or representations are accurate, and in compliance with the relevant legislation.
2) Consumers are responsible, to the extent possible, for appropriately using the information made available to them in labelling and advertising, thereby enhancing their role in the marketplace.
3) Environmental claims and/or representations that are ambiguous, vague, incomplete, misleading, or irrelevant, and that cannot be substantiated through credible information and/or test methods should not be used.
4) Claims and/or representations should indicate whether they are related to the product or the packaging materials.282

The guidelines establish principles for the use of such terms as “recyclable,” “recycled,” and “biodegradable.”283 Vague phrases,

280. CANADA, CONSUMER AND CORPORATE AFFAIRS, GUIDING PRINCIPLES FOR ENVIRONMENTAL LABELLING AND ADVERTISING 4 [hereinafter GUIDING PRINCIPLES].
281. Id.
282. Id. at 7.
283. See id. at 9-12.
such as "environmentally friendly" and "green," are not looked upon with favour, and persons contemplating their use are urged to use "extreme caution and ensure that such generalized statements are made explicit by providing specific product or packaging characteristics that set out the reason for the claimed benefit." The guidelines also cover the use of environmental logos.

The labelling and advertising guidelines have not been introduced without criticism. One critic, the executive director of the Canadian Advertising Foundation, has warned that the guidelines will not be taken seriously by industry or its advertising agencies because there is no provision for penalties for those who do not comply. However, in setting out the guiding principles, the government and contributing organizations explicitly accept that this is but "a first step in addressing the consumer information issues relating to environmental labelling and advertising" and recognize that the guidelines will have to be reviewed and updated on a periodic basis.

G. Canadian Environmental Jurisprudence

Canadian environmental jurisprudence has evolved dramatically over the past 15 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 caselaw 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 Regina v. Sault Ste. Marie. The respondent city of Sault Ste. Marie had entered into an agreement with a company for the disposal of all

284. Id. at 8. The example given in the document is "Environmentally Friendly - 95% post-use recycled materials." Id.
285. See id. at 9.
287. GUIDING PRINCIPLES, supra note 280, at 5.
garbage generated in the city.\textsuperscript{289} The company was supposed to provide a site, labour, and equipment for this purpose.\textsuperscript{290} The site bordered a creek which ran into a river.\textsuperscript{291} 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 Commission Act.\textsuperscript{292}

According to the law at that point, the only types of offences in the field of criminal law were: (i) those offences which are truly criminal and for which the Crown must establish a mental element or \textit{mens rea},\textsuperscript{293} and (ii) absolute liability offences which entailed conviction on proof merely that the defendant committed the prohibited act constituting the \textit{actus reus} of the offence.\textsuperscript{294} However, for the court, neither of these two standards was appropriate for public welfare offences which include pollution offences.\textsuperscript{295}

After a thorough review of the authorities, Mr. Justice Dickson, writing on behalf of the unanimous nine-member bench, concluded that there were “compelling grounds for the recognition of three categories of offences rather than the traditional two.”\textsuperscript{296} The three categories are: (i) offences which require a full \textit{mens rea}; (ii) offences of absolute liability; and (iii) offences of strict liability for which the accused may show that he exercised due diligence even though the offence occurred.\textsuperscript{297}

\begin{itemize}
\item \textsuperscript{289} \textit{Id.} at 1299.
\item \textsuperscript{290} \textit{Id.}
\item \textsuperscript{291} \textit{Id.}
\item \textsuperscript{292} \textit{Id.} Section 32(1) of the Ontario Water Resources Commission Act provided “that every municipality or person that discharges, or deposits, or causes, or permits the discharge or deposit of any material of any kind into any water course . . . is guilty of an offense.” \textit{Id.} The section has been replaced by § 16(1) of the current Ontario Water Resources Act. \textit{See supra} note 144 and accompanying text.
\item \textsuperscript{293} [1978] 2 S.C.R. at 1309.
\item \textsuperscript{294} \textit{Id.} at 1310.
\item \textsuperscript{295} Id.
\item \textsuperscript{296} \textit{Id.} at 1325.
\item \textsuperscript{297} \textit{Id.} at 1325-26. Justice Dickson described the strict offences as follows: Offences in which there is no necessity for the prosecution to prove the existence of \textit{mens rea}; the doing of the prohibited act \textit{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
\end{itemize}
2. Distribution of Legislative Powers for Environmental Offences

As discussed above, the Constitution of Canada divides legislative powers between the federal and provincial governments. Recently, the Supreme Court of Canada considered the question of whether section 4(1) of the Ocean Dumping Control Act, which provides that no person shall dump any substance into the sea except in accordance with the terms and conditions of a permit, was beyond the powers of the federal Parliament because it covered waters wholly within the territory of a province.

In the case of Regina v. Crown Zellerbach Canada Ltd., the Court held, by a majority of four to three, that the relevant section was validly enacted federal legislation under the POGG power. Writing on behalf of the majority, Mr. Justice LeDain held that marine pollution, "because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole."

Since the judgment, the Ocean Dumping Control Act has been repealed and replaced by Part VI of CEPA. Nevertheless, the decision has provided the federal government with a window of opportunity (if only a small one) to use its POGG power to legislate in a greater variety of environmental matters.

3. Sentencing

One of the seminal Canadian cases regarding sentencing in Canada is Regina v. United Keno Hill Mines Ltd. The case involved a mining company which pled guilty to an offence of depositing waste in Yukon waters contrary to the Northern Inland Waters Act. Accordingly, it was only necessary for the judge to determine the appropriate sentence. The ensuing judgment of Chief Justice Stuart is


298. See supra notes 29-31 and accompanying text.
301. Id. at 402. See supra note 39 and accompanying text.
303. See supra note 68 and accompanying text.
305. Id. at 44. Northern Island Waters Act, R.S.C. ch. 28, § 6(1) (1st Supp.)
one of the most thoroughly reasoned reviews of the factors which should be considered when sentencing an accused for environmental offences. The decision is still widely referred to today by judges across the country.

One of the points which Chief Justice Stuart discussed at length was the ineffectiveness of corporate fines in ensuring environmental compliance by corporations.\textsuperscript{306} He firmly believed that "[f]ines alone will not mould law abiding corporate behaviour;"\textsuperscript{307} therefore, the corporate managers should also be prosecuted.\textsuperscript{308} According to Chief Justice Stuart, "[a]fter a few corporate presidents are prosecuted, it is likely senior executives will make it their business to know what all subordinates are doing and effective policies and checks against illegal activities will be implemented."\textsuperscript{309}

More recently, the sentence imposed by the Ontario Court of Justice (Provincial Division) in \textit{Crowe v. The Queen}\textsuperscript{310} made history in Canada. It marked the first time in Canada that a polluter was imprisoned for having committed an environmental offence.\textsuperscript{311}

The accused individual, the company president, and his company were convicted of knowingly having buried 185 barrels of liquid industrial waste on the lands of the accused.\textsuperscript{312} The drums had leaked and impaired the ground water of the surrounding natural environment.\textsuperscript{313} At trial, the individual was sentenced to six months in jail

\begin{footnotesize}
\begin{enumerate}
\item[307.] \textit{Id.}
\item Fines are only one part of a necessary sentencing arsenal to foster responsible corporate behaviour. A greater spectrum of sentencing options is required to ensure effective deterrence and prevent illegal economic advantages accruing to corporations willing to risk apprehension and swallow harsh fines as operating costs.
\item Fines are inadequate principally because they are easily displaced and rarely affect the source of illegal behaviour. Usually fines can be ultimately passed on in the form of higher prices to either the consumer or the taxpayer. Sentencing, to be effective, must reach the guiding mind - the corporate managers: be they directors or supervisors. They are the instigators of the illegality either through wilfulness, willful blindness, or incompetent supervisory practices.
\item Id.
\item Id.
\item Id. at 53-54.
\item [1991] 6 C.E.L.R. 138 (N.S.).
\item Prior to this decision, environmental offenders had been jailed, but only for contempt of court.
\item \textit{Id.} at 138.
\end{enumerate}
\end{footnotesize}
and the corporation was ordered to pay a fine of $90,000. On appeal, the sentences were reduced to 15 days in jail and $30,000 respectively.

Nevertheless, in rendering his decision, Judge Anderson expressed the current view of the courts regarding environmental offenders:

This is a serious matter, and it is viewed as being increasingly serious by the society in which we live.

... The act complained of in this matter seriously impaired the quality of life which ought to have been enjoyed by Mr. Crowe and his neighbours. This impairment was done in a calculating and totally irresponsible manner. This type of behaviour cannot be condoned. In the interests of general deterrence, potential polluters must clearly receive the message that to engage in this type of behaviour, either out of laziness or for financial gain, will involve clear and severe penalties if uncovered.

Undoubtedly, we will continue to see even stiffer sentences for convicted offenders in the future.

4. 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 from 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 Env't, 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, of greater significance was the court's restriction of liability regarding the owner of the site. The site was owned by the Canadian National Railway Company (C.N.) and leased to Northern Wood Preservers. The Court found that C.N. was not liable because they were 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 harbour 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, whether or not they caused the contamination. However, that amendment may not deal with the interpretation by the Court. The legislation still applies to contaminants discharged into the natural environment rather than contaminated properties directly. The *Northern Woods* decision is under appeal. Whether the legislature will respond remains to be seen.

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. The ultimate intent of the government undoubtedly is to include as many parties as possible as potential deep pockets to pay for cleanups. However, the 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. Although we possibly are seeing the beginnings of a Canadian move towards the equivalent of the American "Superfund" legislation, Canadian governments may face significant judicial hurdles in putting that type of legislation into effect.

**CONCLUSION**

The environmental legal regime in Canada is comprehensive in its scope. Although there are a few potholes in the road as it currently exists, Canadian environmental law is evolving at such a rate, both legislatively and judicially, that such holes may soon be repaired.

Clearly, persons considering investing in Canada would be remiss if they did not devote significant attention to all applicable environmental laws and their potential impact on the proposed investment. In today's society, environmental law touches almost all aspects of life. From a legal point of view, environmental law considerations are found in such diverse fields as real estate transactions, administrative hearings, litigation, and corporate law. When the legal issues are combined with other factors, such as the scientific aspects of the environment, public opinion, and interest groups, it is easy to understand why the field is a complicated one.

One positive result of the growing environmental awareness among corporations is the change in their approach to environmental compliance. As recently as five or ten years ago, many corporations would only contact their lawyers on an environmental matter if they

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318. Environmental Protection Act, ONT. REV. STAT. ch. 141, § 7(1)(a).
319. *Id.*
were being charged by the government for an environmental violation or if they were being sued by a private party. Today, numerous companies have changed their corporate philosophy towards the environment from a reactionary one to a pro-active one.

More and more, companies are retaining full-time environmental counsel to keep them up to date on current environmental issues and legislative developments. Indeed, knowing what the proposed changes to a certain law are before they come into effect is one of the most effective ways to plan for change and to be prepared for such change at the time of implementation.

Perhaps the most effective way for a company to ensure its compliance with environmental standards is to conduct an environmental audit. An audit involves the use of environmental consultants to go through a corporation’s premises and comprehensively review all environmental issues, from manufacturing processes and mechanisms for dealing with emergencies such as spills, to management awareness of environmental laws, and an in-house policy on the environment (if any) for employees. The environmental audit is becoming increasingly popular among members of the Canadian corporate sector and is often done under solicitor-client privilege in light of the liabilities outlined above.

Several challenges lie ahead in the area of environmental law for the government and for 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 that the area of environmental law is still in its infancy which forces solicitors to constantly keep informed of new developments as they happen. Additionally, in many areas of environmental law there have been no decisions which would help resolve basic environmental issues. Indeed, one of the most challenging aspects of the field of environmental legal practice is the inherent uncertainty which exists as a result of a lack of judicial interpretation of many important pieces of legislation.

Accordingly, the road map to Canadian environmental law is still being drawn. Where it will ultimately lead, no one can be completely certain. However, one thing which is certain is the fact that this is a subject of primary importance to many corporate ventures. Environmental considerations of a proposed undertaking or investment can be just as important as business considerations. Before embarking on a business venture in Canada which may have environmental ramifications, it would be appropriate to seek qualified environmental expertise.