

# ENVIRONMENTAL LAW

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The year 2004 has proven to be another active year for environmental law in Canada, which continues to develop in response to international and domestic influences. A noteworthy example of an international event with potentially far-reaching implications for Canadian business was the U.S. Environmental Protection Agency's (EPA's) move to unilaterally assert jurisdiction over the Canadian operations of a Canadian company, Teck Cominco Metals Ltd. (Teck Cominco), for allegedly causing pollution in the United States. Another example is the Russian ratification of the Kyoto Protocol to the U.N. Framework Convention on Climate Change, which will lead to the much-debated protocol coming into effect on February 16, 2005.

On the domestic front, innovative legislation introduced in previous years is gradually being implemented into the legal mainstream, including the federal *Species at Risk Act* (SARA), which was enacted as part of Canada's response to the U.N. Convention on Biological Diversity. Our courts have also been active this year, with a number of important environmental cases, including *Canfor*, *Fletcher*, *S.D. Myers*, *Haida Nation* and *Taku River Tlingit First Nation*. The courts could also see more environmental class-action lawsuits, such as the high-profile Sydney Tar Ponds action brought in Nova Scotia this year—even though, so far, environmental class actions in Canada have been slow to get off the ground.

While we obviously cannot cover all of the important developments in environmental law across Canada over the past year, this article highlights some of what are, in our view, the more interesting and nationally relevant examples of the ever-evolving environmental regime.

## INTERNATIONAL DEVELOPMENTS

### NEW CROSS-BORDER ENVIRONMENTAL LIABILITY?

In 2004, the dispute between the EPA and a large Canadian mining company, Teck Cominco, was "headline news" for Canadian environmental lawyers. This long-brewing dispute arose over the allegation that, over the course of a century, Teck Cominco's lead and zinc smelter in Trail, British Columbia, had discharged contaminants into the Columbia River, thereby contaminating the Upper Columbia River and Lake Roosevelt in Washington State. Rather than treating the

issue as one between two sovereign nations (as one might have expected), the EPA went after Teck Cominco directly. After negotiations between them broke down, the EPA issued a unilateral order under U.S. federal legislation (the *Comprehensive Environmental Response, Compensation, and Liability Act*, or CERCLA, often referred to as "Superfund"). The unilateral order purported to require Teck Cominco to undertake an extensive contamination study in accordance with EPA standards and any further work that may be deemed necessary by the EPA. While Teck Cominco offered to pay for the costs associated with certain investigations and to deal with the risks identified in those investigations, it also took the position that CERCLA does not apply to discharges originating in Canada from a Canadian company, and that it would therefore not comply with the order. The Canadian government (through the formal channel of the Canadian Embassy in Washington, D.C.) also indicated that, in its view, CERCLA does not apply in these circumstances, and suggested that the order be rescinded.

In November 2004, the dispute was heard in the U.S. District Court (Eastern District of Washington at Spokane) as an action for enforcement of an order brought by a citizens' group. Teck Cominco made a motion to dismiss the action but it was denied. The Court indicated that the EPA was not "attempting to tell Canada how to regulate" Teck Cominco's contaminants, but rather that Teck Cominco must assist in cleaning up a "mess" in the United States, which it allegedly had caused. Teck Cominco has filed a petition to have the Ninth Circuit Court of Appeals consider the application of CERCLA to Teck Cominco, but the Appeals Court has not yet indicated whether it will hear the matter.

Given the nature of this dispute and its broad potential implications, we expect that it will eventually be resolved at the diplomatic level (between representatives of Canada and the United States). However, it appears that for at least a while longer, Canadian and U.S. lawyers will have an opportunity to convince domestic courts of the virtue (or otherwise) of extending the reach of domestic environmental regulations across an international border. Depending on how this case ends, we may be witnessing the infancy of a new type of cross-border environmental liability, with potentially far-reaching implications for Canadian and U.S. businesses.

## CLIMATE CHANGE

Despite significant uncertainty through much of 2004, Russia finalized its ratification to the Kyoto Protocol to the U.N. Framework Convention on Climate Change by delivering Russia's ratification instrument to U.N. Secretary-General Kofi Annan on November 18, 2004. As a result, the controversial protocol will come into force on February 16, 2005. The outstanding requirement was that the Annex I parties to the protocol (which include Canada, the United States, Russia and the other so-called industrialized countries) *that ratify or approve* the protocol must account for at least 55% of the total 1990 carbon dioxide emissions produced by these parties. While about 124 countries (representing marginally more than 40% of the emissions) had ratified it prior to the fall of 2004, as a practical matter, Russia's ratification was required to bring it into force.

In response to the Canadian government's commitments under the protocol (which it signed in April 1998 and ratified in December 2002), Canada has pursued various climate-change initiatives over the last several years. Critics, however, have argued that Canada has not proceeded with sufficient urgency to achieve its target of greenhouse gas (GHG) emission reductions. The most recent effort has been through the Climate Change

Plan for Canada, which includes a commitment to achieve GHG emission reductions, in part through a cap-and-trade system for selected large industries (including the oil and gas, mining and electricity sectors), called the "Large Final Emitters" group. The current plan envisages that Large Final Emitters will create and trade emission-reduction credits. The regime is currently under development by federal regulators in collaboration with representatives of the Large Final Emitters, and we may see a first draft of federal legislation as early as 2005.

Apart from the requirement for quantification and reporting of GHG emissions by certain large emitters, however, federal progress on climate change was limited in 2004, consisting largely of further consultations with stakeholders, support for energy efficiency initiatives and "green" energy technologies and the establishment of longer-term research-based initiatives. Such progress may have been restricted by the controversy (and regional polarization) on this subject during the federal election, but also in part by some uncertainty over Russia's intentions with respect to ratifying the Kyoto Protocol. With the protocol coming into force in 2005, international pressure on Canada to accelerate its domestic efforts will increase. The question in 2005 will be whether the minority Liberal government can afford to respond positively to that pressure (and expected pressure from the New Democratic Party and Bloc Québécois) by moving its climate-change agenda forward in a context in which virtually every controversial decision will be a parliamentary referendum on the Liberals' continued fitness to govern.

## DOMESTIC DEVELOPMENTS

### SPECIES AT RISK ACT

SARA, first introduced as Bill C-65 in 1996, was much debated, including in consultations with industry, non-governmental organizations and the public. It went through several iterations before finally being passed in 2002. Despite the years of controversy, however, the final operative provisions of SARA slipped quietly into force in the summer of 2004. It is, accordingly, worth a reminder that SARA could have significant impacts on certain kinds of businesses, particularly those in the natural resource industry and those developing greenfield sites.

The provisions that came into force on June 1, 2004 include, most importantly, the *prohibitions* on killing, harming, harassing, capturing or taking an individual of a wildlife species that is specifically listed and the prohibitions on damaging or destroying the residence of one or more individuals of those species. While these prohibitions are automatically applicable to federal lands, they may (under certain circumstances) become applicable to provincial, territorial or private lands. The potential penalty for a corporation for a first-time violation is up to \$1 million per day that the offence continues. However, there are licensing provisions allowing agreements, permits or other similar documents to be issued by the appropriate minister in certain circumstances to authorize a person to engage in an activity that affects a listed species or its habitat. The practical consequence will undoubtedly be that some lands otherwise appropriate for development for commercial or industrial purposes will either lose that advantage entirely or have their use restricted in some way. In addition, businesses currently operating facilities that might harm any of the listed species or their habitat could also be affected.

To ensure compliance with the prohibitions and other provisions in SARA, businesses that may be affected should consider taking steps to identify whether their current or proposed activities will affect any protected species or habitats. This

could be part of the checklist on a broader environmental assessment, or it could be carried out through a separate focused exercise. If any of the listed species or their habitats are identified, the next step would be to consider measures that might be necessary to address the situation, possibly in consultation with the regulator. As mentioned, in some cases, at least theoretically, the restrictions imposed by SARA and associated federal and provincial requirements could cause a project to be restricted in scope or even abandoned; carrying out an assessment as early as possible in new project planning will therefore be critical. As a practical matter, of course, much will depend on the way the regulator will interpret SARA in practice. Although we would expect considerable pragmatism in that regard, particularly in the first two or three years under the new regime, that should not be taken for granted.

## ENVIRONMENTAL CASES

### FLETCHER

Leave to appeal the May 12, 2004, decision of the Ontario Court of Appeal in *Fletcher v. Kingston (City)* was filed with the Supreme Court of Canada on August 9, 2004. If granted, the Supreme Court will have an opportunity to clarify the proper legal test to be applied in determining what constitutes a "deleterious substance" under the *Fisheries Act*.

In 1997, the City of Kingston was charged under the *Fisheries Act* for allowing a rust-coloured leachate from a former landfill (turned into a city park) to seep into the Cataraqui River. In total, eight charges for contravening subsection 36(3) of the *Fisheries Act* were laid, four by a private citizen, Janet Fletcher, and four more by the Ontario government. In the first instance, the city was convicted by the trial judge on seven of the eight counts for depositing a "deleterious substance" into waters "frequented by fish."<sup>1</sup>

On the first appeal, the Ontario Superior Court of Justice overturned the convictions because the lower court had not applied the Ontario Court of Appeal's test in the *Inco* case, which could (depending on how it was applied on the facts) have allowed a consideration of evidence addressing how the leachate affected aquatic life in the Cataraqui River (as opposed to in the lab water). The Ontario Superior Court of Justice recognized that the potentially more forgiving *Inco* test had been applied to the alleged polluter under the *Ontario Water Resources Act* (OWRA), but saw no reason in principle why the same logic should not also apply under the federal *Fisheries Act*.<sup>2</sup>

On further appeal, the Court of Appeal restored three convictions based on the charges brought by the Ontario government. The Court rejected the opportunity to apply the *Inco* test under the *Fisheries Act* on the basis that there was a clear difference in the language between the relevant offence-creating provisions in each statute. In this respect, the Court held, "The elements of the two offences [under subsection 30(1) of the OWRA and subsection 36(3) of the *Fisheries Act*] are different because the language of the offence-creating provisions is different. In our view, it would be incorrect to apply a test established for prosecutions under s. 30(1) of the OWRA to charges brought pursuant to s. 36(3) of the *Fisheries Act*."<sup>3</sup>

The four convictions that had arisen from Ms. Fletcher's efforts were not restored because the samples of leachate had not been diluted with water in the lab and did not, in the Court's view, offer sufficient evidence of the impact the leachate would have had on fish if the water had been added.

If the Supreme Court grants leave, it will have an opportunity to clarify the test to be applied by courts across the country.

Given that the offence under subsection 36(3) of the *Fisheries Act* plays a significant role in the enforcement of the federal environmental regulatory scheme, the environmental community is watching carefully.

#### S.D. MYERS

The Federal Court of Canada's January 13, 2004, decision in *Canada (Attorney General) v. S.D. Myers, Inc.*<sup>4</sup> could well have an impact on the design, implementation and enforcement of federal environmental regulation in Canada for years to come, as it relates to foreign investors, particularly to those from Mexico and the United States.

The underlying dispute at issue in the case arose from the Canadian government's ban on the export of PCB wastes to the United States in 1995. The publicly stated rationale for the government's policy was that PCB wastes should be processed "in Canada by Canadians." Chapter 11 of NAFTA requires that investors from other NAFTA countries be treated similarly to domestic investors of a particular NAFTA country, and that a NAFTA country must provide a minimum standard of treatment to an investor of another NAFTA country. Myers brought a claim under NAFTA against the Government of Canada for breaching its obligations to treat Myers, a U.S. investor in Canada, in a manner similar to domestic investors and for its failure to provide a minimum standard of treatment for U.S. investors. The NAFTA arbitration tribunal found that there was no legitimate environmental reason for the export ban, awarding Myers more than \$6 million in damages. The Government of Canada sought judicial review of the decisions by the Federal Court of Canada on the grounds that the award exceeded the scope allowed under Chapter 11 of NAFTA on a number of bases, and that the export of PCBs to the United States was contrary to Canada's obligations as a party under the Basel Convention as a matter of public policy under the *Commercial Arbitration Code*.

The Federal Court rejected the government's arguments and dismissed the judicial review application on the bases that the tribunal had the necessary jurisdiction, that the findings of the tribunal satisfied the applicable standards of review and that certain bases advanced by the government were outside the court's jurisdiction for judicial review. In dismissing the public policy argument, the Federal Court noted, "'Public policy' [under the *Commercial Arbitration Code*] does not refer to the political position or an international position of Canada but refers to 'fundamental notions and principles of justice.'"<sup>5</sup>

This decision has been widely hailed as confirming that the arbitration process under Chapter 11 of NAFTA provides an effective remedy for investors. As a consequence, governments may well be more attentive to ensuring that foreign investors are treated in a similar manner to domestic investors, and that a minimum standard of treatment for foreign investors is met, by environmental regulation. In areas of joint federal and provincial jurisdiction, such as waste transportation, greater coordination and harmonization between these levels of government in Canada may be required to ensure that NAFTA's Chapter 11 obligations are met.

#### CANFOR

In *British Columbia v. Canadian Forest Products Ltd. (Canfor)*, the Supreme Court of Canada considered, among other things, the Crown's ability to sue for compensation under its *parens patriae* authority with respect to environmental matters and environmental loss.

The case, in which Canfor ultimately prevailed, revolved around a forest fire in 1992 that damaged about 1,491 hectares of forest, including areas surrounding watercourses that were later declared by the Crown to have too much environmental value to permit logging at all. While the Supreme Court acknowledged that the Crown could receive compensatory remedies in its role as defender of the public interest, the six-justice majority cautioned that such actions raised important and novel policy questions, including the Crown's potential liability for inactivity in the face of threats to the environment; the limits to the role, function and remedies of governments that take such action; and the imposition on private interests of an indeterminate liability for an indeterminate amount of money for environmental damage. The majority also noted that while the common law could evolve to assist in the realization of the fundamental value of environmental protection through the awarding of "environmental damages," the Court must proceed cautiously in the absence of statutory intervention. While the majority found that the Crown identified at least three components of environmental loss in this case—use value; passive use, or existence, value; and inherent value—and certain types of evidence that would lay the basis for appropriate valuation methodologies, the Crown ultimately failed to lead sufficient evidence on these points, or to put forward an appropriate valuation methodology for environmental loss to succeed on the claim in this case. As a result, the majority held that on the basis of the present record, the Court could not proceed further.<sup>6</sup>

While the Court seems to have raised more issues than it resolved, the *Canfor* decision does provide some guidance as to how future environmental claims by the Crown may be adjudicated. This decision could well be the first in a series of cases in which the court further defines the role of Crown as *parens patriae* and lays out in more detail what may be required for a successful Crown claim for environmental loss.

#### HAIDA NATION AND TRTFN

The Supreme Court of Canada's recent decisions in *Haida Nation v. British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v. British Columbia* are likely to have an impact on the nature and extent to which federal and provincial governments (and project proponents who are interested in avoiding delays) include Aboriginal peoples in the decision-making processes that affect lands that are the subject of asserted (but unproven) claims of Aboriginal rights or title.

In *Haida Nation*, the Haida initiated a lawsuit asking the Court to set aside three decisions made by the B.C. Minister of Forests relating to certain tree farm licences regarding lands to which the Haida people had claimed title. The Court considered whether the government was required to consult the Haida about decisions to harvest the forests and to accommodate their concerns about harvesting on lands to which the Haida had not yet proven their title and their Aboriginal rights. In arriving at its decision, the Court noted that to fulfill the Crown's promise regarding Aboriginal sovereignty under section 35 of the *Constitution Act, 1982*, the Crown must engage in honourable negotiation, which includes the duty to consult and accommodate Aboriginal peoples whose sovereignty is not yet reconciled. Given that the government was aware of the Haida's good *prima facie* claim to title and Aboriginal right to harvest red cedar, and that the decisions regarding harvesting may have a serious impact on the Haida's Aboriginal rights and title, the Court held that the government was obligated to consult the Haida on the harvesting decisions. The Court also held

that the strength of the Haida's case and the potential for serious impacts of the harvesting decisions on the title and Aboriginal rights required that the government provide significant accommodation to the Haida people. While the Crown may delegate procedural aspects of consultation to third parties, the Court indicated that third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate (which cannot be delegated).<sup>7</sup>

In the second case, the Supreme Court considered the scope and content of the duty to consult and accommodate Taku River Tlingit First Nation (TRTFN) in the following situation: the TRTFN had fully participated in the environmental assessment process conducted by the B.C. government in connection with the reopening of a mine, which included a plan to build a road through a portion of TRTFN's traditional territory. TRTFN brought a petition to quash the B.C. government's project approval certificate. The Supreme Court ruled that the government was obligated to engage in more than the minimum consultation with TRTFN and to accommodate its interests. The Court went on to find that TRTFN had participated fully in the environmental assessment process (including having its views put before the decision makers) and that the final project approval contained measures to deal with TRTFN's both immediate and long-term concerns. In this case, the Court held that the duties to consult and accommodate were satisfied by the environmental assessment process that had been undertaken.<sup>8</sup>

Since the scope and content of the duty to consult and the duty to accommodate depend on both the strength of the case for Aboriginal right and title and the gravity of the potential impact of a particular decision, mechanisms that assess both these issues will gain increased importance in environmental decision-making processes where Aboriginal title and/or rights are asserted (but unproven).

#### CLASS ACTIONS AND THE SYDNEY TAR PONDS

Despite the introduction of class action-enabling legislation in a number of provinces in recent years, environmental class actions are only slowly making a mark on the Canadian litigation scene. Unlike in the United States, where high-profile environmental class actions are common, a number of recent Canadian courts have appeared reluctant, thus far, to encour-

age class actions as a suitable way to bring environmental claims. For example, in *Hollick v. Toronto (City)*, a 2001 case, the Supreme Court of Canada had its first opportunity to consider an environmental class action (regarding the impacts of the operation of a landfill) under Ontario's class proceedings legislation. The Supreme Court refused to certify the claim as a class action because it would not be the preferable procedure for resolving the common issues in *Hollick*, as required under the test for certification in Ontario.<sup>9</sup> *Pearson v. Inco Ltd.*, a 2004 decision of the Ontario Divisional Court dealing with impacts from a nickel-ore refinery, is a more recent example of the courts marching in the same general direction. In *Pearson*, the Court confirmed a lower court decision that a class action was not the preferable procedure for resolving the common issues and that dealing with individual claimants on a case-by-case basis would be more appropriate.<sup>10</sup> The Ontario Court of Appeal has granted leave to appeal in *Pearson*. In both the *Hollick* and *Pearson* decisions, the courts' rationale for their holdings appears to be influenced, at least in part, by the fact that causal issues will require considerable individualized investigation compared to the common issues of the proposed class of plaintiffs in order to resolve the claims.

Despite the challenges that face environmental class actions in Canada, in 2004 several plaintiffs in Nova Scotia commenced an ambitious action seeking damages for, among other things, health problems and property losses in connection with the infamous Sydney tar ponds, which are related to the decades-long operation of Sydney Steel in Sydney, Nova Scotia. Despite the absence of specific class action-enabling legislation in Nova Scotia, the plaintiffs have applied to have their case heard as a class action, which could allow thousands of Sydney residents to be added as part of the plaintiff class. ■

1 [1998] O.J. No. 6453 (QL).

2 [2002] O.J. No. 2324 (QL).

3 [2004] O.J. No. 1940 para. 75 (QL).

4 [2004] F.C.J. No 29 (QL).

5 *Ibid.*, para. 55.

6 [2004] S.C.J. No. 33 (QL).

7 [2004] 3 S.C.J. 70 (QL).

8 [2004] 3 S.C.J. 69 (QL).

9 [2001] 3 S.C.R. 158 (QL).

10 [2004] O.J. No. 317 (QL).