

CANADIAN FEDERALISM AND THE ENVIRONMENT

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Federalism and Environmental Litigation

Overview

When considering environmental policy and legislation, or environmental administration of that policy or legislation, lawyers often ask:

1. Who can act? Which level of government is constitutionally permitted to act in this area?
2. Are they acting? Is the policy or legislation being implemented and enforced?
3. Must they act? If there is a failure by government to take action, is there a remedy?
4. Is there dual or triple jurisdiction and if so, is there conflict between the relevant provisions?
5. Are there gaps in the regulatory scheme (each jurisdiction has only gone part way) and if so, is there a remedy?

These are only a few of the types of questions that lead to litigation in the Courts over environmental governance and the issue of jurisdiction is often fundamental to the legal conflict. I support the view that First Nations represent another order of government within Canada's constitutional framework. Accordingly, there must also be room for First Nations to exercise governance over their environmental aboriginal and treaty rights.

I'd like to spend my time reviewing a few of the cases decided by Canada's courts in the last year, particularly on the part of the Federal Court (both trial division and appeal levels), as well as the Supreme Court of Canada.

I believe that by now you've probably heard that in Canada we have a system of senior courts in the provinces with both statutory and inherent common law jurisdiction. However we also have two national Courts, firstly the Federal Court which includes a trial level and an appellate level. The Federal Court is a statutory court and must find its authority under the Federal Court Act. We also have the highest appellate court in the country, which sits in appeal from all of the senior provincial courts as well as from the Federal Court, namely the Supreme Court of Canada. Both the senior provincial courts and the Federal Court could find themselves obliged to make decisions as to whether a matter is within the jurisdiction of a province, or of the federal government, or both. Accordingly, a matter may arrive at the Supreme Court of Canada by either route.

The Cases

Spraytech et al v. Town of Hudson 2001 SCC 40

CELA represented 11 Interveners at the Supreme Court of Canada in this case. It involved a challenge by the lawn care pesticide applicators to the authority of the Town of Hudson in the province of Quebec to pass a by-law restricting application of pesticides on private properties within the town's boundaries. The Supreme Court of Canada upheld the by-law and the municipality's authority to pass the by-law and in doing so, had to consider the question of whether there was conflict with the provincial or federal pesticide legislation, as well as the jurisdiction of the municipality.

In rendering the decision, Justice L'Heureux-Dube wrote, and I'll quote from the passage at page 2 of the decision:

"The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity. La Forest J. wrote for the majority in *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213, at p. 296, that "the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels" (emphasis added). His reasons in that case also quoted with approval a passage from *Our Common Future*, the report produced in 1987 by the United Nations' World Commission on the Environment and Development. The so-called "Brundtland Commission" recommended that "local governments [should be] empowered to exceed, but not to lower, national norms" (p. 220)." {end of passage}

Justice L'Heureux-Dube continued, "Nevertheless, each level of government must be respectful of the division of powers that is the hallmark of our federal system; there is a fine line between laws that legitimately complement each other and those that invade another government's protected legislative sphere. Ours is a legal inquiry informed by the environmental policy context, not the reverse." (pp 2,3)

These comments form a nice summary of the context of much of our environmental litigation over federal-provincial jurisdictional issues .

Hamilton-Wentworth v. Canada 39 CELR (NS) 186 (2001) (Fed. T.D.) (appeal to Federal Court of Appeal by Canada subsequently dismissed)

This case involved a referral to a review panel under the Canadian Environmental Assessment Act of a project that involved needed federal fisheries and other approvals related to a highway expressway in Hamilton, Ontario. The applicant municipality brought an application for judicial review to federal court, arguing that the federal government had no jurisdiction to make the referral under the federal environmental assessment process. CELA represented the Interveners, the Friends of Red Hill Valley in the matter. The Federal Court judge held that the federal government could not make the referral because of certain statutory grandparenting provisions in

the federal legislation that provided that where the construction or operation of a physical work was initiated before June 22, 1984, the federal environmental assessment legislation would not apply. The rationale was that 1984 was the date of promulgation of the first federal environmental assessment process and projects already underway at that time ought not to have to go back and do an environmental assessment. CELA did not and does not agree with the interpretation of this section by the Court and we continue to advocate to the federal government that the section wording must be changed to ensure that projects are properly considered under federal environmental assessment legislation when federal approvals are required.

However, the factual backdrop to the case included that the Ontario provincial government was an Intervener in the case, supporting the applicant in resisting the applicability of the federal legislation.

This case demonstrates the tension that arises from time to time when both levels of government have relevant legislation, and there are differences of opinion between them as to whether the other level should be exercising their jurisdiction.

Canadian Environmental Law Association v. Minister of Environment (Canada) June 5, 2000 (Fed. C.A.)

This case was a classic federalism issue. CELA brought an application to Federal Court for judicial review to challenge the action of the federal Minister of Environment in having executed four federal-provincial environmental agreements in 1998. They were the Canada-Wide Accord on Environmental Harmonization and three subagreements being the Canada-Wide Environmental Inspections Sub-Agreement, the Canada-Wide Environmental Standards Sub-Agreement and the Sub-Agreement on Environmental Assessment. The trial judge described our concern as follows, which is a fair summary:

“The applicant Association is concerned that these federal-provincial agreements establish a structure under which the respective governments will rearrange among themselves their roles and responsibilities, and this will obligate the federal government to refuse to exercise some of its jurisdiction in environmental matters, and thus lead to a diminution in environmental protection for Canadians. For example, all the agreements contain a provision that obligates one level of government not to act under certain circumstances. The applicant is also concerned that the agreements constitute a *de facto* transfer of authority to an intergovernmental body and this will diminish the accountability of the Minister and her officials through Parliament to Canadians. The agreements provide for the establishment of environmental protection priorities by the Canadian Council of Ministers of the Environment Inc., a corporation the members of which are the various federal and provincial ministers of the environment.” The judge continued to review our legal grounds of excess of jurisdiction, excess of authority and fettering of discretion.

In her reasons, Justice Reed reviewed the constitutional context and reiterated that the federal and provincial governments share jurisdiction over the environment, a fact which has repeatedly been stated by the Supreme Court of Canada. She referred to very interesting discussions of constitutionally permissible methods of inter-delegation that we brought to her attention which I

won't discuss further here, but one of which you might be interested in, Franklin Gertler, "Lost in (Intergovernmental) Space: Cooperative Federalism in Environmental Protection" in S.A. Kennett, ed., *Law and Process in Environmental Management* (Calgary: Canadian Institute of Resources Law, 1993).

The critical provision of the Agreements provide that one of the objectives is to "delineate the respective roles and responsibilities of the federal, provincial and territorial governments, by ensuring that specific roles and responsibilities will generally be undertaken by one order of government only."

Subsequent to the signing of the Accord, during the progress of this litigation, the sub-agreements were amended to make the respective governments' jurisdictional independence and their ability to act or not act more clear.

The court found that the agreements were in many respects too unspecific, inchoate and inconsistent to render a judgment as to their legal validity. Furthermore, she agreed with us that the specific legislation prevails as to how the governments are to exercise their authorities, but she found that the determination as to whether the Accord's approach was legal or not had to await future agreements such as implementation agreements.

In the end, therefore we lost the case, partially on the ground of prematurity, and our appeal to the Federal Court of Appeal upheld the judge's decision. The Court of Appeal stated that it saw "no legal difficulties, at this time, in this effort to coordinate and cooperate, which is the main purpose of the accords."

This case provides interesting insight into the operation of federalism and the tension between the accountability and respective procedures of the federal and provincial legislative processes and their efforts to coordinate activities.

Inverhuron & District Ratepayers' Association v. Canada (Minister of the Environment) 39 CELR (NS) 161 (Federal Court of Appeal)

This case involved an argument by the applicants that the environmental assessment process was flawed because the actual final system design for a nuclear waste storage facility that was chosen was not the one that was the subject of the environmental assessment. The applicants did not succeed in their arguments.

Among the reasons given by Sexton J.A. for the Court was this statement, which illustrates one of the difficulties we face when we ask the Courts to look at complex environmental issues:

"In my opinion, it is not for this Court to delve into the scientific complexities associated with determining the validity of the appellant's factual assertions. To do so would be contrary to the long-accepted principle discussed by my colleague Strayer J. in *Vancouver Island Peace Society*:

'It is not the role of the Court in these proceedings to become an academy of sciency to arbitrate conflicting scientific preditions ... Whether society would be well served by the

Court performing either of these roles, which gravely doubt, they are not the roles conferred upon it in the exercise of judicial review under section 18 of the Federal Court Act.' [1992] 3 F.C. 42 (Fed. T.D.)"

This is a very difficult and serious barrier to environmental litigation since the issues we deal with often involve science based evidence with competing opinions. When I represented a group of plaintiffs who brought a judicial review application in Federal Court over the federal Minister of Transportation's decision to allow mixed oxide (plutonium) fuel from the U.S. and Russia to be flown in Canadian territory, I was very clear in drafting the application material that our request for relief from the Court was to mandate that the Minister follow due process in his decision making process. The case was settled on the basis that the Department of Transportation re-consulted on the issue of air flights prior to the final decision regarding the Russian source fuel. It would have been a very different case if we had made the scientific and technical merits of the fuel packaging and accident scenarios the focus of our litigation. In that case, the scientific and technical debates had to occur outside of the context of the court case, and the court case itself dealt strictly with the administrative law issues with which the Court is normally comfortable.

The *Inverhuron* decision reiterated that the standard of review to which Canadian environmental decision makers will be held over the technical and scientific decisions will often be "reasonableness" and their decisions will not be overturned by the Courts unless they were made in bad faith or based on irrelevant considerations.

From the perspective of environmental lawyers and non-governmental organizations, this standard of review means that many environmental decisions that we would like to challenge (as having been the wrong decision for the environment) cannot be successfully reviewed.

For us and for our clients, the possibility of adverse costs in the event that we lose in Court is an enormous barrier to taking the risk of litigation. This occurred in the *Inverhuron* case, where the Ratepayers Association was obliged to pay the other side's lawyer's costs, and in the *Harmonization* case that I discussed earlier.

Tsawassen v. Canada (Minister of Finance) 37 CELR (NS) 182 (Fed. C.A.)

I'd like to finish with the point that there is a third level of government in Canada, often overlooked in the jurisdictional tug of war, and this is First Nation's governments. I agree with those who argue that their jurisdiction is inherent and is constitutionally valid in Canada. Furthermore, section 35 of the Constitution Act explicitly recognizes existing aboriginal and treaty rights in Canada. Accordingly, I have written that First Nations ought to have and do have rights of governance over environmental aboriginal and treaty rights. It is a discussion for another day as to all of the forms that such governance might take, but the next two cases illustrate some of the ways that First Nations' concerns sometimes conflict with decisions taken by the other levels of government, with differing results in the Courts.

In the *Tsawwassen* case, a construction project was occurring at what an ecologically important estuary near the Band's reserve and the Canadian Environmental Assessment Act had not been

applied to the project. Tsawwassen brought an application for judicial review arguing that CEAA should apply to the project but the Court disagreed, primarily because of the definition of “project” under the relevant legislation.

This case illustrates the very imperfect participation by First Nations governments in many decisions that affect their environment in significant ways. An attempt to use the federal law by enforcing compliance with its provisions was not successful.

Athabasca Chipewyan First Nation v. B.C. Hydro 37 CELR (N.S.) 147 (Fed. C.A.)

In this case the applicant First Nation was successful in its application to overturn an export permit granted by Canada’s National Energy Board, because the Court found that the Board had effectively, and improperly, placed the burden on the First Nation as Interveners to demonstrate the adverse environmental impacts that they were concerned about. The burden of proving no significant adverse impact belonged to the applicant, B.C. Hydro. Again, the First Nation was making its case in the context of the provisions of federal legislation, with a more successful result.

However, neither of these cases, nor many others such as the Supreme Court of Canada’s two Marshall decisions, address the issue of First Nation’s rights to make governance decisions over environmental issues that concern them. There is very differing inclusion and consultation in various parts of Canada, and there are several different models as to whether the First Nation is exercising governance and decision making or is merely one of the parties consulted. Some of the differences depend on the territory involved (is it a reserve, treaty land or land claims agreement land, for example), and some of them depend on the underlying legal dispute that arose (does the First Nation want to fend off prosecutions or control the resource, for example).

Canada has a long way to go until the First Nations’ roles in governance are sufficiently developed, understood and practiced, and I expect a great deal of evolution in this area over the coming years.

Conclusion

At the outset I posed questions such as Who are the levels of governments / who can act? Are they acting? Is there conflict? How do they coordinate? What about gaps or failure to act – can citizens mandate appropriate action?

These questions will continue to arise and be answered in specific contexts, sometimes with resort to the Courts. It might be an inevitable consequence of a federal system to have to deal with such legal conflicts.

However, the different scales of government (national, provincial, aboriginal, municipal) and the differing perspectives that they bring mean that these governments also have opportunities to meet the various environmental concerns in different ways, one not necessarily less important than the other. In our law reform work at CELA, and in our case work, we continue to

strenuously support a dynamic, strong federal system in which all levels of government can and do exercise governance over important environmental issues.

Thank you for the opportunity to speak to you today.

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