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THE REGULATION OF HAZARDOUS WASTE IMPORTS AND EXPORTS IN CANADA AND THE UNITED STATES

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Introduction

This paper seeks to clarify the law and regulations governing the import and export of hazardous waste in both the United States and Canada. In section I it undertakes an analysis of U.S. hazardous waste export controls by comparing and contrasting them with the Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal (hereafter the Basel Convention). Section II of the paper examines various Canadian federal controls on the importation of hazardous waste. Discussion of environmental assessment procedures is not within the scope of this paper nor is there any analysis of the relevant provincial regulatory framework.

I. The United States and United Nations Regulatory Framework

International concern over the potentially adverse environmental consequences of transboundary movements of hazardous waste coalesced in the adoption of the Basel Convention. (UNEP/IG.80/3). It was open for signature on March 22, 1989. As of November 30, 1990, fifty-eight countries had signed the Convention. For the United States to adhere to the Convention's waste export control regime, several important changes to domestic law will have to be made. In this regard hearings have been held for the purpose of introducing new legislation. That legislation, the Waste Export and Control Act (WECA) is presently being developed although it is

still in draft form. Currently, U.S hazardous waste export controls are governed by the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 690126992K).

(a) Background to Hazardous Waste Exports

Under the RCRA, the exporter submits to the U.S. Environmental Protection Agency (EPA) a description of the waste (type and quantity) it intends to export. The U.S. Department of State must then relay the information submitted to the EPA along with a description of how the waste would be managed in the United States, to the government of the importing country for its consent or objection.

A shortcoming of this process is sourced in the failure of the EPA to provide any conclusions regarding the adequacy of the exporters' proposal, or recommendations on whether the proposal should be accepted. Consequently, exporters have given virtually meaningless descriptions of how hazardous waste should be treated, stored, or disposed of in the receiving country. Further, the EPA is not permitted to take any action to stop a shipment to which consent has been given, even where the EPA has reason to believe that the waste will not be managed in an environmentally sound manner.

(b) Waste Trade with Canada

Approximately 85% of all U.S. hazardous waste exports are destined for Canada. A bilateral agreement known as the Agreement Between

the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Wastes (hereafter U.S.-Canada Bilateral Agreement) was signed on October 28, 1986 and will be in force from November 8, 1986 until November 8, 1991. It will automatically be renewed unless one of the parties gives written notice of its intent to terminate it. The agreement fails to make any allowance for the fact that in the United States waste is managed in a more environmentally sound way by comparison to the Canadian approach and the fact that Canada is dumping hazardous waste in unlined fills. Such an agreement should have brought Canadian standards in line with the U.S. approach, but it has not so far.

(c) Wastes Covered

The RCRA only applies to exports of "hazardous wastes". In contrast to the RCRA's limitation, the Basel Convention applies to both "hazardous waste" and "other wastes". The Convention defines "hazardous waste" to include the following:

(1) Wastes that belong to any category listed in Annex I to the Convention unless those wastes do not possess any of the characteristics contained in Annex III to the Convention, or

(2) Wastes that are defined as or considered to be hazardous waste by the domestic legislation of the Party of Export, Import, or Transit.

Annex I lists eighteen categories of hazardous waste streams (e.g. wastes from the manufacturer, formulation, and use of wood preserving chemicals and wastes from the production, formulation and use of organic solvents) as well as twenty-seven hazardous waste constituents (e.g. heavy metals, phenols, organo halogens). Annex III refers to such hazardous characteristics as explosiveness, flammability, poisonousness and corrosivity.

The Convention defines "other wastes" as wastes that belong to any category contained in Annex II to the Convention which contains only two categories: (1) Wastes collected from households and (2) Residues arising from the incineration of household wastes.

(d) Prior Informed Consent - Bilateral Agreements

For transboundary movements of waste between parties to the Basel Convention, the waste exporting state may not allow the movement to begin until it has received written consent from the waste importing country. As discussed above, the RCRA already provides a method of obtaining the consent of the importing country.

The Basel Convention provides for a means of general notification when hazardous wastes or other wastes having the same physical and chemical characteristics are shipped regularly to the same disposer via the same customs office of exit. In a similar manner, the U.S. -Canada Bilateral Agreement contains an implied consent provision which provides that if Canada does object within thirty days of

having received notification of a planned hazardous waste shipment, the shipment cannot proceed.

(e) Permits

The Basel Convention obligates the parties to take appropriate legal, administrative, and other measures to implement and enforce the provisions of the Convention and to prohibit all persons under its national jurisdiction from transporting or disposing of hazardous wastes or other wastes unless such persons are authorized or allowed to provide such types of operations. The RCRA has a waste export notification and consent procedure but no mandatory permit system. This procedure has been supplanted by the provisions of the U.S.-Canada Bilateral Agreement.

(f) Treatment Standards

The Basel Convention establishes a number of general principles to govern the transboundary movement of wastes. First and foremost, the Convention requires that parties ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such waste, and is conducted in a manner that will protect human health and the environment against the adverse effects that may result from such movement. In accordance with this principle, each party shall require that hazardous wastes or other wastes to be exported, are managed in an environmentally sound manner in the state of import or elsewhere.

In addition to the general principle of environmentally sound management, the Basel Convention establishes other principles to govern transboundary waste movements. The convention requires that parties limit such movements to situations in which one of the following three criteria are satisfied:

(a) the state of export does not have the technical capacity and the necessary facilities, capacity, or suitable disposal sites in order to dispose of the wastes in question in an environmentally sound and efficient manner; or

(b) the wastes in question are required as a raw material for recycling or recovery industries in the states of import; or

(c) the transboundary movement in question is in accordance with other criteria to be decided by the Parties, provided those criteria do not differ from the objectives of this Convention.

In addition, the Convention provides the obligation of waste generating states to ensure their wastes' environmentally sound management responsibility may not under any circumstances be transferred to the states of import or transport.

Domestic hazardous waste disposal requirements under the RCRA are governed by the "best demonstrated available technology" standard. However, there is no comparable provision which applies to the

waste disposal methods in countries to which the U.S. exports its hazardous wastes.

(g) Cleanup Liability and Financial Insurance

The Basel Convention provides no means of imposing liability if there is a release during a transboundary waste movement or during management of the waste in the receiving country. The preamble to the convention, however, states that "states are responsible for the fulfilment of their international obligations concerning the protection of human health and protection and preservation of the environment, and are liable in accordance with international law." In addition, the Convention requires contracting parties to immediately notify one another whenever it comes to their knowledge that an accident occurs during the transboundary movement of hazardous wastes or other wastes or their disposal might present risks to human health and the environment in other states. Finally, the Convention provides for co-operation among the contracting parties with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damages resulting from the transboundary movement and disposal of hazardous wastes and other wastes.

On the other hand, the U.S.-Canada Bilateral Agreement applies only to damages during the movement of wastes, including loading and unloading, but apparently does not apply to the wastes once they

have arrived at their destinations.

(h) Conclusion

Shortcomings in the EPA's hazardous waste export rules became evident shortly after Congress enacted the RCRA. Congress' failure to authorize the EPA to stop exports in instances in which the Agency had reason to believe the exports would not be managed safely was a critical shortcoming. More generally, the EPA's authority to prevent U.S. waste from being exported is too limited. For instance, the notification and consent procedures do not cover wastes that are not considered hazardous in the U.S., but which may be legally defined as hazardous abroad. One study has also shown that hundreds of tons of hazardous wastes were exported without the appropriate notification (Inspector General U.S.E.P.A. 1988).

It is a further criticism that the EPA's hazardous waste export regulations are unclear and ambiguous, often resulting in the misclassification of hazardous wastes as materials for recycling. Finally the RCRA has no enforcement strategy and has failed to co-ordinate its efforts with those of the U.S. customs service.

On the bright side, if the WECA were to be passed then the notification and consent procedures would be replaced with a far more rigorous export permit requirement. The export permit would provide the EPA with a powerful tool for ensuring that U.S. waste is managed soundly abroad. Permit applicants would have to

demonstrate that the wastes would be managed abroad in a manner not less strict than if the waste were lawfully managed domestically.

This remedy would by no means stem the flow of U.S. waste to Canada because it is likely that Canadian facilities could be brought up to the protective standards proposed by the WECA.

II. Federal Regulation of Hazardous Waste Imports

(a) Transportation of Dangerous Goods Act - Federal

The major piece of legislation which governs the movement of dangerous goods in Canada is the Federal Transportation of Dangerous Goods Act (R.S.C. 1985, Chapter T-19 as amended) (hereafter the TDGA). This legislation and its extensive regulations establish the regulatory framework for dangerous goods movements interprovincially and internationally. By and large, its regulatory scheme has been adopted by each of the Canadian provinces for intra-provincial movements.

The Canadian legislation applies to all movements of dangerous goods, whether by common carrier or not, and whether moving within Canada or to or from Canada, by any mode of transport. Thus, captured by the legislation, are not only those in the business of for hire transportation of dangerous goods, but also private fleet operators for whom transportation may be incidental to a primary manufacturing business.

"Dangerous goods" is defined under the legislation, to mean "any product, substance or organism included by its nature or by the regulations in any of the classes listed in the schedule". The schedule to the Act lists over three thousand commodities and classes of commodities. Each commodity is identified by a standardized United Nations product description and a United Nations product identification number.

The Act describes adherence to its Regulations. The Regulations are voluminous and complex. They are founded on the premise that most hazardous commodities are required to be moved; the system is one that endeavours to manage that risk.

The essential building block of the Regulations is product classification. Products are classified according to the hazard or hazards presented by the commodity. There are nine product groups established under the Act. They include gases, flammable liquids, flammable solids, oxidizing substances and organic peroxides, poisonous (toxic and infectious) substances, radioactive materials, corrosives, and miscellaneous products or substances. Product classifications are established by reference to Schedule II of the Regulations, by identifying the product shipping name and thereby determining its product identification number and primary and subsidiary classifications. (See Part III of the Regulations.)

A number of safety measures follow on the basis of the product's

identification and classification. Documentation for the movement of dangerous goods is the first such safety measure prescribed in the Regulations. A shipping document is required to accompany dangerous goods movement. For dangerous waste movements special manifest provisions apply. The shipping document is required to contain a substantial amount of information designed to disclose the nature of the dangerous goods being transported and the emergency measures which may be required for certain classes of commodities in the event of an accident. Thus, included in the information required to appear on the shipping document is the prescribed shipping name of the dangerous goods, the primary and the subsidiary classification of the dangerous goods and the United Nations product identification and packaging group of the goods.

For certain classes of dangerous goods the shipping document must include a summary of the emergency response plan number, any special instructions necessary for the safe handling, transportation or storage of the dangerous goods, and a twenty-four hour telephone number where the consigner or manufacturer may be reached for information concerning damaged or defective packages or containers.

Hazardous waste movements have special documentation requirements. Waste manifesting is prescribed by Section 4.15 of the Regulations. Notable as well with respect to the movement of waste is the sixty-day pre-notification requirement of the Director General under the

TDGA before hazardous waste may be imported into Canada. (There are draft regulations under the Canadian Environmental Protection Act which will replace the notification requirements of the TDGA within the coming year.) Part of the Regulations provides for safety marks for dangerous goods shipments. The safety mark provisions govern product labelling and transport vehicle placarding. The labelling and the placarding requirements depend upon the product classification as established under the Regulations. The clear objective of the legislation is disclosure of the nature of the product and its hazards through a standardized system of product description and warning symbols.

For certain classes of goods, listed in Schedule XII of the Act, there is a requirement that there be filed with the Director General under the TDGA an emergency response assistance plan. The plan applies not only to the domestic movement of goods but also to shipments to or from Canada, as well as for the movement of goods through Canada for a distance greater than 70 kilometres. Schedule XII of the TDGA provides a lengthy list of explosive commodities as well as gases, acids, flammables and other particularly dangerous substances.

The plan summary is required to include a brief description of the emergency plan capability and the means by which it is to be activated, as well as certification that the emergency response capability exists. Upon receipt, the Director General assigns the

plan a summary number. That number is required to appear on the transportation of dangerous goods document which accompanies the shipment.

The Regulations provide that "no person shall handle, offer for transport or transport dangerous goods unless he (a) is a trained person; or (b) is performing those activities under the direct supervision of a trained person". Interestingly there is no prescribed level of training other than the satisfaction of the employer that his employee has been adequately trained for the duties that he is proposed to assume. Once that level of satisfaction is achieved the employer issues a "certificate of training". Such a certificate is valid for a period of thirty-six months from the date of completion of the training.

It should also be made known that there exists under Part XI of the Act a provision for an Application for a Permit for Equivalent Level of Safety. The provision is designed for permitting of dangerous goods transportation in a manner other than that described by the Act. It is open to a person to apply to the Minister for a special permit to allow the transportation of dangerous goods in a fashion that is equivalent in safety to that prescribed under the legislation.

Non-compliance with federal legislation may result in severe penalties. On summary conviction there may be liability to a fine

not exceeding $50,000 on a first offence, not exceeding $100,000 on each subsequent offence, or on conviction on indictment to imprisonment to a term not exceeding two years. A ticket offence may result in a fine of up to $1,000.

Officers, directors or agents of a corporation "who directed, authorized, consented to, acquiesced in or participated in the commission of an offence" may be guilty of an offence whether or not the corporation has been prosecuted or convicted. The scope of that language is particularly broad and compelling and should be the subject of concern for officers and directors of companies where the business of the company involves the movement of dangerous commodities.

Inspectors under the federal legislation have broad powers of investigation. They have the right to enter and inspect any building at any time where they believe on reasonable and probable grounds that dangerous goods are being handled, offered for transport or transported and they may request the opening and/or inspection of containers, packaging or the means of transport. Where an Inspector is satisfied on reasonable and probable grounds that there is non-compliance, he may request the taking of remedial measures; and where the dangerous goods originate from a place outside Canada and remedial measures are not possible, he may refuse entry into Canada of the goods or take measure to turn them back into the place of origin.

There also exist under the federal legislation, seizure, removal and forfeiture provisions, which may be invoked when an Inspector has reasonable and probable grounds for believing that such measures are necessary "in order to prevent or reduce any serious or imminent danger to life, health, or property or the environment."

(b) Environmental Contaminants Act

The Environmental Contaminants Act, R.S.C. 1985, C.3-12 was repealed in 1988. The provisions of the Act which were relevant to the issue at hand have been incorporated into the Canadian Environmental Protection Act (see below).

(c) The Canadian Environmental Protection Act

The Canadian Environmental Protection Act, S.C. 1988, C.22 (CEPA) also deals with the export of toxic substances and waste materials. Sections 41 to 45 of the CEPA contain the relevant provisions. They allow for the establishment of a Schedule II which has three parts. Part I lists all toxic substances prohibited for use in Canada. Part II of Schedule II lists chemicals substantially restricted in Canada. This list is entitled the "List of Toxic Substances Requiring Export Notification", and pursuant to Section 42, notification must be given to those countries placed on a list of Toxic Substances Authorities.

Section 43 provides for Part III of Schedule II, which is the "List

of Hazardous Wastes Requiring Export or Import Notification". Again, notification will be required to be given to a specified authority indicated on the List of Hazardous Waste Authorities in respect of the country to or from which the export or import will be taking place. Parts I and II of Schedule II are due to be published in the Canada Gazette very soon. The new "Export Notification Regulation" and the "List of Toxic Substance Authorities" are still under review and will be published at a later date. Part III, the "List of Hazardous Waste Requiring Export Notification", is still in the consultation process. A draft of this regulation will not be available until May 1991. Similarly, draft regulations designed to provide compliance with the provisions of the Basel Convention are still in their infancy.

Conclusion

While the recent U.S. and U.N. initiatives go some distance in improving upon Canada's "risk management" approach to hazardous waste disposal they are of little comfort to those who advocate a complete ban on the international waste trade. Those members of the United States Congress who believe that American standards--rather than a ban--will protect foreign countries from the poisons of exported U.S. waste need only examine the domestic disasters opposed by toxic dumps within their own borders. The position that superior waste management techniques, when applied to other nations, will eliminate the problems of hazardous waste disposal is simply untenable.