DEVELOPMENTS IN CANADIAN ENVIRONMENTAL LAW: SELF-REGULATORY INITIATIVES UNDER THE NEW CANADIAN ENVIRONMENTAL PROTECTION ACT*

Jaye Ellis

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I. Introduction

In March of this year, following a lengthy and difficult battle in the House of Commons and the Senate, a new version of the *Canadian Environmental Protection Act*[1] entered into force.

Several features of CEPA 1999 are worth noting. The Act establishes a National Advisory Council,[2] with representatives drawn from the federal ministries of health and environment, the provinces, and aboriginal governments,[3] to advise the federal ministers on toxic substances regulation, interprovincial cooperation, and other environmental matters.[4] All substances in Canada are now to be subject to screening for toxicity,[5] whereas previously screening was not conducted in a systematic manner. The Act incorporates the precautionary principle, which appears in the preamble,[6] in the provisions on the National Advisory Council,[7] and in provisions regarding the

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[1] S. C. 1999, c. 33 [*hereinafter* CEPA 1999].

[2] *Id*., s. 6 (1).

[3] *Id*., s. 6 (2).

[4] *Id*., s. 6 (1).

[5] *Id*., s. 73.

[6] The sixth recitation of the preamble, *id*. states: Whereas the Government of Canada is committed to implemenang the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation; [...].

screening process for substances.[8]

Each of these subjects, and many other aspects of CEPA 1999, deserve further attention, but I would like to focus on a further element of the new statute, namely the provision empowering the Minister of the Environment to require firms to draft plans for pollution prevention and virtual elimination with respect to specific substances. This approach has been used in the past,[9] but the fact that it has now been enshrined in CEPA 1999 indicates that the federal government intends to pursue it in a more systematic manner.

The pollution prevention and virtual elimination plans provided for in CEPA 1999 (the CEPA plans) constitute one example of self-regulatory initiatives, which have become increasingly popular with governments in Canada and elsewhere.[10] I need hardly point out that such initiatives are extremely controversial, raising as they do the fear that governments may be shirking their regulatory responsibilities; that the regulatory process may be coopted by industry; and, more generally, that the possibility of achieving high environmental standards will be compromised and the public interest in a healthy environment neglected. I would like to leave aside for the time being the question whether self-regulatory environmental initiatives should be pursued in order to consider the second-order question what the conditions for the success of this particular initiative might be.

I will begin my discussion with a brief overview of the toxic substances regime in CEPA 1999 and the place of the plans within that regime. I will then turn to the literature on self-regulatory initiatives for the purpose of developing a framework for evaluating the CEPA plans. Previous Canadian experience with self-regulation in the environmental protection field will be canvassed, and finally, some comments about the best —and worst— ways to implement the CEPA

[7] *Id*., s. 61 (1.1).

[8] *Id*., s. 76.1, provides that "the Minister shall apply a weight of evidence approach and the precautionary principle".

[9] *See, e.g*., Canada Oil and Gas Drilling Regulations, SOR/79-82, s. 87; Oil Pollution Prevention Regulations, SOR/93-3. Part V: Response Organizations and Oil Handling Facilities Regulations, SOR/95-405, Part II.

[10] John Moffet and François Bregha, *An Overview of Issues with respect to Voluntary Environmental Agreements* 8 JELP 63 (1998).

plans will be made.

II. The Canadian Environmental Protection Act, 1999

CEPA's approach to toxic substances is to generate a series of lists and to subject the substances on these lists to varying types and degrees of regulatory control. Substances designated as toxic[11] are placed on a Toxic Substances List[12] and subjected to a series of regulations which ostensibly follow the chemicals from cradle to grave; in other words, CEPA 1999 seeks to regulate these substances at every point in their life cycle, from production through sale, transportation and use to disposal. A further list provided for under CEPA 1999, entitled the Virtual Elimination List,[13] is to contain substances that are persistent and bioaccumulative.[14] The objective of regulations covering these substances is to reduce their presence in the environment below detectable levels.

In addition to the regulations applicable to these substances, the minister can order certain persons or classes of persons to draft and submit plans for the handling of these chemicals. Two types of plans are of particular interest: pollution prevention plans[15] and virtual elimination plans.[16] Penalties attach to the failure to submit plans,[17] but the Minister has no authority to impose standards or objectives that must be included in the plans. The Minister may, however, specify a

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[11] Toxic substances are described at s. 64 of CEPA, *supra* note 1 as substances that pose threats of harmful effects to the environment, or threats of danger to the environment or to human life or health.

[12] *Id*., s. 90.

[13] *Id*., s. 65 (2).

[14] Further conditions for inclusion are that the presence of the substance in the environment be the result of human activity, and that the substance not be a naturally occurring radionucleide or a naturally occurring inorganic substance: *id*., s. 77 (4).

Virtual elimination is defined at s. 65 (1), *id*., as "...the ultimate reduction of the quantity or concentration of the substance in the release below the level of quantification specified by the Ministers...," and level of quantification is defined at s. 65.1, *id*., as "...the lowest concentration that can be accurately measured using sensitive but routine sampling and analytical methods".

[15] *Id*., ss. 56 ff.

[16] *Id*., ss. 79 ff.

[17] *Id*., s. 272.

list of factors to consider,[18] including environmental objectives.[19] Further guidance may be provided in the form of model plans,[20] which may also include environmental objectives as well as more specific guidelines regarding management strategies for the substance in question, a plan and schedule for implementation, and strategies for monitoring implementation, among other elements. These are not legally binding requirements, however. With respect to pollution prevention plans, the Minister of Environment has some capacity to review and assess the plans on an informal basis only,[21] but have no authority to review or assess them.[22]

The federal government is in the process of developing, in consultation with other interested parties,[23] guidelines for the implementation of this planning initiative. A set of draft guidelines have been prepared, which give some indication of the manner in which implementation is to proceed.[24] With respect to substances that were placed on the Toxic Substances List under the CEPA 1985,[25] pollution prevention plans may be used where there is no existing regulation applicable to that substance and no immediate plans to produce one; where regulation already in place does not address all the relevant health and environmental risks; where existing regulations have not achieved the desired result; or where new information about risks

[18] *Id*, s. 56(2)(c), respecting pollution prevention plans.

[19] National Office of Pollution Prevention, Environment Canada. Draft Guidelines for the Implementation of the Pollution Prevention Planning Provisions of the New Canadian Environmental Protection Act (CEPA) (2000) [*hereinafter* Pollution Prevention Guidelines].

[20] *Id*., ss. 61 and 62.

[21] *Id*., s. 59 requires that the plans be kept on file. Section 60(1), *id*., authorises the Minister to request the submission of plans for the purpose of assessing them, but this does not involve an authority to approve the plans. This requirement appears to be for the Minister's information only.

[22] Pollution Prevention Guidelines, *supra* note 3.

[23] The actors with whom the Minister is to offer to consult are specified at s. 62(2), *id*., namely, provincial governments and representatives of aboriginal governments who are members of the National Advisory Committee established pursuant to s. 6(1), *id*. In addition, the Minister may consult with government departments or agencies, aboriginal people, industry and labour representatives, municipal authorities or members of civil society.

[24] Pollution Prevention Guidelines, *supra* note 3; National Office of Pollution Prevention, Environment Canada, Toward the Implementation of Virtual Elimination Planning Provisions under CEPA 1999 (Draft) (1999) [*hereinafter* Virtual Elimination Guidelines].

[25] *Canadian Environmental Protection Act*, R. S. C. 1985, c. 16 (4th supp.) (repealed).

has come to light. No virtual elimination plans will be required for substances that were listed under CEPA 1985.[26] Pollution prevention plans will be required for substances listed under CEPA 1999, except where adequate regulations are put in place or where existing management strategies prove adequate.[27] Decisions whether to call for the preparation of virtual elimination plans for substances listed under the new CEPA will be made on a case-by-case basis.[28]

III. Self-Regulatory Initiatives

Self-regulatory initiatives have been the subject of a good deal of attention from scholars and policy analysts. It is argued that bringing industry into the process of developing, implementing and enforcing environmental norms and standards holds several advantages, including greater flexibility, greater efficiency for industry, lower cost to government, and higher levels of industry support, to name a few.[29] Attention must also be drawn, however, to potential disadvantages, including the complexity of multiple regulatory schemes, the difficulty of accounting for cumulative effects, lower standards, industry cooption of the regulatory process, lower levels of enforcement, and loss of transparency. The growing body of literature on self-regulation provides us with a variety of classification schemes, as well as analyses of the conditions under which self-regulation is more likely to succeed. With the assistance of certain articles drawn from this literature, I will make some brief comments on the various self-regulation initiatives taken by the federal environment ministry and on the likelihood of their success.

Margot Priest has developed a typology of self-regulatory initiatives based on characteristics such as levels of government involvement, accountability, comprehensiveness of membership, the availability and nature of sanctions, and the presence or absence of a regulatory framework to provide a backdrop to self-regulation. At

[26] Virtual Elimination Guidelines, *supra* note 4.

[27] Pollution Prevention Guidelines, *supra* note 3.

[28] Virtual Elimination Guidelines, *supra* note 4.

[29] Margot Priest, *The Privatization of Regulation: Five Models of Self-Regulation* 29 Ottawa L Rev 233 (1997-1998); Moffet and Bregha, *supra* note 2.

one end of the scale are voluntary codes of conduct, such as the guidelines and codes of practice developed by the Canadian Chemical Producers' Association (CCPA) for their members under the rubric of the Responsible Care programme (CCPA). These codes are developed and implemented by industry with little or no government involvement. As we will see, federal and provincial governments have recently become involved in the implementation and oversight of voluntary codes. On the other end of the scale, with the highest degree of government involvement, is regulatory self-management, a category into which the pollution and virtual elimination plans described in CEPA fall. In such programmes, rules are made by the government rather than members of the industry concerned, but the government retains residual control over enforcement. Implementation and monitoring of compliance may be handled in a variety of ways. For example, an oversight organisation might be created by government and receive delegated powers of oversight and monitoring. The industry might hire independent auditors to interpret and enforce regulations. Alternately, the internal compliance structures of individual firms might be made responsible for implementing and monitoring compliance with regulations. It is not clear which of these approaches will be taken with respect to the CEPA plans.

The notion of delegating responsibility for implementing and enforcing pollution prevention regulations to industry has met with strong opposition from environmental groups and others. It appears quite counter-intuitive, especially as the firms in question may stand to gain a good deal from low environmental standards and lax enforcement, and as the stakes for environmental quality and public health are so high. The recent disaster in Walkerton, Ontario has brought home to the Canadian public the need for strict, and strictly enforced, environmental standards and regulations. Walkerton's municipal water supply had become contaminated with bacteria, leading to several deaths and cases of serious illness. This situation developed in the wake of provincial budget cuts in the area of environmental protection. It is evident that the stakes are very high, and any attempts by the federal government to adopt new approaches to environmental regulation and enforcement must be carefully scrutinised.

It should be emphasised that the status quo, namely government

promulgation, implementation and enforcement of regulations, is not necessarily a viable or effective alternative to self-regulation.[30] The size, variety and complexity of industrial processes may make it impossible for the government to mount effective inspection and enforcement efforts. In certain instances, it may not be the case that a reliable and comprehensive enforcement programme is or can be put in place. That being said, there are certain conditions identified in the literature that must be met for regulatory self-management to be successful. Price notes, for example, that the individual firms involved must have effective information gathering and decision making systems and proceses in place; senior management must support the compliance system; and the system must have measures for accountability built in. There must be what Price refers to as exogenous incentives for compliance, such as the desire to avoid bad publicity. Finally —and this point is of great importance— the system must be backed by a regulatory structure that is available to punish non-compliance. Self-regulation as a substitute for governmental regulation.[31] In the words of Margot Priest, "[s]elf-regulation appears to work best in the 'shadow' of government action".[32]

By requiring firms to develop pollution prevention and virtual elimination plans, the Minister is in effect shifting responsibility for carrying out certain regulatory tasks onto individual firms. However, this is far from a wholesale delegation of regulatory authority. The Minister retains authority to enact and enforce regulations detailing the handling of the relevant substances. The division of labour between government and firms could be structured in a variety of different ways. Government regulatory authority could be held in abeyance. In this case, the substance in question would not be subject to regulations promulgated by the Minister, this task falling entirely to industry or to individual firms. The draft guidelines for implementation of the pollution prevention plans referred to above indicate that this approach will be taken in certain cases. The firms targeted might

[30] Priest, *supra* note 5.

[31] Alastair R. Lucas, *Integrating Voluntary and Regulatory Environmental Management: The Legal Framework* 64 Resources: The Newsletter of the Canadian Institute of Resources Law (1999).

[32] Priest, *supra* note 5.

then have an incentive to design effective plans and to implement and enforce them fully in order to avoid the imposition of regulations designed by government.[33] In cases in which regulations are in place but are not adequate, a scenario envisaged in the draft guidelines, firms could be called upon to implement plans that would enable them to exceed the regulatory standards. Once again, an incentive for them to do so would be to avoid the imposition of stricter and more invasive regulatory standards. A third possibility would be for the Minister to enact framework regulations setting performance standards, leaving with the firms the responsibility for determining how these standards could be met. In this case, the incentive to create and implement effective plans would be more obvious, namely, to avoid sanctions for violation of the regulatory standard.

IV. Previous Experience with Self-Regulation

The federal ministry has had some limited success with voluntary standards in the past. The Accelerated Reduction / Elimination of Toxics (ARET) initiative,[34] launched in 1991, called upon industry to accept emissions reduction targets on a voluntary basis. This programme differs from the CEPA plans in that it focuses exclusively on results, leaving it entirely to industry to determine how those results are to be achieved. It also differs in that it exists outside the context of CEPA or any other regulatory framework. The threat of regulation and sanction operates in the background inasmuch as insufficient levels of participation by industry or inadequate reductions would presumably lead to the imposition of regulations. Indeed, the federal government has responded to slow progress on meeting voluntary standards with initiatives to regulate targeted substances.[35]

ARET set a short-term goal of ninety percent reduction of persis-

[33] Moffet and Bregha, *supra* note 2.

[34] Environment Canada, Consultation Paper on the Future of ARET (1999) [*hereinafter* Consultation Paper].

[35] In early 1999, then Environment Minister Christine Stewart expressed frustration with the pace of progress on reduction and elimination of a number of chemicals covered by the voluntary programme, and moved to enact regulations covering these substances, *The Edmonton Journal*, 20 de marzo de 1999, Final Edition, p. A8.

tent, bioaccumulative and toxic substances emissions and fifty percent reduction of all other toxic substances emissions by 2000. The long term goals are virtual elimination of emission of thirty persistent, bioaccumulative and toxic substances and reduction of another eighty-seven toxic substances to levels insufficient to cause harm.[36] A review of the programme carried out by Environment Canada revealed mixed results. Progress on the first set of substances fell short of the target, with an estimated seventy percent reduction, while reduction of the second category was in the order of eighty percent.[37]

Environment Canada identified a number of problems with the programme, including insufficient rates of participation by industry, lack of verification of results and incomplete reporting on reductions.[38] Furthermore, certain obstacles to improvements to the programme were noted. In particular, the programme may be reaching the limits of its viability. Up to a certain point, it is relatively easy and inexpensive for industry to achieve emissions reductions, but in order to achieve further reductions, greater effort and expense must be invested. The report concluded that it may be necessary for government to provide further incentives for industry to make these investments.

Another possible vehicle for negotiated reductions of toxic substances is sectoral agreements, through which standards and implementation strategies are negotiated with particular industrial sectors. In 1994, the Governments of Canada, Ontario and Alberta and the Canadian Chemical Producers' Association concluded a Memorandum of Understanding on Environmental Protection Through Action Under CCPA Responsible Care.[39] The MOU expired in 1998 and is currently being renegotiated. The approach taken involved the creation of a steering committee, the Environmental Protection Steering Group, whose members were drawn from the parties to the MOU.

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[36] ARET Secretariat, Environment Canada, *ARET Homepage* (julio de 2000), http://www.ec.gc.ca/aret/homee.html.

[37] Consultation Paper, *supra* note 7.

[38] *Id*.

[39] Canadian Chemical Producers' Association and Governments of Canada, Ontario and Alberta, *Memorandum of Understanding for Environmental Protection through Action under CCPA Responsible Care (Draft)* (1999) [*hereinafter* Draft MOU]; Moffet and Bregha, *supra* note 2.

The MOU provides a list of candidate substances, a methodology for developing and implementing pollution prevention plans, reporting procedures, and an infrastructure for supporting the initiative.[40] The draft MOU currently under negotiation states that aggregate release reduction targets are to be formulated by the CCPA and reviewed by the Steering Group. Reports on the targets themselves are to be publicly available, and members of the public will have access to reports on progress made to achieve those targets through the Steering Group. Information on site-specific targets and progress to achieve those targets will be available at the discretion of the member companies. An obvious problem with this MOU is the tentativeness with which it approaches the issue of reporting on progress. If firm-specific information is not made available to the governmental participants and to members of the public, there will be few opportunities for peer pressure to operate against firms with poor performance records. Furthermore, the governments will not receive sufficient feedback to permit them to determine whether a more formal, regulatory approach is necessary and the features that such an approach should incorporate.

V. Excursus: The Constitutional Division of Powers

It is not possible for a Canadian to talk on any subject for any length of time without mentioning the Constitution. Before entering into a discussion of the likely strengths and weaknesses of the pollution prevention and virtual elimination plans provided for under CEPA, I will make some brief comments about the constitutional division of powers over environmental protection. Federal jurisdiction over toxic substances is based on a range of heads of powers, including, most notably, criminal law jurisdiction, jurisdiction over trade and commerce, and jurisdiction under the national concerns branch of the peace, order and good government power. Without going into detail on the nature of these various heads of power, it bears mentioning that federal jurisdiction over toxic substances is not broad enough to support the comprehensive regulation of industrial processes. The jurisdiction of the federal government is sufficient to allow the cre-

[40] Moffet and Bregha, *supra* note 2.

ation of a regulatory framework, for example through the classification of substances and the identification of those that pose particular dangers to human health and environmental quality, and through the setting of performance standards and emissions targets. However, the regulation of industrial processes, for environmental or other purposes, falls to the provinces. It is therefore not surprising that CEPA does not formally grant the environment minister authority to review and approve the CEPA plans. The question remains how effective these plans are likely to be. Instruments such as voluntary programmes and open-ended quirements for the submission of pollution plans permit the federal government to extend its regulatory reach without trenching on provincial jurisdiction. Such programmes may also provide a basis for federal-provincial cooperation in the design, implementation and enforcement of comprehensive toxic substances management and elimination strategies.[41] They may also foster harmonisation of environmental standards and objectives. It may be the case that the CEPA plans will prove to be a powerful tool in the promotion of much-needed interprovincial cooperation.

VI. Preliminary Assessment of the CEPA Plans

International environmental protection regimes place great store by reporting requirements. State parties are obligated to report on the steps they have taken to implement the objectives of international conventions, thus creating a degree of transparency that is generally regarded to be essential to compliance. This transparency permits peer pressure to be brought to bear on states not in compliance; it permits the parties to identify and address obstacles to compliance; and it provides reassurance to that other states are playing by the rules and are not gaining an illicit competitive advantage. The literature on self-regulatory programmes suggests that the same considerations operate at the domestic level.[42] If the government wishes to make a credible threat that regulations will be adopted if voluntary targets are not met, then it must be in a position to know whether the

[41] *See* Priest, *supra* note 5.

[42] *See, e.g.*, Priest, *supra* note 5.

threat needs to be executed. If voluntary targets, codes of practices etc. are being unevenly observed, it must be known which firms or industrial sectors are in compliance and which are not, in order to improve the programmes, design effective regulatory instruments, and target regulatory sanctions appropriately. Even if the ministry has no formal power to vet pollution plans, it must have a capacity to evaluate their adequacy and effectiveness, and to review their implementation and analyse the results achieved. Finally, the government must be prepared to enforce its regulatory standards, which means that it must be capable of detecting instances of non-compliance. In short, industry participation in the design and implementation of regulations is not and cannot be a substitute for government involvement and oversight.

In order to ensure that the public interest is being protected, self-regulatory initiatives must possess several additional features. For example, the processes of decision making, implementation and enforcement must remain open and accessible to members of the public; government must remain accountable for results; the standards adopted must be sufficiently high; the cumulative effects of regulatory initiatives in different sectors or geographic areas must be taken into account.[43]

There is a consensus in the literature to the effect that self-regulation can work in certain circumstances, and that it is very important to find the right combination of policy tools and administrative structures to suit a particular set of circumstances. To cite one example, certain firms or industries will not have well-developed internal structures for the making and implementation of decisions and for reviewing results. Certain actors may not have the expertise required to design and implement appropriate plans. This problem may be resolved through investment by government and industry in capacity-building, and it may be the case that such investments pay off in the long run in the form of higher industry standards, higher rates of compliance with standards, and the development of a responsive and responsible corporate culture. However, initial investments may be high, and results may be slow to manifest themselves and difficult to

[43] *Id.*, Moffet and Bregha, *supra* note 2.

quantify.

A government whose main objective is to reduce its own costs by simplifying regulatory structures and delegating various tasks to the private sector, or to create a more industry- and investment-friendly environment will in all likelihood do a very bad job at devising self-regulatory initiatives that serve the public interest. The development of successful self-regulatory programmes requires a certain level of investment at all stages, from design through implementation to monitoring and review.

VII. Conclusion

It remains to be seen whether the CEPA plans will be effective, from the point of view of the public interest. A major factor contributing to success or failure will be the capacity of federal and provincial governments to cooperate to create an infrastructure for self-regulation. The capacity of environmental NGOs to play a watchdog role will also be of major importance. If it appears that the federal government is not acting in the public interest in implementing pollution planning, it will be open to NGOs to bring a submission under art. 14 of the North American Agreement on Environmental Cooperation (NAAEC). The federal government should also bear in mind the possibility of facing action under art. 22 of that Agreement if it regards the CEPA plans as a means of abdicating its responsibilities.

It is impossible to speculate on the direction that the CEPA plans will take, but there is clearly a good deal at stake. These instruments have the potential to provide the basis for a progressive, ambitious programme of pollution prevention and elimination of toxic substances, but in order for them to live up to this potential, a significant investment of money, time and expertise on the part of the federal and provincial governments and stakeholders in industry and the NGO community must be made.

⊙ Índice General
◎ Índice ARS 27