

Section Five

Environmental Policy in Canada

In the preceding chapters we showed how and why markets fail to achieve social efficiency when externalities associated with the natural environment exist. Chapter 10 looked at the extent to which decentralized policies can work out socially efficient solutions to environmental problems. Chapters 11 through 14 examined the economics of specific government policies designed to achieve social efficiency. In this section, Chapter 15 provides an introduction to some key characteristics of Canadian environmental policy—the Constitution and important features of the parliamentary model of government in a federal system. In the chapters that follow, we examine specific environmental policies that have been used by governments in Canada to deal with *environmental problems*—water and air pollution, toxic substances, solid wastes, and *global problems*—climate change, ozone depletion, and biodiversity, including species at risk. The analytical tools developed in the previous sections are used to evaluate these policies. Canadian policies are contrasted with those in the United States and other countries to get a perspective on where Canada stands relative to other industrialized countries.

Chapter 15

Environmental Policy and Institutions in Canada: An Overview

It is much more difficult in practice to achieve social efficiency than economic models suggest. There are many reasons for this. Economic efficiency is only one possible objective of environmental policy. Other motivations include equity (ensuring a fair distribution of both the benefits and costs of meeting environmental targets across income groups), regional diversity, and political factors (such as vote seeking on the part of politicians, responses to special groups, ideological beliefs, and so on). Governments are also constrained by constitutional powers, legislation, and the presence or absence of particular institutions. While it is beyond the scope of this text to address all of these factors, this chapter presents the constitutional foundations for developing and implementing environmental policy in Canada, a review of the agencies that make and enforce Canadian environmental policy, and a short summary of the direction of Canadian federal environmental regulation with a guide to where to find more details in the chapters that follow. We start with some general points about Canadian environmental policy to set the stage.

General Points about Canadian Environmental Policy

1. Incentive-based policies are much less common than command-and-control policies.
2. There has been a reluctance to impose specific standards. Most regulation has been in the form of guidelines that suggest a range of pollution targets. Both ambient and emission guidelines and standards are used. Technology-based standards remain in wide use.

3. Environmental legislation in Canada has been based on a co-operative model of negotiation between the government regulator and the polluting party where contracts exist between specific polluters and government.¹
4. Environmental legislation in Canada has been primarily enabling rather than mandatory. What this means is that officials are authorized to develop regulations. They rarely have the obligation to act. This is quite different from the situation in the United States, where regulations passed by Congress generally require implementation of specific policies.
5. Negotiation and moral suasion have been used to achieve compliance with environmental targets.
6. Jurisdiction over the environment is not always well defined. Conflict among the levels of government and inaction can arise as a result.

¹ A memorandum of understanding is a commonly used agreement between governments and the private sector to achieve a particular goal (e.g., reduction of emissions). This allows the government to achieve pollution targets without passing specific regulations. However, it may also thwart achieving these targets. If there is a memorandum of understanding, a company cannot be prosecuted for failure to comply if it has notified the government that it needs more time, for example, to install pollution-abatement equipment or if adverse economic conditions prevent compliance. This has enabled some companies to delay compliance for fairly long periods of time.

Constitutional Powers Over the Environment²

Federal Powers

Section 91 of the *Constitution Act* (1867) establishes federal powers over ocean and inland fisheries (section 91[12]), navigation and shipping (section 91[10]), and federal lands and waters. Each of these powers has been used by the federal government to enact legislation that has some element of pollution control. For example, under its fisheries powers the *Fisheries Act*, one of the strongest and most-used environmental regulations, was promulgated. The federal government enacted under its navigation and shipping powers the *Navigable Waters Protection Act* and the *Arctic Waters Pollution Prevention Act*. The *Northern Inland Waters Act* comes from its powers over federal lands and waters. The federal government also has powers to enter into international agreements and has done so on many occasions in matters that involve environmental concerns. Examples of international agreements regarding the environment are the Montreal Protocol for stratospheric ozone depletion, the Basel Convention on toxic wastes, the Kyoto Accord for greenhouse gases, and many others. Finally, there is a provision that is increasingly serving as a basis for federal government regulation regarding the environment. This is the preamble to section 91 of the *Constitution Act* that gives the federal government the power to enact legislation in the interests of “Peace, Order, and Good Government.” The widely used acronym for this is POGG. The major piece of federal legislation relating to toxic materials, the *Canadian Environmental Protection Act*, was based on POGG power. The federal government also has the power over interprovincial and international trade, and the power to levy taxes and to make expenditures. Its taxation powers have rarely been used to justify environmental policy.

² This section of the chapter is based largely on the readings in Robert Boardman, ed., *Canadian Environmental Policy: Ecosystems, Politics, and Process* (Toronto: Oxford University Press, 1992). We will deal with local government powers in Chapter 19.



Canadian Environmental Protection Act, 1999: <http://laws.justice.gc.ca/en/C-15.31>

Provincial Powers

The key to understanding Canadian environmental policy is to recognize that most regulatory powers applicable to the environment lie with the provincial governments.

Most of the provincial powers come from section 92 of the Constitution. Under section 92, the provinces have power over local works (section 92[10]), property and civil rights within the provinces (section 92[13]), matters of a local or private nature (section 92[16]), and authority over provincially owned lands and resources (section 92[5]; 109). This last authority is extremely significant, as it gives the provinces the right to regulate their natural-resource industries. Development and use of natural resources can often lead to environmental trade-offs and conflicts. As well, most publicly held land in the country is in the provinces, so whatever policies provincial governments enact will tend to have larger environmental impacts than federal policies related to lands. A 1982 amendment to the *Constitution Act* (section 92A) strengthened the provincial powers over its natural resources. Under 92A, each province has exclusive jurisdiction over the development, conservation, and management of its non-renewable resources, which have been interpreted to include energy resources, forests, and hydroelectric power facilities. Each province has established an environmental regulatory regime that contains provisions for procedures and statutes controlling various sources of pollution and addressing ambient environmental quality.

Overlapping Powers

Having looked at these constitutional powers, it is tempting to generalize by saying that, with the exception of fisheries, the federal government is responsible for federal lands and international aspects of the environment while the provinces are responsible for *intraprovincial* environmental quality. Unfortunately, the situation is not this simple. The regulation of specific environmental problems in Canada tends to be done at both the federal and provincial levels. The Constitution does not explicitly prohibit this. For example, provincial water-pollution regulations overlap with federal fisheries regulations. Both have regulations for accidental spills into waterways as well as air-pollution regulations. Pesticide distribution, use, and sale is regulated by the federal government. Provinces have their own pesticide regulations.

Another indeterminate area of constitutional powers concerns *interprovincial* pollution flows. In principle, one would expect that the federal government would have regulatory power when pollution flows across provincial boundaries. This would be analogous to its international and interprovincial powers in other matters. However, federal extrajurisdictional powers can be in conflict with the section 92A powers of the provinces. Interprovincial environmental problems remain an area of potential federal–provincial tension.

Finally, there are even unresolved issues with the federal government's treaty-making powers. While the federal government clearly has the power to negotiate an international treaty, implementing a treaty would be a provincial matter if section 92A and other provincial powers apply. There is the possibility that provinces may refuse to cooperate with the federal government. Individual provinces may also want to make separate arrangements about the conditions of implementation with the federal government, or even act independently for political or other reasons. It is not necessarily a bad thing to have different arrangements with each province because environmental quality and pollution problems can differ widely across the country; policy harmonization across the country is not necessarily required. But, arrangements that differ considerably across the country may lead to unequal and unjust burdens in different provinces, or even thwart the federal government's efforts. If each province enacts its own legislation, this also raises the compliance costs for polluters that deal with myriad regulations.

The Role of the Courts

The third player in the Canadian regulatory setting for the environment is the legal system. With respect to the Constitution, the role of the courts is to establish principles for interpreting the powers of each level of government through litigation dealing with these powers.³ The types of rulings the courts must make include determining if only one level of government has the exclusive power (under section 91 or 92) to enact particular legislation. If, for example, the subject matter of a law does not come within section 92 powers, a provincial law is said to be *ultra vires*, which means beyond the province's power. The other type of ruling concerns cases where both levels of government have laws pertaining to the environment. This is allowed as long as the laws are not in direct conflict.

The court's job is to determine whether or not the laws conflict. The term used to describe the situation where both levels of government have laws over the same thing is **concurrency**.

³ Chapter 10 discusses the role of the legal system in environmental issues that involve property rights and liability laws (i.e., actions taken by private individuals or companies). These issues will not be discussed again in this chapter.

If the laws are in conflict, the federal law has precedence over the provincial law. This is called the doctrine of **paramouncy**. The legal system is driven by cases. Even though there is the potential for conflict between the levels of government, a suit must be launched to generate a legal interpretation of the powers of each government. Very few legal decisions regarding environmental legislation have been rendered. The one exception is in the management of fisheries. However, it is expected that more challenges may emerge if environmental legislation in Canada moves from the level of suggested guidelines to specific standards and/or incentive-based policies. Many aspects of the constitutional powers over the environment remain unclear. The delegation of the powers between the federal and provincial governments can be ambiguous and has in the past contributed to conflict in the development and implementation of environmental policy. Let's look at some of these problems in more detail.

Constitutional Powers in Conflict

Two types of problems that stem from Canada's Constitution and federal system have arisen in environmental policy. These are

- lack of clarity and overlap of jurisdictional responsibilities, and
- conflicting objectives between the federal and provincial governments.

Lack of Clarity and Overlap of Jurisdictional Responsibilities

As noted above, the Constitution does not clearly spell out distinct jurisdictional responsibilities for each level of government. Their responsibilities can overlap, causing the potential for uncertainty as to which level of government has the authority to regulate for specific environmental problems and objectives. The overlap may be sustainable, with both levels of government concurrently regulating some sector of the economy. A number of examples are illustrated in the next five chapters. If concurrent regulations are consistent in that they have identical objectives and use similar policy instruments, conflict is less likely. For example, if the government of the province of Nova Scotia and the federal government both require a permit for industries to dump toxic wastes into a waterway, and the allowed amount of wastes is identical, conflict and confusion over the concurrent policies are unlikely. However, if the province issues a permit that allows some waste discharge and the federal government prohibits dumping, obvious problems arise. The example below illustrates one of these conflicts and how it was resolved in the courts.

Example: Water resources

The federal government has constitutional powers over water in the area of fisheries, navigation, and shipping. The provinces have the power to manage and conserve natural resources. When there is conflict, legal decisions are basically shaping the conditions for one level of government to have supremacy. Several examples illustrate this point. The Supreme Court of Canada ruled many years ago (in 1929) in *The Water Power Reference* that the federal government may restrict or even prohibit provincial water developments to preserve federal navigation and fisheries rights. Many years later, in 1980, the Supreme Court upheld a federal prosecution against a company that spilled oil into an inlet in British Columbia on the grounds that the federal government had the right to protect fisheries. The company responsible for the spill had argued that the province had the sole authority to regulate pollution under its property and civil-rights power.

Other cases have put conditions on federal powers over water. In a case involving the discharge of logging debris into any waterway, the Supreme Court ruled that a section of the federal *Fisheries Act* was beyond the power of the federal government because logging regulation was a provincial power under the property and civil-rights clause. This ruling might at first be seen as contradictory to the previous ruling. However, the court noted that the federal government had failed to meet certain conditions in this regulation:

1. It did not show that timber debris had a specific deleterious effect on fish.
2. The regulation was too broad. It had no specific limitation on the amount of debris. By implication, then, any amount of debris was deleterious to fish. Clearly, this is unlikely to be the case.
3. The regulation covered all waterways, some of which may not have a fishery.
4. Finally, all aspects of logging operations were covered by the regulation. This is where the conflict with provincial powers emerged.

Other cases have reinforced aspects of this case—for example, overturning convictions under the *Fisheries Act* when the federal government failed to show that discharges went into rivers frequented by fish. So while the courts have interpreted federal water rights as allowing the federal government to impose pollution regulation, certain conditions have to be satisfied to prevent infringement of provincial constitutional rights.

Example: Transboundary pollution

The Supreme Court also appears to have given the federal government the power to regulate pollution when the pollution flows outside provincial boundaries even if the federal government has not shown harm to fish or navigation and shipping. The federal right to regulate transboundary pollution was based on the Peace, Order, and Good Government (POGG) power in the Constitution. Ironically, the 1988 case that generated this decision again involved the dumping of logging debris, this time into an ocean cove in British Columbia.⁴ The federal policy in question was the *Ocean Dumping Control Act*, which required a permit for discharge into the ocean. The defendant in the case did not have a permit. The key aspect of the ruling was the court's decision that the federal government has regulatory power under POGG to enact regulations when there is "national concern" about pollution. The court ruled that marine pollution was a matter of national concern because marine waters are an indivisible resource, whereas fresh waters are not. If a province failed to control pollution into the marine environment, other provinces or countries could be affected. Thus, the federal government had the authority to enact environmental regulations.⁵

⁴ The case is *Regina vs. Crown Zellerbach Canada*.

⁵ The federal government also has power to intervene with regulation when there is seen to be a national environmental emergency.

Unfortunately, decisions such as the two cases described above have not completely clarified federal versus provincial powers. The term "national concern" was defined somewhat vaguely. The court noted that a matter of national concern must have a "singleness, distinctiveness, and indivisibility that clearly distinguishes it from provincial concern."⁶ To help decide whether a pollution problem met these criteria, the court added that measurement should be made of any extraprovincial effects that occurred when a province failed to regulate pollution within its own boundaries. There is certainly room for disagreement as to what is a national concern. As well, the court acknowledged in this case that provinces may be granted concurrent jurisdiction to protect local interests.

⁶ Supreme Court of Canada, 1 S.C.R. 401 (1988), as cited in David VanderZwaag and Linda Duncan, "Canada and Environmental Protection" in Robert Boardman, *Canadian Environmental Policy: Ecosystems, Politics, and Process* (Toronto: Oxford University Press, 1992).

Ambiguity and the scope for conflict remain. We may see legal challenges of current and pending legislation once specific regulations are approved. CEPA is an example of a federal regulation that uses the concept of national concern as a basis for regulation. The pollutants of national concern in this case are toxic substances. Few specific regulations have been brought in under CEPA.

At present, there are some signs of greater federal and provincial co-operation in the setting of regulatory targets and instruments. An example is the Harmonization Accord of 1998. The goals of this federal-provincial agreement are to improve coordination of environmental policy, reduce conflict and overlap, and promote joint initiatives on the environment. Some critics of the Accord argue that the federal government has been devolving too much authority to provincial governments at a time when these governments have been reducing public expenditures. They are fearful that environmental quality will be threatened. Chapter 16 provides several examples that support these concerns.

Time will tell if the federal and provincial governments will co-operate on the setting of national environmental policies. If these conflict with the interests of a province, given past history it is likely that the province would challenge the federal government's right to do so.

Environmental Regulation in a Parliamentary System

Overview

Environmental policy in any country is greatly affected by its political system. In this section, the implications for environmental policy of Canada's parliamentary democracy are examined. The Canadian situation is also compared to the policy process in the United States. Key points are as follows.

1. Under a parliamentary system with a majority government, the governing party has a lot of control over the legislative agenda. Our system of government is very good at getting legislation approved that is supported by the party in power. The converse is also true. Federal interest in environmental issues waxes and wanes. Environmental policies and, more importantly, action on these policies by the federal government track quite well the level of environmental concern of the public and the party and the government's overall economic agenda.
2. There are few, if any, checks and balances in a parliamentary system. There is nothing equivalent to the two different branches of government in the United States, the executive branch (the President) and the legislative branch (Congress). The U.S. Congress may have one or more of its houses controlled by a party different from that of the president. Congress writes and passes laws that need not have the support of the executive branch. In the parliamentary system, this is generally impossible. The executive and legislative branches under a majority government are essentially one. If the federal government wants to drag its feet on dealing with environmental problems, it can. Public pressure plays a very important role, as it does in all democratic political systems, and the government is ultimately accountable at election time. However, a five-year maximum term gives the party in power a lot of time to avoid confronting issues if this is what it wants to do.
3. The parliamentary system can also curtail public debate and scientific inquiry into environmental issues through its control of the federal bureaucracy. In Canada, the party in power basically controls the federal bureaucracy, and the federal bureaucracy controls research and legislative agendas. Environmental research is essential for undertaking regulation. For example, a standard cannot be imposed until there is evidence on what the level of emissions or ambient quality should be. Scientific and economic environmental research is not often a high priority of the federal government. An example is the budget cuts during the early years of the Mulroney government that threatened the monitoring of toxic chemicals in waterfowl. A more recent example is the lack of significant federal action to reduce greenhouse gas emissions. There is no other body independent of federal or provincial governments that can initiate large and potentially expensive studies. By contrast, there are many examples of research on environmental issues done for the U.S. Congress that influence policy. In our federal system, the one check we have is the provinces. They can have different priorities and public pressures than the federal government. For example, Ontario typically led the country by introducing major environmental initiatives in the 1960s. British Columbia introduced a textbook carbon tax in 2008 (see Chapters 12 and 20) and other policies to reduce GHG emissions. Ontario has introduced incentives to greatly increase the share of renewable resources generating electricity and reducing its dependence on coal-fired generation.
4. With the legislative and executive branches combined, environmental legislation takes on quite a different character in Canada than it does in the United States. The process for setting standards and designing regulations is said to be "far more informal, discretionary and closed than that in the United States."¹⁰ This is true for the provinces as well. Environment Canada typically prepares federal environmental regulations. The ministry has quite a bit of discretion in the scope and formulation of the laws and regulations it proposes to Cabinet.

¹⁰. Don Dewees, *Reducing the Burden of Environmental Regulation* (Kingston: School of Policy Studies, Queen's University, Government and Competitiveness Discussion Paper, 1992), 22.

The situation in the United States is quite different. Congress initiates a bill that *requires* their environmental agency, the Environmental Protection Agency (EPA), to develop regulations within specified time periods, impose those regulations, report back to Congress on progress, and sometimes even to achieve specific targets such as zero discharge by specific dates. In Canada, because Environment Canada designs the legislation without conditions imposed by another political body, it is much less likely to propose a law that binds it to specific timetables, procedures, and so on. In practice, Canadian environmental laws contain less specificity than their U.S. counterparts. They authorize or permit Environment Canada to do something, but do not compel it to act.

Once a regulation is designed by Environment Canada, its path into application is much less arduous than typically is the case in the United States. In Canada, the only procedural requirement for imposing federal regulations is that they be published in *The Canada Gazette*. Committees of Parliament may review the regulations “gazetted,” but typically don’t do so until after the regulation is adopted. Environment Canada consults with affected parties, other ministries, and the provinces prior to the adoption of the regulation. In the past, environmental groups were left out of this consultation process, but that has changed in recent years. There are now regular meetings of what are called *stakeholder’s groups*, which include public- and private-sector representatives as well as those from non-governmental organizations (NGOs). They discuss not only regulation but also all aspects of environmental policy.

In the United States, the whole system is much more litigious. Federal agencies must publish a notice of proposed regulation in the *Federal Register*, allow interested parties to comment on it, then publish reasons for the final regulation. The regulations must be supported by what’s called “substantial evidence.” The courts are the judges of what is substantial. There are many legal challenges to regulations in the United States, and very few in Canada. It is important to note that despite these significant differences in policy making between the two countries, the United States is not more successful than Canada in reducing pollutants or achieving higher levels of environmental quality. In the United States, battles within Congress or between the legislative and executive branches and the large amount of litigation that occurs can impede effective implementation of policies. Our often more co-operative process of setting regulations might lead to higher compliance.

A Sketch of the Regulatory Activities of Environment Canada

To understand the regulatory process at the federal level in Canada more fully, we provide a brief history of Environment Canada, Canada’s federal environment ministry.¹¹ Environment Canada (EC) was created in 1971 to bring together a number of different federal agencies that had environmental responsibilities. New responsibilities were also intended for the agency, notably environmental protection through the creation of the Environmental Protection Service, and coordination of federal efforts at preserving environmental quality and/or controlling pollution. There were high hopes at the beginning of the 1970s that Environment Canada would be a world leader in protecting the environment. A number of factors combined to prevent that realization from occurring.

¹¹. This section is based in part on material in M. Paul Brown, “Target or Participant? The Hatching of Environmental Industry Policy” in Robert Boardman, *Canadian Environmental Policy: Ecosystems, Politics, and Process* (Toronto: Oxford University Press, 1992).



Environment Canada: www.ec.gc.ca

First, Environment Canada has had a number of bureaucratic difficulties. From the period 1971 to 1986, it had 10 different ministers and many reorganizations. At one point, it was under the jurisdiction of the federal fisheries department. It has not been a high-profile ministry. Perhaps some of this was intentional policy on the part of the federal Cabinet: to have in place the institution for environmental policy, but not let it do very much. Evidence for this is in some of Environment Canada’s powers and its political influence relative to other federal ministries. For

example, EC was limited to duties, powers, and functions—not by law assigned to any other department, branch, or agency of the federal government. This meant that if Agriculture Canada had regulations about water use (that might have significant environmental impacts), EC couldn't also intervene. Secondly, a number of its initiatives were stopped by budget cuts. EC had designed a program to deal with environmental aspects of federal operations on Indian reserves. This program was terminated in the mid-1970s by budget reductions, and not reinstated until the federal Green Plan in 1990. Further evidence of EC's weak regulatory role comes from a study of the federal bureaucracy done at the end of the Trudeau government. The study identified 82 pieces of federal legislation that had a bearing on the environment. Of these, EC was responsible for 13. The Department of Indian and Northern Affairs had more. Environment Canada was typically thwarted in its efforts because its responsibilities overlapped with other federal agencies and because these agencies had greater political and statutory powers. Recent years have seen upsurges in EC's stature with the fanfare surrounding the Green Plan in 1990. This has been followed by decline in activity since the mid-1990s with the quiet disappearance of the Green Plan after the election of the Liberals in 1993 and massive budget cuts to the ministry. Since the late 1990s, international pressure to take action on climate change and domestic concerns over local air and water pollution have led to a partial reinstatement of EC's staff and a major interest in examining economic instruments for environmental objectives. However, government priorities have recently shifted away from environmental issues and EC has again taken a rather lower profile among agencies, with challenges to its staffing levels and ability to engage in significant environmental issues facing Canada.

The federal budgetary process does not favour Environment Canada. The federal budget is allocated among its ministries and agencies by placing each agency into a particular "envelope" based on its principal tasks. Environment was in the "social development" envelope that also included health and welfare, a major recipient of federal funds (some 35 percent of total federal spending in the 1970s to 1980s and even higher in the 1990s). Social development also included statutory transfers to the provinces and to individuals. By the time these two activities received their budgets, there was not much left for Environment Canada. The other significant aspect of placing environment into social development was that it separated it from economic agencies and, more importantly, treated the environment as a social, not an economic, issue. When social policies started to be hit hard in the federal budgets of the 1980s and 1990s, and again after middle of the decade in 2000, EC sank with them. This separation of economic policy from environmental policy has had a bearing on the type of policies enacted as well. As we'll see in later chapters, there has been virtually *no use of economic incentives* for environmental improvement at the federal level.

The early to mid-1970s saw the delivery of a number of environmental policies, which we examine in the next three chapters. EC had an agreement with the Department of Fisheries and Oceans to allow it to administer the section of the federal *Fisheries Act* that dealt with pollution of fish habitats. Similar agreements with Transport Canada existed for the shipping of hazardous wastes, and with Agriculture Canada for pesticide regulation. But many areas of regulation were essentially left to other agencies. We must not forget as well the powers of the provincial governments over environmental policy. Overall, the period from the mid-1970s to late 1980s is one of missed opportunity to act for the federal government.



Canadian Council of Ministers of the Environment: www.ccme.ca

By the mid-1980s, public opinion about the environment began to force some changes in federal policy. Public opinion polls started consistently putting environmental concerns at the top of people's lists. Some recognized that environmental protection did not necessarily mean losing one's job. The publication of the Brundtland Commission's *Our Common Future* in 1986 focused attention on the concept of "sustainable development." The Mulroney government found this concept appealing (at least as rhetoric), and moved to create a stronger environmental ministry. The Canadian Council of Resource and Environment Ministers was created in 1986. Its task was to establish a National Task Force on Environment and the Economy. This council was later changed to the Canadian Council of Ministers of the Environment (CCME), a federal-provincial group. When first founded, the CCME had an active agenda that led to adoption of a number of accords between the federal and provincial governments. Research programs were initiated and some interesting reports were released. Unfortunately, like so much else in

Canadian environmental policy, after a good start the process waned. In recent years, the activities of the CCME have diminished substantially, focusing on a few issues where progress has been made (e.g., sulphur in fuels).

The public's environmental awareness also led to the formation of "round tables" on the environment, economy, and sustainable development at both the federal and provincial levels by the end of the 1980s. The round tables involved government, industry, environmental NGOs, and researchers and were quite active in the early 1990s. By the late 1990s, most of the provincial round tables were not very active. The National Round Table on the Environment and Economy (NRTEE) was created by Parliament in 1994 as an independent advisory body whose mandate is to provide advice and recommendations to governments, industry, and the public for promoting sustainable development. When created, the NRTEE reported directly to the Prime Minister. It now reports to the Minister of the Environment. In recent years, the NRTEE has had a focus on climate change, issuing a number of reports.



National Round Table on the Environment and Economy: www.nrtee-trnee.ca

New environmental legislation emerged in the late 1980s with the approval of CEPA by Parliament in 1988. The *Canadian Environmental Assessment Act* also emerged during this period. In January of 1989, the Cabinet Committee on the Environment was created and chaired by the Minister of the Environment. The other departments on this committee included Health and Welfare; Energy, Mines and Resources; Fisheries and Oceans; Transport Canada; Forestry Canada; Consumer and Corporate Affairs; Labour; Agriculture; Science and Technology; and the Atlantic Canada Opportunities Agency. Curiously absent (again) were the "economic" ministries—the Department of Finance and Industry Canada. The mandate of the Cabinet committee was to "manage the government's environmental agenda." The Minister of the Environment was also given a seat on the influential Priorities and Planning Committee and the Operations Committee. A major policy initiative came from Environment Canada during this period—the 1990 "Green Plan."

Canada's Green Plan was a national strategy and action plan for sustainable development. Its goal was "to secure for current and future generations a safe and healthy environment, and a sound and prosperous economy."¹⁴ With an initial budget of \$3-billion announced (but never fully delivered), the Green Plan was heralded by the federal government as a major breakthrough in environmental policy; a recognition that the economy and the environment were linked. The Green Plan established seven goals: clean air, water, and land; sustainable use of renewable resources; protection of special spaces and species; preserving the integrity of the North; global environmental security; environmentally responsible decision making; and minimizing the impact of environmental emergencies. While the Green Plan set out an agenda for addressing these goals, it prescribed very few specific regulations. Some of the agenda was simply a consolidation of activities that already existed, but new initiatives were also planned. As noted above, the Green Plan slowly died over the first few years of the Chrétien government, when reducing the deficit became the predominant federal policy. Environment Canada's budget was slashed. Work on most of the initiatives slowed or stopped. The Green Plan did make some contributions to Canadian environmental policies. Some of the initiatives and subsequent outcomes are noted below, along with a notation of the chapters in which the topics are discussed in more detail.

¹⁴ Government of Canada, *Canada's Green Plan: The Second Year*, Catalogue No. En21-110/1993E (Ottawa: Minister of Supply and Services, 1993), p. 4.

1. Many action plans were initiated to help meet the target of clean air, water, and land. Few regulations emanated from these plans. (See Chapters 16, 17, and 18.)
2. Agreements were made with the private sector to reduce pollutants, especially in the area of toxic releases. Environment Canada worked with industry groups to promote *voluntary emissions reductions*. These are reductions done even though there is no regulation requiring it.

3. Bilateral agreements were signed to improve water quality on Canada–U.S. boundary waters (e.g., for Lake Superior). Studies were initiated, but few if any regulations resulted. (See Chapter 16.)
4. Actions authorized under CEPA of 1988 (i.e., before the Green Plan) to control toxic substances were undertaken. Reporting of toxic releases and transfers began in 1994 with publication of the first National Pollutant Release Inventory (NPRI). NPRIs are released to the public annually.
5. More importantly, a new CEPA was passed in 1999. A number of new initiatives coming out of this act are investigated in Chapters 16, 17, and 18. CEPA allows the government to regulate the release of toxic compounds. While some compounds have been banned, there are a large number still under investigation as to toxicity, impact on health and the environment.
6. The Pulp and Paper Regulatory Package (see Chapter 18) came into effect (for most companies) in 1992. The regulations required the industry to change its technologies to prevent the formation of dioxins and furans, to reduce organochlorine levels, and to strictly control other conventional pollutants. This is primarily a technology-based policy designed to reach emission standards, and their production and release has been strictly regulated with the result that emissions have declined considerably.
7. The national smog program was introduced in 1990 with the adoption of a NO_x–VOC management plan. The objective was to begin the process of negotiating agreements with the provinces to establish emission targets for these compounds. Most of the policies introduced center on technology-based standards. Transferable emission permits have been considered, but not implemented. More stringent exhaust emission standards were implemented for new passenger cars and light trucks beginning with 1998 model years and rise in stringency over time.. A new smog program was introduced in 2001. (See Chapter 17.)
8. The Green Plan established a target of setting aside 12 percent of the country as protected space. Protected spaces include national parks, marine parks, wildlife areas, and migratory-bird sanctuaries. A number of new sites have since been created, as well as programs launched to better conserve existing sites (such as wetlands), but protected areas still only comprise about 10 percent of Canada’s lands and waters. Canada passed endangered-species legislation in late 2002 and has signed international agreements covering species protection.
9. Climate-change agreements to limit greenhouse gases were signed at the Rio Earth Summit in 1992 and the Kyoto Protocol in 1997. Canada ratified Kyoto in 2002, but at the federal level has focused only on subsidies for investment in energy efficiency technology, moral suasion, and subsidies for the development of technologies for carbon sequestration (e.g., for carbon capture and storage). No carbon taxes, emission trading, or other pricing policies have been introduced at this time. The current federal leadership has indicated that the Kyoto targets are nonbinding and set longer-term targets that result in less reduction in GHG emissions. Substantive action on climate change has been at the provincial level as noted in Chapters 1 and is elaborated again in Chapter 20. *The Energy Efficiency Act* came into force on January 1, 1993, and its first regulations came into effect in 1995. The Act provides for making and enforcing regulations that specify minimum energy performance levels for products. Standards now exist for a number of energy-using products, such as fluorescent lamps and electric motors. More are under study. The federal budget of February 1992 removed an excise tax on ethanol-methanol portions of blended fuels produced from grains and agricultural wastes. This tax change encourages substitution of ethanol-methanol for fossil fuels that are more carbon dioxide and monoxide intensive. Subsidies of up to \$2 billion for biofuel production (most going to ethanol) were part of the 2007 federal budget. In the fall of 2010, the government passed regulations requiring oil refineries to include 5 percent ethanol in gasoline, 2 percent in diesel and heating oil by the end of 2010. These regulations had been in the works for a number of years. See Chapter 20 for more details on climate change and Canadian energy use.
10. An acceleration of the phase-out of ozone-depleting substances agreed to in the Montreal Protocol of 1987 was announced by the CCME in 1992. Completion of the phase-out has occurred. (See Chapter 20.)
11. Two reports on the State of the Environment for Canada were produced, in 1992 and 1996, but since then there are sporadic releases of information on the state of our environment in the form of environmental indicator bulletins on selected environmental problems such as ozone depletion, water quality, and urban air quality. These are available on Environment Canada’s Web site, but not regularly updated. Budgets for data gathering and reporting are tight and data collection and dissemination at times under threat due to inadequate resources. Statistics Canada works with Environment Canada and Health Canada to incorporate environmental factors into

Canada's System of National Accounts and other forms of environmental reporting. See Statistics Canada's website: www.statcan.gc.ca and their Environment link for its work on Canada's System of Environmental and Resource Accounts, environmental protection data, sustainability indicators, waste production and more. **12.**

Legislation was introduced to protect Canada's oceans, coastline, and inland waters from oil and chemical spills; for example, since 2003, all newly constructed large oil tankers operating in Canadian waters must be double hulled and all single-hulled oil tankers are required to be phased out by 2015. (See Chapter 16.)

While these examples show that progress toward improving environmental quality has occurred by the early part of the 21st century, we find ourselves not much further along than at the beginning of the 1990s. There is still a lot of talk about environmental strategies and initiatives, about action plans to do this or that, but there is precious little in the way of real action. No major policy thrust equivalent to the Green Plan has emerged since the mid-1990s. As we will see in the upcoming chapters, Canada has few actual regulations that establish standards for pollutants and has made little progress to protect its natural capital. Very little use has been made of economic instruments. Reliance has been on guidelines and voluntary compliance by industries that target pollution intensity more often than absolute levels of emissions. Much has been left to the provinces. Public and political attention to the environment is fickle. When environmental issues retreat to the "back pages" in media coverage, Canadian governments (like most governments) have a tendency to backtrack or postpone proposed environmental policy initiatives. When media and public attention is focused on high profile environmental issues, there is a flurry of activity in the form of public statements and intent to regulate; less frequently followed by concrete policies to address the problems.

SUMMARY

In this chapter, we examine the constitutional basis for environmental regulation by the federal and provincial governments. Each level of government has unique powers that can be applied to the environment. The federal government has the power to legislate over ocean and inland fisheries, navigation and shipping, and federal lands and waters; to negotiate international treaties; and to implement national concerns under the principle of Peace, Order, and Good Government. The provinces have power over local works; property and civil rights within the provinces; matters of a local or private nature; and authority over provincially owned lands and resources. The last right gives each province exclusive jurisdiction over the development, conservation, and management of its non-renewable resources. These powers do not necessarily mean that only one level of government will enact environmental regulations for a particular problem such as air or water pollution. There are many examples of concurrent regulation, which is allowed under the Constitution unless the laws are in direct conflict. If that is the case, the federal government is said to have supremacy and its laws prevail. Concurrent legislation can lead to overlap in regulation and the potential for confusion and high costs of compliance to polluters. In this federal system, there is also the possibility of conflict between the federal and provincial governments over the interpretation of their constitutional powers. A number of court cases have occurred that have helped to define the powers of each level of government with regard to the environment. Sometimes these cases strengthened the federal powers. Other decisions imposed restrictions on federal powers.

The regulatory process in Canada is highly dependent on the interests of the party in power under our parliamentary system. Because the legislative and executive branches of government are not separate when there is majority rule, the party in power controls the legislative policy agenda. Public pressure can influence policy, but there has been little public involvement in the policy process. The history of Environment Canada illustrates many of the difficulties of introducing environmental policies into a highly bureaucratic federal government. Canada has yet to introduce specific policy instruments, particularly lacking are incentive-based policies that price pollution, for a wide range of environmental problems.

KEY TERMS

Concurrency, 281

Paramouncy, 281

Stakeholder's groups, 289

Voluntary emissions reductions, 293

DISCUSSION QUESTIONS

1. Would you change any of the powers of the federal and/or provincial governments in Canada's Constitution to facilitate the design and implementation of environmental policy?
2. Some people think that incentive-based environmental policies create more federal-provincial conflict than command-and-control policies. Why might this be the case?
3. "Canadian environmental policy is constrained by its political system." Why is this the case and what can be done about it?
4. "Canada's Green Plan was a failure." State whether you agree with this statement and explain why or why not.