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Introduction

If one is old enough to remember a few decades back, one may realize the rapid growth of what may generally be called environmentalism. There was seemingly unlimited fresh water and pristine wilderness. We enjoyed parks, drove big gas-gulping cars, and learned vaguely about conservation in school. A generation ago only a few voices in the wilderness were raising an alarm about our natural environment. There was no branch of regulation called environmental law.

In the early 1970s, some governments created Ministries of the Environment for the first time. The national (Ontario-based) Canadian Environmental Law Association was formed a few years later. Health concerns associated with DDT arose. This was followed in rapid succession by international concerns at Three Mile Island, Love Canal, Bhopal (with its direct effects on human beings), North American acid rain, Brazilian rainforest going up in smoke, the Exxon Valdez oil spill, CFCs degrading the ozone layer, the Greenhouse effect, old growth forests, and little spotted owls.

Federal legislation, the Canadian Environmental Protection Act, came into force in 1985. The first World Commission on the Environment and Development (the Bruntland Commission) was convened in 1987. It coined the new term sustainable development for our lexicon. This Commission boosted the environmental juggernaut that culminated in one of the largest multilateral head of state shows of force in Rio de Janiero, the Earth Summit, in 1992. Suddenly, the physical environment was a matter for international protection.

This led to the creation of Round Tables on the environment (twelve in Canada) to consider long-term environmental strategy. In the present decade, most industrialized governments passed comprehensive omnibus legislation to both protect the environment in the future and deal with past degradation. Regional and global trade treaties, such as our NAFTA, address environmental sustainability. Most recently, the Kyoto Accord set rigorous targets for reducing world greenhouse gas emissions that many believe will impair the standard of living to which they have become accustomed.

Today, many advanced study programs in environmental science, management, and law are offered. Several hundred environmental interest groups operate. This acute environmental awareness and around the world has resulted in not only the enactment, but the spirited enforcement, of environmental protection regulations. Statutes regulate the storage, transportation, treatment, and disposal of environmentally harmful substances and to compel the restoration of already-contaminated sites. New environmental offences have been created. Third parties, who themselves may not have contributed to the environmental degradation are also made liable and must increasingly respond with greater caution and interest. The experience of the last few years demonstrates that public authorities and the courts are inclined to passionately enforce these new regulations and policies.

As a burgeoning area of law and public policy, like the introduction of the Charter of Rights seventeen years ago, the courts will be the battleground well into the next century while the law is settled. Every environmental law case now is still seen as a precedent. This field now may be the fastest growing area of law anywhere.

Canada's Environmental Position in the World

Compared to others, Canadians are rather complacent in their relationship with their environment, aware that they have much land for a small population and a stout supply of natural resources. They are also vulnerable.

Much of the Canadian territory is uninhabitable and very fragile to industrial development. Ours remains a non-renewable resource-dependent economy. Our largest cities are located at sea level, and vulnerable to global warming. Our economy and lifestyles are dependent on our export trade.

One of the key elements of our trade is environmental regulation at the international level, with particular focus on the movement and disposal of hazardous waste across national borders. The two international agreements, which will be highlighted, one bilateral and one multilateral, were enacted for this purpose since the late 1980s. Several other international treaties impose restrictions on member states. The 1972 London Dumping Convention (re: disposal of waste at sea) and the 1984 OECD rules are examples.

Canada-USA Agreement

The careful storage and treatment of dangerous industrial waste through its lifecycle is a matter of interest for both countries, since they generate large amounts and would instinctively prefer to export them. Over 100,000 tonnes of hazardous waste cross the Canada-USA border each year, on their way to the nearest treatment or disposal site. Concerns for human health and the natural environment include the handling and transporting of these wastes and their safe storage or treatment.

Risks from these substances can be reduced by several methods. Some wastes can be recycled into safe products or compounds. Others can be stored or disposed of at the manufacturing site. Some export is inevitable and even desirable in certain circumstances such as for destruction or detoxification of the waste by physical or chemical treatment with advanced and expensive technology and facilities. Other waste may only be placed in a secure landfill or other storage. Overall, this export process must be managed.

This treaty came into effect in late 1986. It is known by the long name: Agreement Between Canada and the USA Concerning the Transboundary Movement of Hazardous Waste, but it is brief in content and drafted in plain language. The domestic law of each country continues to be respected and enforced. Nevertheless, this Agreement goes farther as required by international movements of hazardous waste. For example, in addition to regulating handling and shipping, it stipulates that these wastes only move to facilities authorized and monitored by the importing jurisdiction.

The originating country must provide adequate and timely notification and other information to the destination country. The waste must be described and classified. Quantities, routes, modes of travel, and frequencies of shipment must be included in this disclosure. The exporter and transportation agent are also fully identified. The notification will cover plans to deal with the waste at the destination. The importing country can object to the shipment within 30 days of notification.

A notification of seven days is given, in similar detail, if one of the two countries is only a transit country for the waste. An exporting country agrees to repatriate any hazardous waste returned for whatever reason. The Agreement secures the co-operation of each country to enforce the manifest requirements of both countries and to monitor and spot-check shipments.

The Basel Convention

The problem of hazardous wastes is far greater than can be addressed by a bilateral Agreement. Poor countries may become dumping grounds for the rich, industrialized countries. In answer to short term desire for hard currency and job creation, developing countries might be most vulnerable to environmental and public health concerns. The dangers inherent in exporting hazardous wastes to developing countries became the focus of international interest even though such exports amounted to only a small percentage of total wastes and exports. The incentive to export hazardous waste to developing countries expands as prices rise and space dwindles for disposal of hazardous wastes in the developed world. The attraction of disposing of hazardous waste in developing countries has been that it could be done at a fraction of the price of disposal in developed countries.

The cheap cost of disposal reflected the inadequacy of disposal methods: where the regulations and infrastructure necessary to provide for environmentally sound disposal are lacking, hazardous waste disposal in developing countries has all too often amounted to mere storage or dumping. Leaking containers and exposed dumpsites pose serious, even lethal, dangers for dockworkers, residents, animals, and the environment. Even distant areas of the recipient state or neighbouring countries can be exposed to toxic wastes once the contaminants enter the waterways or seep through groundwater. A global multilateral strategy is needed.

In March 1989, a three-day conference was held in Basel, Switzerland, under the auspices of United Nations Environmental Programme (UNEP), to consider the regulation of transboundary movements of hazardous wastes and their disposal.

Representatives of various nations attending the convention expressed profound disquiet over the unregulated international trade in, and dumping of, hazardous wastes.

Acknowledging this danger posed by a laissez-faire approach, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted. All countries were invited to become signatories to the Basel Convention in order to maximize its sphere of influence. It came into force in 1992.

It is both noteworthy and curious that the United States has not ratified this treaty. It is the most influential country and this treaty largely parallels the Canada-USA Agreement which was already in force.

In addition to regulating transboundary movements and disposal of hazardous wastes, the Basel Convention was drafted to persuade signatory states to reduce the volume of their exports of hazardous wastes. To that end, states are encouraged to dispose of their own hazardous wastes and to develop means of minimizing or obviating the need to generate hazardous wastes. Technological advancement is key to reducing hazardous waste; therefore, international co-operation to develop and share reduction technologies, particularly with developing countries, is mandated by the Basel Convention.

Despite the dangers posed by dumping hazardous wastes in developing countries, a total ban on the transboundary movement of hazardous waste was passed over in favour of mere regulation. The fact that the Basel Convention does not prohibit transboundary movement of hazardous wastes entirely creates some incentive for other countries which wish to continue to export hazardous wastes.

There is also an environmentally sound reason for doing so: it enables states that lack appropriate disposal facilities to export materials for safe disposal rather than store them unsafely or dump it in its country of origin. Nonetheless, measures are needed to prohibit technologically advanced countries from using the developing regions as cheap dumpsites instead of reducing production or safely disposing of their own hazardous wastes. There is a limit to the Basel Convention's effectiveness in this regard. Allthough it demands that hazardous wastes be disposed of in an environmentally sound manner, there is no requirement that the importing and exporting countries have comparable standards for disposal.

One of the most serious difficulties posed by the hazardous waste trade that is not addressed by the Basel Convention involves the economic incentive for developing countries to accept wastes that they cannot dispose of in an environmentally sound manner. While the Basel Convention contemplates information-sharing between developed and developing countries, it does not demand sharing the means of implementing environmentally sound disposal.

Developing countries have, in the past, accepted such shipments simply because they needed the funds exporters were willing to pay to dump their hazardous loads. Banning or regulating such shipments brings a measure of control over such activities.

Nevertheless the financial incentive for poor countries to accept hazardous waste, despite their inability to dispose of it in an environmentally sound manner, remains.

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