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RESEARCH ARTICLE

ASPECTS OF CANADIAN LAW CONCERNING THE ENVIRONMENT

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Abstract

The Researcher has worked on the aspects of the Canadian law concerning the environment, new epitome by exploring Canadian environmental protection act,1985 and 1999 along with Oldman river society v/s Canada scope of the area is limited to CEPA-1985 &1999,National Task force on the Environment & Economy in 1987.

Introduction:-

The Constitutional Division of Legislative Powers over Environmental Protection

The Constitution Act of 1867 divides legislative power between the federal and provincial governments in Canada. However, this Act does not explicitly mention the environment as a separate area of jurisdiction for either level of government. As a result, determining which level of government has authority over environmental issues can be a complicated and uncertain[1] matter.

Environmental laws and regulations are often tied to an existing area of jurisdiction, such as fisheries management in the federal sphere. The degree to which environmental concerns are considered in the exercise of these powers can vary, leading to inconsistencies in how environmental issues are addressed across different areas.

For example, it may be unclear whether the federal or provincial government has authority over air pollution in a specific case. The answer would depend on factors such as the source and effects of the pollution and the specific legislation being considered[2].

Overall, the lack of a clear constitutional basis for environmental jurisdiction can make it challenging to develop effective environmental policies and regulations. Without clear lines of authority, there may be overlap or gaps in regulatory authority, and the level of protection afforded to the environment may vary depending on the specific circumstances.

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[1]Friends of the Oldman River Society V. Canada (Minister of Transport), [1992] 1 S.C.R. 3, at para. 86
[2]A.R. Lucas, "Harmonization of Federal and Provincial Environmental Policies: The Changing Legal and Policy Framework" in J.O. Saunders, ed. Managing Natural Resources in a Federal State: Essays from the Second Banff Conference on Natural Resources Law (Toronto: Carswell, 1986) 33 at 34

A.Federal Power.
The federal government has the authority to address environmental issues related to specific areas under federal jurisdiction, such as fisheries, navigation, shipping, federal works and undertakings, and lands reserved for First Nations. It can also regulate the environmental aspects of industries under federal jurisdiction, such as aviation, interprovincial and international transportation and communication, and nuclear power.

Additionally, the federal government has the power to regulate activities that are beyond the territorial reach of provincial governments, such as pollution that may cross provincial or international borders[3].

Moreover, the federal government has the power to conduct environmental assessments for projects that may affect areas under federal jurisdiction[4] or are incidental to any institution or activity. This power enables the federal government to ensure that environmental concerns are considered in the decision-making process for such projects.

The federal government can also use the opening words of Section 91 of the Constitution Act of 1867, which grant it the power to legislate for peace, order, and good government, as a basis for environmental legislation. This power allows the federal government to enact measures to address emergencies, such as a release of radioactive waste, or matters that are deemed to be of national concern.

[3]Peter Hogg. Constitutional Law of Canada, 4th ed. (loose-leaf), (Toronto: Thomson Carswell, 1997) 29.7 (b)

[4]Friends of the Oldman River, supra note 1.

In the case ofR. v/s. Crown Zellerbach Canada Ltd[5]., the Supreme Court of Canada upheld a federal ban on ocean dumping. The court determined that marine pollution, which has implications that extend beyond provincial borders and has international significance, qualifies as a matter of national concern.

The criminal law jurisdiction can also serve as a basis for environmental measures, such as the provisions related to toxic substances in the Canadian Environmental Protection Act. These provisions were upheld as valid federal legislation by the Supreme Court of Canada in the case of R. v/s Hydro-Québec[6].

According to the majority judgment, environmental protection is a public purpose of great importance, and the listed toxic substances are those whose use in a manner contrary to the regulations that the Act ultimately prohibits. While this prohibition is limited to a small number of substances, it is enforced through criminal sanctions and serves a valid criminal objective, making it a valid form of criminal legislation.

B. Provincial Power
The primary sources of provincial authority to address environmental issues are the power over property and civil rights within the province and the power over municipal institutions. The former allows for the regulation of land use and most aspects of business activities that could have adverse environmental effects.

The power over municipal institutions grants authority to municipalities to regulate local activities that have an impact on the environment. This includes areas such as zoning, construction, water purification,sewage, garbage disposal, and noise control[7].

[5]R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401

[6]R v. Hydro-Quebec, [1997] 3 S.C.R. 213
[7]Hogg,supra, 27.7(c)

While provincial jurisdiction is limited to within its geographical boundaries, the power over property and civil rights and the power over municipal institutions allow for extensive regulatory measures[8] within a province. This can result in additional compliance costs and uncertainty for industries that are subject to both federal and provincial regulations.

It's important to note that federally regulated industries are not immune to provincial measures. For instance, when a federal railway company faced charges under the Ontario Environmental Protection Act, the Supreme Court of Canada rejected the company's claim that the Act unconstitutionally interfered with the management of a federally regulated undertaking. Despite the fact that the Act impacted the railway's operations, it was considered a statute of general application within the province[9].

C. Intergovernmental Cooperation and Harmonization

As both the federal and provincial governments have authority over the environment, there is a need for coordination to address any gaps or ambiguities in regulation and promote consistency. To achieve this, the Canadian Council of Ministers of the Environment has been established as the most important coordinating body. It is composed of 14 environmental Ministers from federal, provincial, and territorial governments and serves as a forum for discussion and cooperative action based on consensus. Through its efforts, the council has developed coordinated approaches to address a range of national environmental issues[10].

[8]Jaqmie Benidickson, Environmental Law, 2nd. Ed, 2002, Ch. 2C
[9]R. V Canadian Pacific Ltd., [1995] 2 S.C.R. 1028
[10]Marcia Valiante, legal Foundations of Canadian Environmental Policy: Underlining Our Values in a Shifting Landscape in D.L. Van Nijnatten and R. Boardman, eds. Canadian EnvironmentalPolicy Context and Cases, 2d ed. (Don Mills, On Oxford University Press, 2002), 3 at 8

The Canadian government's endeavour culminated in the creation of the Canada-wide Accord on Environmental Harmonization[11]. This accord expresses the intent of the Ministers to establish sub-agreements in all areas of environmental management where coordinated action can lead to benefits. The primary objectives of harmonization are to improve environmental protection, promote sustainable development, and achieve greater effectiveness, efficiency, accountability, predictability, and clarity. One of the ways to achieve these objectives is by preventing overlapping activities and inter-jurisdictional disputes. In essence, this coordinated effort aims to balance uniformity and comprehensiveness while also allowing room for innovation, experimentation, and tailored responses to local conditions. The ultimate goal is to achieve the benefits of both central regulation and control and a multi-jurisdictional system.

2. Federal legislative Initiatives

While this section provides an overview of recent federal environmental legislation, it is important to acknowledge that there are also regulations in place at the provincial level that govern the release of environmental pollutants. Typically, these regulations require licenses for controlling and managing such discharges. Additionally, many provinces have adopted laws that follow the polluter pays principle. Such laws address issues related to identifying contaminated sites, developing remediation plans, establishing joint and several liability, assigning responsibility and cost recovery to responsible parties, and imposing retroactive liability. Those who incur the cost of remediation[12] are empowered to recover their expenses from the responsible parties.

[11]Accessible online at http://www.come.ca/assets/pdf/accord harmonization_e.pdf

[12]E. Hughes, A.R. Lucas, W.A. Tilleman, Aneuroveniental Law and Policy, 3rd, ed. (Toronto Emond Montgomery, 2003) at 302.

It should be noted that while the provinces in Canada have regulatory authority over environmental matters within their borders, they do not possess the authority to make international commitments. Only the federal government has the exclusive power to create such commitments, particularly in areas such as climate change. The Canadian government ratified the Kyoto Protocol, signifying that addressing climate change has become a national priority. The government is collaborating with Canadians and the global community to tackle this challenge[13]. In April 2005, the Canadian government unveiled an updated plan for balancing environmental and economic interests, called "Moving Forward on Climate Change: A Plan for Honouring Our Kyoto Commitment." This plan is available online for review and provides details on how Canada intends to fulfil its Kyoto obligations.

A. Canadian Environmental Protection Act, 1999

(1) Principles and goals

The introductory section of the document outlines the underlying principles that will govern the ensuing discussion. These principles include a firm commitment to:

1. The preamble establishes that the discussion will be guided by certain principles, including a dedication to sustainable development. This entails utilizing natural, social, and economic resources in an ecologically efficient manner. It also recognizes the importance of integrating environmental, economic, and social considerations into all decision-making processes by both governmental and private entities.
2. One of the guiding principles set forth in the preamble is a commitment to making pollution prevention a national objective and the primary approach to safeguarding the environment.

[13]http://www.ec.gc.ca/climate/home-e.html

The principles outlined in the preamble include the adoption of the precautionary principle. This means that when there is a risk of severe or irreversible harm, a lack of complete scientific certainty cannot be used to justify postponing cost-effective measures aimed at preventing environmental damage.

These principles are also expressed as binding obligations that the government must uphold in pursuit of the goals established in the preamble. Furthermore, there is a commitment to collaborate and comply with intergovernmental agreements and arrangements that aim to achieve the highest environmental standards across Canada. This commitment is reflected in Section 2(1)(1). The Minister is required to consult with provinces, territories, and members of the National Advisory Committee, which represents aboriginal governments, before implementing any proposed measures. Additionally, Section 2(1.1) mandates that the positive ecological and economic impacts of any proposed measures[14] must be taken into account.

(2) Regulation to Toxic Substances

While the new Act encompasses a broader range of objectives and commitments, its primary focus remains the regulation of toxic substances. The Act is typically applied when it is determined that a substance is toxic, as defined by its potential to cause harm to the environment, pose a threat to the environment upon which life depends, or endanger human life and health. Once a substance has been identified as toxic and placed on the Toxic Substances[15] List, regulations can be put in place to govern every aspect of its life cycle.

[14]A Guide to the Canadian Environmental Protection Act, 1999, March 2000 available online athttp://www.ec.gc.ca/CEPARegistry/the act/guideArchived/toc.cfm

[15]Valiante, supra, note 7, at 14

This can include restrictions on the quantities that may be manufactured, processed, used, or sold, as well as total, partial, or conditional prohibitions on its manufacture, use, sale, import, export, release, storage, transportation, or disposal.

The Act also provides for pollution prevention provisions, which give the Minister the authority to require certain individuals or entities to prepare and implement a plan for preventing pollution related to specific activities. The Act provides the Minister with a significant amount of discretion to determine the specific parameters of each plan on a case-by-case basis, although there are provisions for the development of model plans and guidelines. This approach can be viewed as a compromise between a completely voluntary system of ad hoc plans and a comprehensive mandatory system[16].

The Canadian Environmental Protection Act (CEPA) has expanded its goals and commitments to include sustainable development, the implementation of the precautionary principle, and cooperation among governments. However, the primary purpose of the Act remains the regulation of toxic substances. When a substance is deemed toxic and placed on the Toxic Substances List, regulations can address every aspect of its life cycle, including manufacturing, processing, use, sale, import, export, release, storage, transportation, and disposal. Another regulatory option is pollution prevention provisions, under which the Minister may require specified persons to prepare and implement a pollution prevention plan with respect to specified activities. Virtual elimination, a more drastic regulatory option, is pursued for toxic substances posing the greatest threat to health and the environment. The Act also provides for the use of economic instruments and market-based approaches, but the details of how they will function remain to be developed through further guidelines and regulations.[16]Id

(3) Enforcement and Compliance

The Canadian Environmental Protection Act provides for the issuance of Environmental Protection Compliance Orders to address illegal activities or violations of the Act or its regulations. These orders can be issued based on reasonable belief that any provision of the Act or regulations has been contravened. The orders can require a person to stop illegal activity or take corrective actions to address violations. The orders can be issued against a person who either owns or controls the substance to which the alleged contravention relates or causes or contributes to the alleged contravention.

If a person fails to take the measures specified in the order, an enforcement officer may take the measures and recover the costs of doing so under the relevant section of the Act. This provision gives enforcement officers the authority to take necessary action to address environmental violations, even if the violator fails to comply with the order. It is a powerful tool for enforcing environmental regulations and ensuring compliance with the Act.

If a person is subject to an Environmental Protection Compliance Order, they have the option to request a review of the order. This review provides the opportunity to make oral representations at a hearing, which is used as a basis for the review officer to confirm, cancel, amend, suspend, or extend the duration of the order for a certain period. If either the person subject to the order or the Minister is not satisfied with the decision made by the review officer, they have the right to appeal to the Federal Court. This allows for an additional level of scrutiny and ensures that the order is fair and appropriate based on the specific circumstances.

The Act establishes an offence for any violation of its provisions or regulations, including obligations, prohibitions, or orders issued under the Act. A person convicted of an offence on indictment may be fined up to $1,000,000 or imprisoned for up to three years, or both. On summary conviction, a person may be fined up to $300,000 or imprisoned for up to six months, or both. Providing false or misleading information is also an offence under the Act.

The Act also imposes additional penalties if the offence is committed intentionally or recklessly, causing a disaster that results in the loss of the use of the environment or showing wanton or reckless disregard for the lives or safety of others, leading to a risk of death or harm to another person. In the latter case, the person may also be prosecuted and punished under Section 220 or 221 of the Criminal Code.

Under the Act, if a corporation is found guilty of committing an offence, any officer, director, or agent of the corporation who played a role in directing, authorizing, assenting to, acquiescing in, or participating in the commission of the offence is also considered to be a party to and guilty of the offence. They can be punished even if the corporation itself has not been prosecuted or convicted.

Moreover, the Act imposes an obligation on every director and officer of a corporation to take all reasonable care to ensure that the corporation complies with the Act, regulations, orders, directions, prohibitions, and requirements imposed by the Minister and enforcement and review officers. This means that if the corporation violates the Act, the directors and officers can be held responsible if they did not take reasonable measures to prevent the violation.

Most of the offences under the Act can be defended with a due diligence defence. Additionally, it should be noted that the Act grants the courts broad discretion to issue additional orders upon conviction of an offence. These orders can include:

1. To prevent the offender from continuing or repeating the offense, the courts have the authority to prohibit them from performing any act or engaging in any activity that may lead to the continuation or repetition of the offense, as an additional order on conviction under the Act.
2. One of the additional orders that the court may make on conviction of an offence under the Act is directing the offender to take appropriate action to remedy or prevent any harm to the environment resulting from the act or omission that constituted the offence.
3. The court may direct the offender to develop and execute a pollution prevention plan as part of the additional orders issued upon conviction of an offence under the Act.

The Act provides the Minister with additional remedies in the form of an injunction, which can be sought when it appears to a court of competent jurisdiction that a person has done or is likely to do an act or thing that constitutes or is directed toward the commission of an offence under the Act. If the court finds such a situation, it has the power to issue an injunction that orders any person to refrain from doing the acts in question or to take any action that may prevent the commission of an offence.

This means that the Minister can seek an injunction to stop an activity that may cause harm to the environment before it actually occurs, thus preventing potential harm or further harm. The injunction can be a powerful tool in the hands of the Minister as it allows for the prevention of an environmental damage by stopping the harmful activity in its tracks.

(4) Public Participation

The Act contains various provisions that promote public cooperation and participation. One of the noteworthy provisions is section 16, which offers "whistleblower protection" to individuals who voluntarily report offenses. This section prohibits the disclosure of the identity of such individuals. Furthermore, the Act makes it an offense to take any action such as dismissal, harassment, or discipline against employees who report violations voluntarily.

To put it differently, the Act is designed to encourage the public to cooperate and participate in the reporting of any offenses. The Act recognizes that people may be hesitant to report offenses for fear of retaliation or exposure. Therefore, section 16 provides protection to whistleblowers by prohibiting the disclosure of their identity. This protection ensures that whistleblowers can report offenses without fear of retribution.

Moreover, the Act goes a step further by making it an offense to harass, dismiss, or discipline any employee who reports a violation voluntarily. This provision aims to prevent any retaliation or discrimination against employees who report offenses. In doing so, it creates a safer environment for whistleblowers to come forward and report any wrongdoing.

The Act is noteworthy for being the first federal environmental statute in Canada that allows citizens to initiate legal proceedings. In specific circumstances, individuals can file a civil suit against those who allegedly committed an offense against the environment.

To begin with, an individual can request an investigation into a suspected violation. If the Minister responsible for the Act fails to conduct an investigation or responds unreasonably, and if the violation caused significant harm to the environment, the individual can proceed with an "Environmental Protection Action." This means that the individual can initiate a civil suit against the person or entity that allegedly committed the offense, rather than the government.

It is important to note that the Attorney General has the option to participate in the action, but it is not a requirement. In other words, the government can choose to intervene, but it is not obligated to do so.

This provision is significant because it empowers citizens to take legal action against those who harm the environment.

It also puts pressure on the government to investigate and respond to alleged violations, as failure to do so can result in legal action by citizens. Overall, the provision of citizen suits is a crucial element of the Act, as it allows for greater public participation in environmental protection and helps to hold polluters accountable.

In an Environmental Protection Action, the individual initiating the civil suit has the option to request the court to:

1. As part of an Environmental Protection Action, the individual initiating the civil suit may ask the court to issue a declaration on how the law applies to the matter at hand.
2. In an Environmental Protection Action, the plaintiff may request the court to order the defendant to cease the activity that caused the alleged offense or to take steps to prevent any further harm to the environment resulting from the offense.
3. As part of an Environmental Protection Action, the court may order the parties involved to engage in negotiations to develop a plan to address and minimize the environmental harm caused by the offense.
4. In an Environmental Protection Action, the court may provide relief in the form of costs associated with the legal action, but it does not have the power to award damages.

The Act affirms an established right in common law and the Quebec Civil Code that allows individuals who have experienced personal loss or damage as a result of a violation of the Act to seek compensation. This provision essentially means that anyone who suffers harm or damage as a result of a violation of the Act can bring a legal claim seeking compensation for their losses.It is important to note that this provision is separate from the Environmental Protection Action outlined earlier.

The compensation provision allows individuals to seek financial compensation for any harm they have suffered as a result of an offense against the environment. This can include compensation for damages such as loss of property, personal injury, or economic loss.By reaffirming this right, the Act ensures that individuals have a legal avenue to seek compensation for any harm they have suffered due to violations of the Act. This provision can provide a significant deterrent effect, as polluters may face significant financial liabilities if they cause harm to individuals or their property. Overall, this provision helps to hold those who violate the Act accountable for any harm caused and provides a means of recourse for those who have suffered as a result of environmental offenses.

3. Supreme Court of Canada Jurisprudence on the Environment

Friends of the Oldman River Society v. Canada (Minister of Transport)[17] case dealt with the Environmental Assessment and Review Process Guideline Order, which was later replaced by the Canadian Environmental Assessment Act in 1995. This Act requires federal authorities to assess the environmental impact of projects they are involved in, including those where they are the proponent, provide financial assistance, dispose of federal lands, or issue approvals. This process applies to provincial or private projects and projects both within and outside Canada[18]. The Act aims to ensure that potential environmental impacts are thoroughly evaluated before a project is approved, promoting sustainable development and protecting the environment for future generations.The Friends of the Oldman River Society case expanded the constitutional scope of federal powers by taking a broad approach to the federal assessment process. The court recognized that the objective of the environmental assessment guideline was to enhance the role of the Department of the Environment and other governmental bodies in considering environmental concerns when making decisions that could potentially have an environmental impact. As a result, the court allowed the federal government to have jurisdiction over projects beyond those explicitly listed in the guideline. This decision allowed for a more extensive reach of the federal assessment process, promoting a more comprehensive consideration of environmental impacts in decision-making.

[17]17 Friends of the Oldman River supra note 1.

[18]Valiante, supra, note 10 at p. 18

In broad terms, the guidelines mandated that all federal departments and agencies with decision-making authority over a proposal conduct an initial screening to determine if it may result in any harmful environmental effects. The guidelines also required a public review process by an environmental assessment panel consisting of members who

are impartial, devoid of political influence, and have relevant expertise in the technical, environmental, and social effects of the proposal. These measures aimed to ensure that potential environmental impacts were thoroughly evaluated before any decision was made, promoting sustainable development and protecting the environment.
The court supported a broad interpretation of the guidelines, which aligned with the objective of making environmental impact assessment a vital aspect of federal decision-making. The guidelines were deemed to be binding on all concerned parties, including the Minister of the Environment. The assessment process was based on the Minister's responsibilities related to environmental quality, which was interpreted as encompassing not only the biophysical environment but also socio-economic factors. This approach recognized the fundamental idea that economic and environmental planning cannot be treated separately. Sustainable economic development necessitates technology and wealth that are generated by continued economic growth, and ensuring environmentally responsible development requires integrated management and planning for both economic and environmental factors. This approach was consistent with the recommendations of the National Task Force on the Environment and Economy in 1987. (Para 39, citing the report of the National Task Force on the Environment and Economy, 1987).

The court found that the guidelines were legally valid because they were designed to assist with decision-making and did not exceed the jurisdictional powers of the federal government. They were limited to examining environmental effects within areas under federal jurisdiction and did not encroach on provincial powers. However, the court also acknowledged the importance of the assessment process and ruled that it should consider the environmental impact on all relevant areas, even those outside of federal jurisdiction, once the assessment had been initiated by a federal decision-making authority.

The Friends of the Oldman River Society case also recognized that the provinces have the jurisdiction to address environmental issues within their own areas of authority, in a manner similar to the federal government. This means that there may be instances where both levels of government[19] are involved in assessing the environmental impacts of a project, which could result in overlap and duplication. Some argue that this highlights the need for a single, joint federal-provincial agency with comprehensive powers delegated by both levels of government to address environmental concerns.

However, the Court's role is limited to affirming the authority of both levels of government to address environmental issues related to a project, and it does not have the power to implement intergovernmental coordination beyond this. The Court's decision laid the groundwork for the possibility of joint federal-provincial agencies, but the actual creation and implementation of such agencies would require the agreement and cooperation of both levels of government.

In R. v. Hydro-Quebec, the Court continued to adopt a broad view of federal jurisdiction in environmental matters, recognizing the need for Parliament and provincial legislatures to fully exercise their legislative powers to protect the environment. This is due to the pervasive and diffuse nature of environmental issues as a subject matter for legislation. As previously mentioned, the case dealt with the constitutionality of the toxic substances provisions under the CEPA, 1985.

These provisions allowed federal Ministers of Health and of the Environment to determine what substances were toxic and to prohibit their introduction into the environment, subject to certain conditions.

[19]19 Hogg, supra, note 3

The new Act[20] retained the broad definitions of environment, substance, and toxic substances, which had to be taken into account when interpreting the provisions.

In R. v. Hydro-Quebec, the constitutionality of the toxic substances provisions of the CEPA, 1985 was challenged on the grounds that the broad definitions of "environment," "substance," and "toxic substance" in the legislation would allow the federal government to regulate any substance that could potentially harm the environment.

However, the majority of the Court rejected this argument and upheld the constitutionality of the provisions. They explained that environmental legislation must necessarily use broad language to ensure that it can address a wide

range of potential environmental harms, even those that may not have been anticipated when the legislation[21] was drafted. The Court recognized that the environment is a complex and evolving subject matter, and that the legislation must be flexible enough to adapt to new environmental challenges as they arise. Therefore, the Court concluded that the broad scope of the CEPA, 1985 was necessary and appropriate to address the environmental risks associated with toxic substances.

[20]20 For instance, environment is defined as the components of the Earth and includes
(a) Air, land and water;
(b) All layers of the atmosphere;
(c) All organic and inorganic matter and living organisms; and
(d) The interacting natural systems that include components referred to in paragraphs (a) to (c).
[21]Ontario v. Canadian Pacific Ltd. (1995)2 SCR 1031, at para 43.