



2011 TRENDS

Blakes
CANADIAN LAWYERS

ENVIRONMENTAL

Across the country, it's all about resources: oil, natural gas, potash, lithium, iron ore and more. And more and more, the question is which market they are headed for and how they will get there. This means renewed focus on environmental assessments, wildlife conservation laws and NIMBY (not-in-my-backyard) responses from local and aboriginal communities. At the same time, the federal government is trying to decide which way the winds are blowing in the United States on climate change and how best to respond without adversely affecting our economy and, in particular, the development of the Alberta oil sands.

Against this background, here is an update on Canada in 2010 and what's expected in 2011.

CLIMATE CHANGE – CANADA TAKING A BACK SEAT

The current federal government has been sitting on a greenhouse gas (GHG) reduction plan for almost five years now and says it is waiting for the U.S. to implement its program first. In the absence of a comprehensive U.S. program, Canada has adopted Environmental Protection Agency (EPA) limits on GHGs in tailpipe emissions and stated that it will continue to follow closely EPA GHG rule-making activity under the *Clean Air Act*. Accordingly, we do not expect any major initiatives in this area for 2011.

AIR POLLUTION – MOVING TOWARDS A NATIONAL AIRSHED MANAGEMENT APPROACH

The concept of a federal *Clean Air Act* was tabled four years ago and then moved to the back burner. In 2010, federal and provincial environment ministers announced a new approach. They have agreed to work on a national system for monitoring and managing pollutants such as nitrous oxide, sulphur oxides, volatile organic compounds and particulate matter. The system will define air zones and regional airsheds and set Canadian ambient air quality standards and base-level industrial emission requirements. The proposal could be finalized and approved in 2011, but binding emissions standards are not likely to take effect before 2015. It remains to be seen whether the system will be implemented through federal or provincial regulations.

WATER – ATTENTION FOCUSED ON EXTRACTIVE INDUSTRIES

From Alberta to Quebec, people have been worrying about the connection between resource extraction and water pollution. The Royal Society of Canada was asked to look into the matter as regards oil sands in Alberta and concluded that not nearly enough was being done on the monitoring front. That is now going to change. In Quebec, where huge shale gas reserves have attracted interest from investors, the government is dealing with public fears concerning contamination of drinking water sources. Framework legislation for this industry, which is currently regulated under the provincial *Mining Act*, is expected this spring.

In other news, the federal government released for comment a regulation that sets water-quality standards for effluent from municipalities and commercial/industrial facilities that discharge to surface waters. Quebec has followed Ontario in charging for water withdrawals. Work continues on improving knowledge of watersheds and aquifers across the country. Finally, environmental groups have challenged Canada's Mining Metal Effluent Regulations, which, if successful, could put at risk several tailings ponds.

CHEMICALS MANAGEMENT

In 2010, Canada became the first jurisdiction in the world to declare bisphenol A to be a toxic substance and ban its use in baby bottles. The process unfolded relatively quickly, beginning in May 2007 and ending in October 2010. However, given the various uses of bisphenol A, the government is still struggling to determine whether all such uses should be banned or restricted in one form or another. In the meantime, retailers and consumers are making their own decisions, and use of the chemical is on the decline. Other chemical substances assessed over the past four years under the federal Chemicals Management Plan and the toxic control provisions of the *Canadian Environmental Protection Act* are still awaiting news of their regulatory fate.

continued on reverse.

MIGRATORY BIRDS AND SPECIES AT RISK – STILL NO PERMITS FOR RESOURCE DEVELOPERS

We have been seeing an uptick in the number of decisions rendered under the federal *Migratory Birds Convention Act*, which makes it an offence to destroy or disturb bird nests or to deposit substances harmful to birds in areas they frequent. Several high-profile cases have recently led to charges and substantial fines being levied against some of Canada's largest companies, including C\$3-million in fines and other penalties levied against Syncrude in connection with the death of 1,600 ducks that landed in its tailings pond north of Fort McMurray, Alberta. This trend is expected to continue, as the federal government is ramping up its enforcement of these prohibitions and has decided to abandon its plan to create a permit system for authorizing impacts to migratory birds and their nests.

Court actions by environmental non-governmental organizations to compel the federal government to enforce the federal *Species at Risk Act* (SARA) will also continue, with the focus this year being on the federal government's failure to complete recovery strategies for boreal caribou and to issue emergency orders to protect this species. Taken together with a recent federal court decision on protecting killer whale critical habitat, there may be serious implications for land-based and offshore oil and gas activity in Canada. Regulations are also being developed under Ontario's new *Endangered Species Act*, which was enacted in 2009. A combination of excessively broad regulations and an unclear permit-granting regime is causing havoc for rural resource businesses and developers.

ENFORCEMENT – ADMINISTRATIVE PENALTIES NOW PART OF THE TOOLBOX

Administrative penalties have arrived, and they've been added to a number of federal acts along with other new provisions intended to strengthen the government's enforcement options. It remains to be seen whether this development is marked by a new approach to enforcement of federal laws or whether the government continues its traditional reliance on criminal enforcement.

ENVIRONMENTAL CLASS ACTIONS

A few years ago, businesses operating in Canada gasped when the Supreme Court of Canada ruled that a cement plant on the outskirts of Québec city was liable to pay damages to area residents for having caused them intolerable inconvenience (noise, smoke, dust). This despite having at all times complied with its operating permits and despite no finding of fault on its part. That was under the *Quebec Civil Code*. Now we have a common-law decision from Port Colborne, Ontario, involving the mining giant Vale and its predecessor's (Inco) nickel smelter. A group of residents was awarded damages for loss of land value resulting from the release of a report on soil contamination related to historical air emissions from the smelter. Until recently, it appeared that environmental class actions were too difficult to be brought to trial successfully. That view is now changed and businesses must take note.

WATCH OUT FOR THE ALBERTA LAND STEWARDSHIP ACT

In a move that is certain to attract interest for years to come, Alberta has a new *Land Stewardship Act* that gives the provincial government the final say on land-use planning in the province. Regions can consult on their plans, but the government decides on the master plan. In like fashion, the Alberta government is going to make it easier for industry subject to environmental assessment requirements to meet the obligation to assess cumulative effects: it will start doing so for them.

Also keep an eye on new cross-country guidance for public companies, on how to identify what makes an issue material from the perspective of a reasonable investor, and how to disclose that issue, once the determination is made that it is material and therefore must be disclosed.