

## Climate Change Legislation – Waiting for Obama; or Just Waiting

By Alastair Lucas, Q.C.

Shaun Fluker's [environmental law non-event of the past decade](#) focused on case law (or lack thereof). My review of climate change legislation continues Shaun's theme. We waited for federal legislation. Then we waited for the Obama climate change legislation. Now with the President's Senate majority gone, how long can Canada continue to wait?

Early in the last decade, the prospect of national climate change legislation seemed real. The need for greenhouse gas emission reductions was acknowledged in Canada's 1997 *Kyoto Protocol* signing and 2002 ratification. Governments (even Alberta) were coming on side, though industrial interests were slower. Legislation would take the form of either integrated federal and provincial statutes, very likely under *Canadian Environmental Protection Act*, S.C. 1999, c. 33 (*CEPA*) "equivalency agreements" (under which federal legislation is backed out by "equivalent" provincial legislation), or stand alone federal legislation. The usual federal-provincial strain, coupled with uncertainty about federal constitutional jurisdiction made the latter the lesser possibility.

What happened? In the realm of research, policy studies and action plans, there was plenty of action. But on the legislative side there was some action, but little accomplishment. (See my article, "Mythology, Fantasy and Federalism: Canadian Climate Change Law and Policy" (2007) 20 *Global Business and Development Law Journal* 41).

Beginning in 2002, we saw four federal climate change plans culminating in Environment Canada's [Turning the Corner: An Action Plan to Reduce Greenhouse Gases and Air Pollution](#), April 2007. The Action Plan proposes emission intensity target limits based on emissions as a factor of production, so emission controls coupled with economic expansion can result in emission intensity reductions but real emission increases. Action plan approaches moved from reliance on voluntary measures (now clearly not a major part of the answer) to proposals for legislation. There were two federal brushes with real enforceable legislation. The first was a 2005 Notice of Intent to regulate major greenhouse gas sources through new regulations under *CEPA*. But the regulations were never promulgated. A second near legislative event occurred in late 2006 with the "new" Harper government's introduction of amendments to *CEPA* dubbed "[Canada's Clean Air Act](#)". Though greenhouse gases had already by order been added to the list of "toxic substances" under *CEPA*, the approach was to create separate legal regimes for greenhouse gases and air pollutants. It authorized Cabinet to set greenhouse gas emission limits

by regulation. Unfortunately, the federal minority government had plenty of pressing issues; and in any event, provinces were not completely behind the amending legislation even though the equivalency agreement approach was proposed. The Bill died on the order paper.

A third event in 2007 actually produced a statute, but in bizarre circumstances. Opposition parties got their collective act together long enough to pass the *Kyoto Protocol Implementation Act*, S.C. 2007, c.30, which requires Canada to take action to meet its obligations under the *Kyoto Protocol*. Measures authorized include regulated emission levels and performance standards. Needless to say, the government was unenthusiastic. Friends of the Earth Canada sued for an injunction to require government action. The federal court backed away, ruling that the issue of government action or not was not justiciable (*Friends of the Earth v. Canada (Minister of the Environment)*, 2008 FC 1183, affirmed 2009 FCA 297).

Meanwhile, there was some legislation at the provincial level. Alberta's 2003 [\*Climate Change and Emission Management Act\*](#), S.A. 2003, c. C-16.7 (and subsequent regulations) was the first. It remains the most comprehensive, including emission intensity based emission targets for major emitters and an emission offset trading system. Offset creation alternatives include \$15.00 per tonne of emissions contributions to a technology fund (who says there will never be a carbon tax in Alberta?). Other provinces have also enacted legislation, but there is no comprehensive federal-provincial agreement.

When President Obama took his oath of office in January 2009, the North American climate change ground shifted. US federal legislation was proposed. As these bills began to wind their way through the US legislative process, the Canadian response was swift. We declared ourselves to be committed to North American cooperation, meaning that we wait to see what the US legislation ultimately looks like. Now, one year later, the Republican Senate upset in Massachusetts that has put the Democratic Senate majority in jeopardy adds a whole new dimension to waiting for Obama. It could be a very long wait.

So what now? How long will Canadians, apparently committed to greenhouse gas emission reduction, remain patient? No one was happy with the national embarrassment in Copenhagen, though it could have been worse if there had been agreement on new emission targets. Canada could have been faced with new GHG obligations and penalty targets. If the federal government concludes that it must act, what will the legislation look like? A major problem is the emission intensity approach, still part of the federal plan, though the US has proposed real quantified limits, and Europeans have long worked under real emission units. So doing nothing also risks Canadian isolation by the European Union. For the moment at least, we still wait.