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Top Ten Environmental Law Stories: Canadian Edition

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This last year was an important one for environmental law and policy, both in Canada and globally. In this post we highlight ten of the most significant developments. Many of these figure among the usual suspects included in top-ten lists, but we've included some less obvious ones as well.

1) The Paris Agreement: On Saturday, December 12, 2015 one hundred and eighty five countries agreed to tackle climate change in what has been described as the most ambitious climate agreement to date. Sharon blogged about it here; a useful compilation of other commentary can be found here. The crucial element to this bottom-up agreement is for each state to follow through on its international commitment with domestic action. Watch for the federal, provincial and territorial governments' meeting in 80 days' time. What are the legal and political implications of Canada joining the Coalition of High Ambition and supporting the goal of holding global warming to no more than 1.5 degrees C over pre-industrial levels? What burden sharing regime will our governments put in place? Stay tuned.

2) Alberta's Climate Change Plan: On November 22, Alberta's new NDP Premier Rachel Notley released the province's Climate Leadership Plan, as well as the detailed expert report upon which it is based. Our colleague James Coleman blogged about it here. Nigel posted on the earlier adjustments to the Specified Gas Emitters Regulation (SGER) regime here and here. Alberta's Climate Change Plan steps beyond these adjustments and promises the phase out of pollution from coal-fired sources of electricity by 2030, carbon pricing that will cover 78-90% of provincial GHG emissions and a legislated maximum emissions limit of 100Mt of GHGs from the oil sands in any given year. But from a legal perspective the devil will be in the details. There is a long history in Alberta of negotiated and non-transparent rules when it comes to compliance targets and recovery of stranded costs for incumbents. It will be interesting to see if the province's new NDP government handles these issues differently than the previous conservative administrations. It will also be interesting to see how Alberta's plans to tackle climate change are reconciled with the much more ambitious commitments agreed to by the Federal government in the recent Paris negotiations.

3) Carbon Pricing: Quebec, Ontario and Manitoba have recently all agreed to adopt a cap-and-trade system and to link with California through the Western Climate Initiative. In combination with British Columbia's carbon tax, and Alberta's SGER and its forthcoming multi-sector carbon pricing regime, the vast majority of Canada's economy is now, or will soon be, subject to a carbon price. With the Federal government also promising to put a price on carbon, we await to see whether going forward there will be an attempt to reconcile these carbon pricing tools or to provide for some form of a consistent price signal across the Canadian economy.

4) Return of the Liberals: On October 29, Justin Trudeau became Canada's 23rd Prime Minister and the Liberals returned to majority government. Amongst their various campaign promises were commitments to restore Canada's environmental and resource development regimes and

ensure that environmental assessments include an analysis of upstream impacts and greenhouse gas emissions resulting from projects under review. If announcements in the past several weeks are any indication, the government plans a comprehensive review of federal environmental laws, especially those mangled by the 2012 omnibus budget bills (C-38 and C-45), including the *Canadian Environmental Assessment Act, 2012,* SC 2012, c 19 s 52 and the *Fisheries Act,* RSC 1985 c F-14 (see *e.g.* Martin's blogs here, here, and here). While any future changes are unlikely to satisfy all stakeholders, we are looking forward to a meaningful, evidence-based law reform process.

5) Keystone XL Rejected: On November 6, after over six years of regulatory wrangling but just over two weeks after Canada's federal election, U.S. President Barack Obama officially rejected TransCanada's Keystone XL pipeline. Does this reflect a sea-change in US climate change and energy policy or just domestic politicking? We think the latter but time alone will tell.

6) Other Pipelines: The controversy surrounding other pipelines continued in 2015, whether in relation to applications moving through the NEB process or the spate of cases before the Federal Court of Appeal contesting the Board's treatment of those applications. For a review of the state of play of the relevant pipeline and Court applications, see Nigel's article: "Pipelines, the National Energy Board and the Federal Court" (2015), 3 Energy Regulation Quarterly 59 – 73. Even the provincial superior courts have got in on the act, with the BC Supreme Court confirming in *Burnaby (City) v Trans Mountain Pipeline ULC*, 2015 BCSC 2140 that a municipality has no authority with respect to the routing of an interprovincial pipeline; see Nigel's comment on that case here.

7) British Columbia's *Nexen* water licence decision: Shale gas has been big news in North America for a few years. The development of non-conventional resources such as in-place shale gas requires the introduction of new technologies or the enhancement of existing technologies such as hydraulic fracturing or "fraccing". Fraccing operations require large quantities of water which may trigger significant regulatory requirements. While energy regulators may feel pressure to facilitate access to water, the decision of British Columbia's Environmental Appeal Board (EAB) in the Nexen water licence case reaffirms that EABs can perform an important role in reviewing the science behind line department decisions. Nigel's post on that decision is here. While the EAB may serve that "check and balance" function in British Columbia, it is important to emphasise (see earlier post here) that Alberta's EAB has no jurisdiction over decisions of the Alberta Energy Regulator. Perhaps that is something that the new provincial government should re-examine as part of a review of the adequacy of Alberta's environmental laws and regulations.

8) Indigenous Environmental Laws: Following the Supreme Court of Canada's landmark Aboriginal title decision in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (CanLII), this year saw the re-emergence of Indigenous environmental laws and regimes. Examples include the declaration of Dasiqox Tribal Park, located within Tsilhqot'in traditional territory, and the Tsleil-Waututh Nation's Assessment of Kinder Morgan's Trans Mountain Pipeline and Tanker Expansion. While it is too soon to tell how these legal regimes will shape Canadian law, we think this trend is likely to continue, especially in light of the June Report of the Truth and Reconciliation Commission and Calls to Action 27 and 28 in particular, which urge training in and teaching of Indigenous laws, and which have already spurred considerable response.

9) Peel Watershed Regional Plan Litigation (*The First Nation of Nacho Nyak Dun v. Yukon*, 2015 YKCA 18 (CanLII)): This litigation is significant for several reasons. As governments throughout Canada increasingly turn to land use planning to deal with the cumulative effects of natural resource and other development (see *e.g.* Alberta, British Columbia), the recommended Peel Watershed Regional Plan stood out as one of the first to take the task seriously. Last minute modifications by the Yukon government, however, threatened to unravel seven years of hard work by the independent planning commission. Drawing on the submissions of long-time Aboriginal and environmental law advocate and pioneer Tom Berger, the Supreme Court of Yukon concluded that the government's modifications were in breach of its obligations under the applicable land claim agreements. The Yukon Court of Appeal agreed but departed from the lower court's approach to remedy by sending the plan back to an earlier stage in the process, which means that the First Nation will have to fight once again for ground lost as a result of Yukon's breaches. Not surprisingly, therefore, the First Nation has recently filed for leave to appeal to the Supreme Court of Canada. For additional commentary, see here, here and here.

10) Justice Rennie. We conclude with a salute to Justice Rennie of the Federal Court of Appeal and his two notable and well-reasoned dissents in *Ontario Power Generation Inc. v Greenpeace Canada et al*, 2015 FCA 186 (*Greenpeace*) and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc, the National Energy Board and the Attorney General of Canada*, 2015 FCA 222 (the *Enbridge Line 9 Case*). In *Greenpeace*, which Martin and Meinhard Doelle blogged about here, Justice Rennie resisted the majority's low bar for the judicial supervision of the reports of environmental assessment panels and recognized, as did the trial judge, that allowing review panels to defer the consideration of environmental effects to subsequent regulatory processes "short-circuits the process under the Act where an expert body evaluates the evidence regarding the Project's likely effects, and the political decision-makers evaluate whether that level of impact is acceptable in light of policy considerations" (at para 52).

In the *Enbridge Line 9 Case*, Justice Rennie gave forceful reasons for concluding that the Court's earlier decision in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308 (CanLII) needed to be reconsidered in light of the Supreme Court of Canada's decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (CanLII) (*Carrier Sekani*). Specifically, Justice Rennie would have held that in making a decision under s 58 of the *National Energy Board Act*, RSC, 1985, c N-7, the NEB had a duty to satisfy itself as to whether the Crown had fulfilled its duty to consult First Nations that might be affected by Enbridge's proposed reversal project - even where the Crown was not a party to the case before the Board.

Looking Ahead

While 2015 was clearly an important year, we think that 2016 will be equally significant as the details of various climate change plans and legislative reforms are fleshed out. We also look forward to decisions on the Northern Gateway Pipeline and several other important cases, including *Syncrude Canada Ltd. v Attorney General of Canada* 2014 FC 776, which challenges the federal government's jurisdiction to regulate greenhouse gas emissions (see Nigel's, Shaun's and Martin's posts here, here and here) and *Ernst v Alberta Energy Regulator*, 2013 ABQB 537, aff'd 2014 ABCA 285 - a fraccing case in which Ernst challenges the legislature's ability to insulate agencies from liability under the *Charter* (see Jennifer Koshan's post here).