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New Report Provides a Framework for Thinking about Environmental Risk in the Regulatory Context

By: Martin Olszynski

Report Commented On: Responsible Risk: How putting a price on environmental risk makes disasters less likely

Anyone following the public debate with respect to carbon taxes in Canada will likely have heard of the Ecofiscal Commission – a policy shop operating at McGill University that for the past couple of years has been championing the use of carbon pricing as the most efficient way to tackle climate change. The Commission is not, however, a one-trick pony; it has also published reports on municipal water pricing, urban congestion, and biofuel subsidies, to name but a few.

In its most recent report, "Responsible Risk: How putting a price on environmental risk makes disasters less likely" ("Responsible Risk"), the Commission has set its sights on the environmental risks that inevitably accompany economic growth and development in Canada. In the report, the Commission makes the case for a more widespread use of "financial assurance" tools (e.g., bonds, insurance, industry funds) in order to more effectively and efficiently manage these risks.

As someone who researches and writes about environmental law and policy and who spent nearly half a dozen years working for a regulator, it is clear to me that this report should be mandatory reading for regulators, regulatory lawyers, and law students interested in environmental and natural resources law.

Making Environmental Law More Concrete

When teaching a course like environmental law, things can get abstract fast. Most of my colleagues – myself included – often begin with a brief history of environmental law and policy: the early days, where common law actions such as nuisance were the only real tools available; the environmental movement of the mid-20th century; and the subsequent burgeoning of environmental laws and regulations throughout the western world. Students read lofty international reports and agreements and then dive into relevant statutes and case law, learning about environmental assessment, species at risk, and so on. This is important stuff, no doubt, but it gives students very little sense of what environmental law looks like on the ground. For example – and of particular relevance to this post – students learn early on about the "polluter pays principle," which holds that those who produce pollution should bear the costs of cleaning it up. In *Imperial Oil Ltd. v Quebec (Minister of the Environment)*, 2003 SCC 58 (CanLII), the Supreme Court of Canada held that this principle "has become firmly entrenched in environmental law in Canada. It is found in almost all federal and provincial environmental

legislation…" (at para 21). That is fine as far as it goes, but what does it actually mean to say that the polluter must pay? What must they pay for?

Through "Responsible Risk," environmental law students and current regulatory lawyers can gain a clearer sense of what the polluter pays principle looks like in practice in Canada, the trade-offs that are often being made in its application, and why. Most immediately, it would help them to think critically about the Supreme Court of Canada's upcoming decision in *Orphan Well Association, et al. v Grant Thornton Limited, et al.* (*Redwater*) and why that case has become such an important one.

With Economic Development Comes Environmental Risk

As noted in the report, with economic development comes environmental risk – especially in an economy such as Canada's that is heavily dependent on natural resources extraction:

> "Resource extraction, transportation of goods, manufacturing processes — in short, many of the pillars of the economy that drive our well-being as Canadians — come with risks. When things go wrong, the environmental damage and human costs can be significant, sometimes even catastrophic. And the economic costs of these events can also be very high" (Responsible Risk, at page 1)

We know this all too well in Canada, whether it be Lac Megantic, Mount Polley, or the continued costs of maintaining various abandoned industrial sites throughout our country (the report sets out its own 16 examples of such incidents, both in Canada and worldwide, at pages 2 – 5).

At the root of these problems is a balancing exercise between fostering economic growth and ensuring some basic level of environmental protection, including against the accidents and malfunctions that inevitably accompany economic activity, carried out variously by legislators, governments, and regulators both provincially and federally. In carrying out this exercise, governments have a series of tools that they can and do employ, from conventional command and control regulations, liability provisions, to financial assurance. "Responsible Risk" takes a deep dive into these tools, focusing on financial assurance, and sets out a framework for understanding their relative strengths and weaknesses.

I am not going to summarize the entire report here – the motivation for this blog post is to encourage ABlawg readers to read it for themselves. In the interests of full disclosure, I played a small role in reviewing an earlier draft. I was keen to do so, however, because I was instantly struck by how much it helped me in my own thinking about these issues. I am sure it will do the same for others.

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