Legislative Summary **LS-539E**

BILL C-30: CANADA'S CLEAN AIR AND CLIMATE CHANGE ACT

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LEGISLATIVE HISTORY OF BILL C-30

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
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TABLE OF CONTENTS

Page

Page

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BILL C-30: CANADA'S CLEAN AIR AND CLIMATE CHANGE ACT*

BACKGROUND**

Bill C-30, An Act to amend the Canadian Environmental Protection Act, 1999, the Energy Efficiency Act and the Motor Vehicle Fuel Consumption Standards Act (Canada's Clean Air Act), was introduced in the House of Commons and given first reading on 19 October 2006. This bill addresses air pollution as well as greenhouse gas emissions.

Air pollutants associated with smog (ozone and particulate matter as well as substances that can form ozone) had been placed on Schedule 1 of the Canadian Environmental Protection Act, 1999 (CEPA 1999) in order to give the government the powers to use regulations and other instruments available under CEPA 1999 to control these substances. Schedule 1 of CEPA 1999 contains the list of substances defined as "toxic" under section 64 of the Act.

During the 38th Parliament, the government had also placed greenhouse gases on Schedule 1 of CEPA 1999 in order, most significantly, to move toward the use of certain portions of the Act to regulate emissions of these substances and to create an emissions trading scheme for significant industrial sources of greenhouse gases (large final emitters). This was done to help Canada meet its Kyoto Protocol obligations to reduce greenhouse gas emissions to, on average, 6% below 1990 levels during the period 2008-2012. During the 39th Parliament, however, the government repudiated the Kyoto targets, stating that Canada could not meet them. Bill C-30 seeks to reduce the health and environmental risks associated with air pollutants and greenhouse gases.

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

** Bill C-30 was amended extensively by the House of Commons Legislative Committee on Bill C-30. Because the effect of those amendments was effectively to re-write the bill, and for clarity, changes to this document are not indicated in bold print.

Bill C-30 was originally introduced in the House of Commons on 19 October 2006. Two days after it was tabled, the government published a *Notice of intent to develop and implement regulations and other measures to reduce air emissions*. The Notice set out the government's intention to develop and implement a number of regulations under CEPA 1999 and to address air pollutants and greenhouse gases using the amendments put forward in Bill C-30. Under this first-reading version of the bill, no mention was made of the Kyoto Protocol. According to the Notice of Intent, firm limits would not be set on greenhouse gas emissions until 2020 or 2025, and emissions regulations on large final emitters would not take effect until 2010.

The bill as it was originally drafted was rejected by all opposition parties and was therefore not approved in substance by the House of Commons. By agreement, it was referred to the Legislative Committee on Bill C-30 before the second-reading stage. This allowed the Committee greater latitude in amending the bill than would otherwise have been the case.

Bill C-30, as amended, reflects revisions made to the substance of the bill. Consistent with the first-reading version, it addresses air pollution and greenhouse gas emissions. However, the focus of the bill has been reoriented to emphasize action to fulfil Canada's international obligations to reduce greenhouse gas emissions.

DESCRIPTION AND ANALYSIS

Bill C-30 amends three separate federal Acts: the *Canadian Environmental Protection Act, 1999*,[1] the *Energy Efficiency Act*,[2] and the *Motor Vehicle Fuel Consumption Standards Act*,[3] the last of which is not in force. Accordingly, the bill is divided into three parts, with each part addressing amendments to one of the three Acts.

Clause 1 establishes the bill's short title as "Canada's Clean Air and Climate Change Act." However, various other parts of the bill still refer to its original short title, "Canada's Clean Air Act."

A. Part 1, Clauses 2-37: Amendments to the *Canadian Environmental Protection Act, 1999*

Most of Bill C-30 is made up of amendments to the *Canadian Environmental Protection Act, 1999*.

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(1) *Canadian Environmental Protection Act, 1999*, c. 33.

(2) *Energy Efficiency Act*, 1992, c. 36.

(3) *Motor Vehicle Fuel Consumption Standards Act*, R.S. 1985, c. M-9.

1. Clauses 2 and 3 – Preamble and Definitions

Clause 2 adds new paragraphs to the preamble of CEPA 1999. Six recitals, some of which overlap with the subject matter of existing paragraphs, are inserted before the beginning of the existing preamble. They concern:

- a commitment to a "national carbon budget";
- a recognition that air pollution and greenhouse gases present a risk of national and international concern to the environment and health that cannot be contained within geographic boundaries;
- a recognition that air pollution and greenhouse gases are matters of shared federal–provincial/territorial jurisdiction within Canada;
- a recognition that climate change "constitutes one of the most serious threats to humanity and to Canada, and poses major risks not only to the environment and the economy, but above all to the health and safety of all people";
- an acknowledgement of the government's "undeniable responsibility" to respond to climate change, in view of both Canada's relative wealth and the effects of climate change already evident in Canada;
- a statement of the fact that Canada has signed the United Nations Framework Convention on Climate Change and ratified its Kyoto Protocol, and of Canada's emission reduction target under that Protocol.

Finally, a paragraph is added that states that the federal regulatory system for toxic substances should be designed both to minimize risks and to encourage the use of less hazardous or non-hazardous substitutes. This paragraph replaces an existing paragraph of the preamble to CEPA 1999, which relates to the pursuit of the "highest level of environmental quality" and of sustainable development, in cooperation with the provinces, territories, and Aboriginal peoples.

Clause 3 introduces and defines various terms. The word "air" is defined to clarify that it includes "indoor air." "Air pollutant" and "greenhouse gas" are subsets of substances that also appear on Schedule 1 to CEPA 1999 (the List of Toxic Substances), as well as "any other prescribed substance" for either category.

"Air pollutant" includes particulate matter (less than or equal to 10 microns), ozone, sulphur dioxide, nitric oxide, volatile organic compounds (except those listed in a proposed Schedule 3.1 that was included in the first-reading version of Bill C-30 and would

have corresponded to the exceptions currently set out in Schedule 1 of the Act), gaseous ammonia and mercury. "Greenhouse gas" includes carbon dioxide, methane, nitrous oxide, certain hydrofluorocarbons, certain perfluorocarbons and sulphur hexafluoride.

Other new terms relate to the carbon budget and emission trading system that is to be established under sections of CEPA 1999 enacted by Bill C-30. "Carbon credit," "carbon permit," "domestic offset system," and "sectoral carbon budget" all refer to instruments issued or set under specified new sections of the Act. "Carbon price" is defined as a dollar value per tonne of carbon dioxide equivalent, and is set at $20 in 2008, $25 in 2009 and 2010, $30 in 2011 and 2012, and either to market value or to a prescribed amount of at least $30 thereafter.

Finally, Clause 3 adds that "for the purposes of this Act, a product that may release a substance, including an air pollutant or greenhouse gas, means a product that may do so during a use for which the product was intended."

2. Clause 5 – Amendments to Section 10, CEPA 1999 – Equivalency Agreements

Clause 5 amends section 10 of the Act with regard to equivalency provisions. Some of the changes are relatively minor; references are made to new sections of the Act created by the bill, and the term "Minister" is changed to "Ministers" to reflect the sharing of responsibilities by the Minister of the Environment and the Minister of Health.

More notably, clause 5 alters the text in subsection 10(3) of the Act. The Act allows the use of equivalency agreements where, by Cabinet decision, a regulation under CEPA 1999 is declared not to apply in a province, a territory or an area under the jurisdiction of an Aboriginal government that has equivalent legislative provisions. The equivalent law or regulation need not use the same wording as the CEPA 1999 regulation, but must have the same effect. Bill C-30 makes this explicit by specifying that the effects of the other government's provisions must

> demonstrably provide an equivalent or superior level of protection of the environment and human health based on, amongst other factors, the quantifiable effects of the regulation on the environment and human health and the effective enforcement and compliance of the federal regulation.

In addition, clause 5 creates a new requirement that an equivalency agreement must include a method to determine whether its terms are being fully met, and eliminates the five-year limitation period for an equivalency agreement previously found in subsection 10(8), replacing that provision with the requirement to adhere to "the time that is specified in the agreement."

Moreover, clause 5 adds that the Governor in Council may make regulations respecting the circumstances in which, and the conditions under which, equivalency agreements can be entered into. This is an additional power to be given to the federal Cabinet that is not present in the current Act.

3. Clauses 6-17 – Amendments to Parts 3-4, CEPA 1999

Clause 6 amends the environmental data and research aspects of the Act. A new provision added after subsection 44(4) states: "The Ministers may conduct research and studies relating to the effectiveness of mitigation and control technologies and techniques related to pollution prevention, air pollutants and greenhouse gases." Interestingly, this is a new and discretionary power given to the Ministers. It enables them to study the effectiveness of such technologies and techniques if they so choose, but does not compel such action. Other aspects of section 44 oblige the Ministers to conduct research and studies on pollution prevention (including control and abatement of pollution) and hormone-disrupting substances and to formulate plans for pollution prevention.

Clause 7, which replaces paragraph 45(*a*) of the Act, requires the Minister of Health to conduct research and studies on: (1) the role of substances *or pollution* (new term added) in causing ill health; (2) the human health effects of exposure to substances or pollution as evidenced by the monitoring of biomarkers; and (3) mitigation and control technologies and techniques related to pollution prevention. Notably, the Minister of Health has no discretion in this regard but *must* conduct these studies, whereas under new section 44(5) the Ministers *may* study the effectiveness of mitigation and control measures.

Clause 8 makes two amendments to section 46 of the Act, which currently permits the Minister of the Environment to issue notices requiring information about substances, nutrients or fuels for the purpose of conducting research, creating an inventory of data, formulating objectives and codes of practice, issuing guidelines, or assessing or reporting on the state of the environment. Clause 8(1) makes a technical amendment to subsection 46(1) of the Act, listing fuels separately from other substances or activities that may contribute significantly to air pollution.

Clause 8(2) amends section 46 to permit such notices issued by the Minister to require independent verification of the information provided.

Clause 8.1 inserts a new section 53.1 related to information gathering. The new section grants the Minister the authority to designate a region as a "significant area" if the Minister believes either that a region is particularly vulnerable to the effects of toxic substances, or that a "significant volume" of toxic substances is being released there. The Minister may subsequently publish a notice requiring, with respect to a designated significant area or any other area, the submission of information from specified persons "for the purpose of learning more about" toxic releases in that area. The Minister may also "identify priorities for research in order to reduce those toxic substances" (i.e., those being released in the area).

The current section 46 gives the Minister fairly broad powers to require information from specified persons, while this new section puts emphasis on the need for information on specified areas of concern.

Information submitted under section 53.1 is to be published in the National Pollutant Release Inventory and is subject to the various sections of the Act that relate to the Inventory and matters of confidentiality.

Clause 9 clarifies the wording of the French text of subsection 54(4) of the Act.

Clause 10.1 adds a new section 63.1 to the end of Part 4 of the Act, Pollution Prevention. New subsection 63.1(1) requires the Minister to commence negotiations, within 90 days of the section coming into force, for the purpose of "creating or designating" an independent agency to be known as the Green Investment Bank of Canada, "which is to be responsible for monitoring and regulating the greenhouse gas emissions of large industrial emitters."

The negotiations are to include representatives of provincial and territorial governments, "members of aboriginal, Métis and Inuit communities," and representatives of "relevant private sector companies and non-governmental organizations." Relative to other sections of CEPA 1999, the specification of groups to be consulted is unusual in that it *requires,* rather than merely *permits,* negotiations with private companies and non-governmental organizations, and also in that it refers to Aboriginal, Métis and Inuit "communities" rather than to Aboriginal "governments" (which have established self-governance agreements with the federal government).

Subsection 63(2) outlines in detail the nature and proposed powers and purposes of the agency that the Minister and his or her provincial counterparts are obliged to consider in negotiations, without specifying how other groups outlined in 63 (1) are to be involved.

Under subsection 63(3), the Minister is required to table in both Houses of Parliament reports on the progress of these negotiations every six months, starting from when the section comes into force and continuing until negotiations are concluded.

4. Clauses 10.2 to 17 – Amendments to Part 5, Controlling Toxic Substances

Clause 10.2 inserts a new section 68.1. Subsection 68.1(1) obliges the Minister to require, within five years of the coming into force of Bill C-30, an assessment of all known and suspected carcinogens identified by the International Agency for Research on Cancer (aside from those already slated for assessment in the Domestic Substance List of CEPA 1999) along with an action plan to find non-hazardous substitutes. The same obligations apply to other "substances of concern" as identified by the Minister. Subsection 68.1(2) specifies that

> Where a substance is slated for safe substitution, that substance shall be phased out of use within ten years after this section comes into force.

Clauses 11 and 12 amend section 69(2.1) and paragraphs 71(1)(*a*) and (*b*) of CEPA 1999 to provide that either Minister may publish a notice in the *Canada Gazette* requiring information, sampling or testing.

Clause 12(1) also makes a substantive amendment to paragraph 71(1)(*c*) with respect to notices requiring people involved in the importation or manufacturing of certain substances to conduct toxicological or other tests and to submit the results to the Minister. This amendment broadens the scope of substances subject to such tests from any product "containing the substance" to any product "that contains or may release into the environment" the substance. This type of amendment is repeated in many clauses throughout the Bill.

Clause 12(3) further amends section 71 by adding an additional subsection (2.1) concerning the contents of a notice: a notice sent under paragraph 71(1)(*c*) may specify the methods, test procedures and laboratory practices to be followed in the required sampling, analysis, measurement, monitoring or quantification of a substance.

Clause 14 amends section 93 of the Act, which sets out the power of the federal Cabinet to make regulations with respect to substances specified on the List of Toxic Substances in Schedule 1. This clause broadens the scope of paragraph 93(1)(*f*) to include "the purposes for

which the substance or a product *that contains or may release it into the environment* may be imported, manufactured, processed, used, offered for sale or sold" (new text emphasized); and (*g*) "the manner in which and conditions under which the substance or a product *that contains or may release it into the environment* may be imported, manufactured, processed or used" (new text emphasized).

This enhanced scope – from substances or products *containing* the substance to those that contain *or may release a substance into the environment* – is continued in paragraphs 93(1)(*l*) to (*r*) of the Act under clause 14(2), and also in section 99 under clause 17.

Finally, a new paragraph 93(1)(x.1) is added by clause 14(3), granting the Governor in Council the power to make regulations respecting the monitoring of a substance and the reporting to either Minister of the environmental and health effects of the release of a substance.

Clause 14.1 creates new section 94.1, which obliges the Governor in Council to create regulations related to the creation of a greenhouse gas emissions trading scheme for industry.

Subsection 94.1(1) requires the Governor in Council to make regulations to establish: (*a*) a greenhouse gas emissions trading system, which would include the use of tradable carbon permits for releases of greenhouse gases by large industrial emitters; and (*b*) a domestic offset system,[4] which would include the use of tradable carbon credits for "incremental and verifiable annual greenhouse gas emission reductions."

Subsection 94.1(2) grants additional, optional powers to make regulations relating to carbon permits and carbon credits in order to specify who may own such permits or credits, to prescribe rules and procedures for trading, to link the trading system to foreign or international trading systems (provided that those systems are compliant with the Kyoto Protocol), and to prescribe the "carbon price" for 2013 or later years. This price must be equal to or greater than $30, taking into consideration foreign and international trading systems.

Subsection 94.1(3) requires that, if regulations are made to link the domestic trading systems to international or foreign systems, those regulations must prohibit the use of "prescribed hot air credits"[5] and also ensure that up until at least 2010, no large emitter may offset more than 25% of their "individual carbon deficit" with credits from foreign and international trading systems.

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(4) Generally, offsets are verified greenhouse gas reductions achieved by persons outside of the large industrial emitter trading system (e.g., agriculture) that can then be purchased by large industrial emitters in lieu of actual emission reductions.

(5) The term "hot air" refers to greenhouse gas emission reductions that resulted from the economic collapse of old East Bloc countries and are available for trading under the Kyoto Protocol.

Subsection 94.1(4) specifies that, as an alternative to setting the carbon price by means of regulation, the Governor in Council may limit the issue of carbon credits in order to maintain a market price of not less than $30.

Section 95 of CEPA 1999 concerns actions to be taken in light of the actual or likely release into the environment of a listed toxic substance.(6) Subsection 95(7) provides an enforcement officer or other authorized person with right of access to "any place or property" where such a release occurs or is likely to occur. Clause 15 limits this power to include access to property where a release occurs or is likely to occur, or that is "reasonably suspected to be affected by the release."

5. Clause 18 – New Parts 5.1, 5.1.1 and 5.2

Clause 18 introduces a substantive amendment to the Act. This clause adds three new parts to CEPA 1999: Part 5.1 (section 103.01 to section 103.05) on "Climate Change Action," Part 5.1.1 (section 103.051) on "Greenhouse Gases" and Part 5.2 (sections 103.06 and 103.07) on "Ambient Air Quality Standards and Emission Standards."

a. Clause 18 – New Part 5.1

The purpose of new Part 5.1 (proposed section 103.01) is to "reduce Canada's greenhouse gas emissions to below current and historical levels in order to protect the environment and the well-being of all Canadians, especially the vulnerable members of society and Canadians living in the North."

New section 103.02 defines "carbon budgets," which must be determined by the Minister and published at least six months before a budget applies.

Subsection 103.02(1) defines the "national carbon budget" as a fixed value of greenhouse gas emissions for a given year. For 2008 to 2012, this value is set at Canada's 1990 emission levels less 6% (essentially, Canada's Kyoto Protocol commitment). For all years from 2013 to 2050, the budget is to be determined by the Minister, but the budget for each year is to be less than for the last. For the years 2020 and 2035 it is to be at least 20% and 35% below 1990 levels respectively, and for 2050 it is to be between 60% and 80% below 1990 levels.

Subsection 103.02(2) defines "sectoral carbon budgets" as portions of the national budget determined to be "appropriate" by the Minister for groups of persons considered to be "responsible for a large portion" of Canada's emissions.

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(6) A substance specified on the List of Toxic Substances in Schedule 1 of the *Canadian Environmental Protection Act, 1999*.

For each “large industrial emitter” and for anyone else considered to be “responsible for a portion” of Canada’s emissions, subsection 103.02(3) defines “individual carbon budgets” as portions of either a sectoral or the national budget. The individual budgets must take into account: early action (between 1990 and the coming into force of this section) to reduce greenhouse gas emissions; the potential for emitters to transfer permits between facilities and to trade permits and offsets; and “fair treatment” for emitters whose rate of economic growth differs from that of average sectoral growth.

Subsection 103.02(5) obliges the Minister to make regulations to determine the method of calculating “individual carbon deficits,” “based on” the amount of greenhouse gases produced in excess of an emitter’s individual budget.

Under subsection 103.02(6) the Minister must issue a carbon permit equivalent to an emitter’s carbon budget where required under the trading scheme established under section 94.1(1)(*a*).

New Sections 103.03 and 103.04 relate to Climate Change Plans. Section 103.03 requires the Minister to prepare a Climate Change Plan on or before 31 May of each year from 2013 to 2050. The Plan is to be tabled at the latest three sitting days after this date.

The Plan must include a description of measures taken under CEPA 1999 and any other Act to ensure that Canada’s domestic greenhouse gas emissions are at or below the level set by the national carbon budget. Sections 103.03(1)(*a*) outlines measures that must be included in the Plan. Subsection (*b*) requires that the date by which these measures are to take effect, along with the measured or expected emissions reduction to be achieved, are included in the Plan.

New Section 103.04 obliges the Minister to develop, in consultation with other government bodies, a “reliable methodology” for estimating and auditing anthropogenic greenhouse gas emissions for large emitters, economic sectors and “Canada as a whole” within six months of the section coming into force.

The final section of new Part 5.1, section 103.05, relates to the “large industrial emitters.” These persons are designated by the Minister, in consultation with the Governor in Council, as those considered “particularly responsible for a large portion of Canada’s greenhouse gas emissions, namely”: (*a*) persons involved in electricity generation, (*b*) persons in the upstream oil and gas sector, and (*c*) persons in energy-intensive industries, including petroleum refineries and natural gas distributors. Under section 103.05(2) the budgets for large final emitters are to be set so that the sum of the budgets for industries or sectors identified in subsection (1) “for each year from 2008 to 2012, shall equal the emissions level for the sector in 1990 less 6%.”

b. Clause 18 – New Part 5.1.1

New Part 5.1.1, "Greenhouse Gases," establishes a "territorial approach" for greenhouse gases similar to the equivalency agreement provisions set out in section 10 for other parts of CEPA 1999. On the recommendation of the Ministers, the Governor in Council may order that provisions of an Act or regulation relating to greenhouse gases do not apply within the jurisdiction of another government where there already exist legal provisions "the effect of which is equivalent to the reductions required by the national carbon budget" and provisions relating to citizen-initiated environmental protection.

The determination and publication of the necessary decision regarding the equivalent effect of provisions is to be undertaken by the Green Investment Bank of Canada on the request of a province. The Bank does not as yet exist, but its creation would be the subject of negotiations under section 63.1 should Bill C-30 come into force. The Bank may also revoke the notice, and the Governor in Council consequently may revoke the order, either if the conditions for the notice no longer exist or "on request from one of the parties to the agreement."

c. Clause 18 – New Part 5.2

The purpose of new Part 5.2 is to "protect the health of Canadians and improve the environment by addressing the anthropogenic deterioration of air quality."

Proposed new section 103.07 concerns ambient air quality standards and air emission standards. Ambient air quality standards must be issued and published by the Minister for each air pollutant within six months of the coming into force of this section. For air emissions standards, the Minister is required within one year to divide the country into geographical zones and to issue standards for each zone.

The air emission standards are to apply to "each industrial emissions facility" in any zone where the corresponding air quality standard is not met over a six-month period, although temporary exceptions may be granted by the Minister if meeting the standard would result in "severe economic hardship."

The Minister is required to review both types of standards at least every five years "to ensure their consistency with best practices and international standards." Furthermore, the Minister is required to table an annual report to Parliament on air pollution and

air quality. This report must address the attainment of the ambient air quality standards and air emission standards required under proposed subsections 103.07(1) and (2), as well as the effectiveness of measures taken by governments to achieve those objectives, and measures the Minister will take to assist in achieving them.

6. Clauses 19-23 – Part 7, Division 4, "Fuels"

In clauses 19 to 23, Bill C-30 amends Division 4 of Part 7 of the Act, "Controlling Pollution and Managing Wastes." Division 4 is entitled "Fuels."

Clause 19 adds new section 138.1, which grants the power to the Minister of Health to send a Notice requiring information for the purpose of assessing whether or how to control a fuel or an element, component or additive in a fuel. This new section describes the kind of information the Minister of Health may require in a Notice and the manner in which the information is to be supplied. Any person required to provide the Minister with information must then keep that information for seven years. (This is four years longer than any other information retention requirement in the existing Act.)

Clause 20 amends the exceptions to the prohibition against producing, importing or selling a fuel that does not meet the requirements prescribed in section 139. Revised paragraphs 139(2)(*b*) to (*d*) amend exceptions to the prohibition, in some cases narrowing the provision and in others broadening it. Paragraph 139(2)(*b*) is amended to make an exception for exported fuel subject to regulations. The amendment to paragraph 139(2)(*c*) expands the exception it provides to cover fuel that is produced or imported (currently the subsection covers only fuel that is imported) provided it meets the requirements of subsection 139(1) by the time it is used or sold. A new paragraph (*e*) stipulates that, subject to the regulations, the prohibition does not apply if the amount produced or imported is "less than 400 cubic meters per year."

Clause 21 amends the regulation-making power of the federal Cabinet in section 140 to include regulations concerning blended fuels (proposed new paragraphs 140(1)(*c.1*), (*e*) and (*g*)), to include "or any additive contained in the fuel" under the power to make regulations concerning "the adverse effects from the use of the fuel … on the environment, on human life or health, on combustion technology and on emission control equipment" (proposed subparagraph 140(1)(*g*)(iii)).

Clause 21(6) replaces subsection 140(3) of the Act, which currently permits regulations that distinguish among fuels according to their commercial designation, source, physical or chemical properties, class, conditions of use, or place or time of year of use. The new subsection 140(3) provides that regulations under subsection 140(1) may vary the operation of paragraphs 139(2)(*b*) to (*e*), and may exempt fuels on the basis of their use or conditions of use.

Clause 23 amends the wording of section 146 of CEPA 1999, concerning variations in fuels, with the following:

> A regulation *made under this Division* may distinguish among fuels according to their *manufacturing process*, commercial designation, *feedstocks*, source, physical or chemical properties, class, *use*, conditions of use or place or time of year of use. [new text emphasized]

7. Clauses 24 and 25 – Part 8, Environmental Matters Related to Emergencies

Clause 24 adds a new reference to paragraph (b) of subsection 103.07(2) (air emission standards) in section 195 of the Act. Clause 25 amends the requirements for environmental emergency plans in paragraph 199(1)(*a*) of the Act to include plans for substances listed as air pollutants or greenhouse gases, in addition to the toxic substances listed in Schedule 1.

8. Clauses 26-31 – Part 10, Enforcement

Clause 26 amends paragraphs 218(1)(*a*) and (*b*). It permits an enforcement officer to enter and inspect any place where he or she has reasonable grounds to believe may be found (*a*) a substance to which this Act applies or a product *that contains or may release* such a substance *into the environment*, or where (*b*) a fuel to which this Act applies is being or has been produced *or blended* (new text emphasized).

Clause 27 amends the "Offences and Punishment" part of the Act by adding new subsection 272(2.1), which sets out the offence of and penalty for failure to remit a tradable unit to the Minister. Upon conviction on indictment, a person is liable to "the prescribed fine, if applicable, or to imprisonment for a term of not more than three years, or to both"; on summary conviction, a person is liable to "the prescribed fine, if applicable, or to imprisonment for a term of not more than six months, or to both."

Clause 28 creates new section 277.1, which provides that all fines received by the Receiver General in respect of the commission of an offence under this Act or the execution of an order in relation to this Act shall be credited to the Environmental Damages Fund. Contained within the accounts of Canada, this fund is also the destination for fines collected under the *Migratory Birds Convention Act, 1994*, as amended in 2005.

The federal cabinet is empowered to make regulations setting out the method of calculating a fine relating to the failure to remit a tradable unit to the Minister and the minimum and maximum amount payable for each such unit (clause 29, adding new section 278.01 to the Act).

9. Clauses 32-37 – Part 11, Miscellaneous Matters

Clause 33 amends the regulatory power of the federal Cabinet under sections of the Act governing toxic substances, air quality, pollution control, waste management (nutrients from cleaning products and water conditioners), fuels, issues relating to international air pollution and international water pollution, government operations, and federal and Aboriginal lands. Under the amended section 326, Cabinet will be able to make regulations with respect to:

> (*a*) a substance, a product *that contains or may release* a substance *into the environment* or *a work, undertaking*, activity *or source* in relation to which the system is established;
>
> (*b*) the methods and procedures for conducting *the* sampling, *analyzing*, *testing*, *measuring*, monitoring or *quantifying* under the system; [amendments emphasized]

Clause 34 amends section 330 by revising one subsection and adding another. Subsection 330(3.1) allows regulations to specify a limited geographical application. This subsection is amended to permit the application of a regulation in only a part or parts of Canada, *including any province*, in order to *achieve national consistency in environmental quality* (amended text emphasized).

Section 330 of the Act sets out a series of conditions for the exercise of the regulatory power by Cabinet. New subsection 330(3.2) is added by the bill to permit regulations made under specified sections[7] to distinguish among persons, works, undertakings or activities according to any factors that, in the opinion of the Governor in Council, will allow for the

(7) Note that, as reported from committee, this clause would create a reference to a non-existent subsection 103.09(2), which had been proposed in an earlier version of the Bill.

making of a regulation that provides for satisfactory protection of the environment or human life or health. Regulations including these distinctions may concern: quantities of releases; production capacity; technology or techniques used; and in the case of works or undertakings, the date of commencement of their operation or the date on which any major alterations are completed.

New subsection 330(3.3) states that nothing in Part 7 shall be construed so as to prevent the making of regulations under Part 5 or 5.1 (concerning "Controlling Toxic Substances" and "Climate Change Action," respectively).

Clause 36 amends subsection 332(1) of the Act to require that the Minister publish a copy of every proposed order, regulation *or instrument* under the specified sections and subsections (new phrase emphasized). A list of sections and subsections subject to this requirement is also included in this clause. This subsection of CEPA 1999 currently requires all orders and regulations to be published and lists three exceptions (interim orders, amendments to the domestic substances list, and amendments to the non-domestic substances list).

Clause 37 adds new subsection 333(2.1) to provide that where a person or government files a notice of objection under subsection 332(2) with respect to regulations proposed to be made under subsection 10(11), the Minister may establish a board of review to inquire into the matter.

B. Part 2, Clauses 42-46: Amendments to the *Energy Efficiency Act*

1. Clauses 41.1 and 42 – Preamble and Interpretation

Clause 41.1 creates a preamble to the *Energy Efficiency Act*, specifying that "the Government of Canada is committed to ensuring sustained improvement in the efficient use of energy in all sectors of the Canadian economy."

Clause 42 adds a new subsection 2.1 to the interpretation part of the *Energy Efficiency Act*. The clause is intended to provide "greater certainty" by adding a precise definition of the word "class" as used in the Act. A "class" of energy-using products may be defined by common energy-consuming characteristics, the intended use of the products, or the conditions under which the products are normally used.

2. Clause 43 – Interprovincial Trade and Importation

In the current *Energy Efficiency Act*, paragraph 4(1)(*a*) prohibits dealers from selling, leasing or shipping an energy-using product "from the province in which it was manufactured to another province" without meeting certain conditions. Clause 43 amends that

paragraph by replacing the quoted phrase with “from one province to another province.” In addition, paragraph 4(1)(*b*) of the current Act, which requires products or their packages to be labelled “in the prescribed form and manner,” is amended to require labelling “in accordance with the regulations.”

3. Clause 44 – Information Provided by Dealers

Clause 44 amends section 5 of the Act, which sets out the information that must be provided by dealers who ship or import energy-using products. Under the current subsection 5(1), dealers must “file” information with the Minister in “a report setting out prescribed information respecting the energy efficiency of those products.” Bill C-30 amends this wording to require that the information be “provide[d] to” the Minister, and adds a requirement for information on the shipment and importation of products.

Similar technical changes (from “file a report” to “provide prescribed information”) are proposed for paragraphs 5(2)(*a*) and (*b*), which provide exceptions to the information set out in subsection 5(1). In addition, this clause allows in certain circumstances for an exemption from the requirement to provide information related to the energy efficiency of energy-using products, while leaving in place the requirement for shipment and importation information. Clause 44 also states that information does not have to be provided if the Minister is satisfied that it has previously been provided, or that information has been provided on comparable products that differ from the products in question “only in a manner that does not *relate* to energy efficiency.” The existing Act uses the phrase “does not *affect their* energy efficiency” (emphasis added).

4. Clause 45 – Retention of Documents and Records

Clause 45 amends sections 7 and 8 of the Act, which deal with the records and documents that dealers must keep, by making the same wording changes as proposed in clause 44 (replacing “to file a report” with “to provide prescribed information”).

This clause makes two other minor wording changes. In the current section 7, the documents and records must *enable* the Minister to verify the accuracy and completeness of the information. Under Bill C-30, they must be *sufficient* for the Minister to do the verification. In the existing section 8, documents and records must be kept for six years “after the day on which the report was filed with the Minister.” Clause 45 changes this to six years “after the day on which the prescribed information was provided to the Minister.”

5. Clause 46 – Regulations

Clause 46 amends paragraph 20(1)(*a*) of the Act, which sets out the regulatory powers under the Act. Currently, the Governor in Council may make regulations to prescribe as an energy-using product any manufactured product designed to operate using electricity, oil, natural gas or any other form or source of energy, or to be used as a door or window system. Clause 46 extends that regulatory authority to cover any manufactured product or *class* of manufactured products. It also removes the reference to door and window systems and replaces those words with "or that affects or controls energy consumption." These changes broaden the range of products that may be regulated under the Act.

Paragraph 20(1)(*b*) of the English version of the Act is amended by removing the word "prescribed" before "classes of energy-using products" to bring it into accordance with the wording in the French version of the Act.

Clause 46 also simplifies the language, while broadening the regulatory authority of the Governor in Council, by amending paragraph 20(1)(*c*). At present, this paragraph permits the making of regulations governing the form and manner of labelling energy-using products or prescribed classes of products, or their packages, with respect to their energy efficiency. Clause 46 states simply that regulations may be made "respecting the labelling of energy-using products or their packages, or classes of energy-using products or their packages." The restriction that the labelling is "with respect to their energy efficiency" is removed.

Finally, new subsections 20(3) and (4) require that, within four years of the day on which the subsections come into force, the Governor in Council shall regulate energy efficiency standards for "all energy-using products the use of which has a significant or an increasing impact on energy consumption in Canada." These regulations are to be made in consultation with the provinces and territories, and the standards so established are then to be reviewed at least once every three years, to ensure that they are "at least equivalent to the levels set by the most stringent standards applicable in other jurisdictions in North America."

C. Part 3, Clauses 47-51: Amendments to the *Motor Vehicle Fuel Consumption Standards Act*

1. Clause 46.1 – Preamble

Clause 46.1 creates a preamble to the *Motor Vehicle Fuel Consumption Standards Act*, stating that "the Government of Canada is committed to a clean environment, healthy Canadians, and the reduction of domestic greenhouse gas emissions" and also that "the Government of Canada is committed to having fuel consumption standards that meet or exceed international best practices."

2. Clause 47 – Regulation

This clause replaces section 3 (Fuel consumption standards) of the Act, which currently states that "The Governor in Council may, on the recommendation of the Minister [of Transport] and the Minister of Natural Resources, make regulations prescribing … a fuel consumption standard for any prescribed class of motor vehicle for any year." This is amended, as subsection 3(1), to require that the Governor in Council "shall" make regulations prescribing such standards, without the need for recommendation by the Ministers. Standards would have to meet or exceed international best practices.

In addition, a new subsection 3(2) clarifies that regulations made under subsection 3(1) may prescribe a method of establishing the fuel consumption standard, using factors that vary from company to company. This clause enables the introduction of a regulated fuel consumption standard that is a function of company-specific variables such as vehicle sales or vehicle size.

Under new subsection 3(3), these regulations must be published within one year of the section coming into force and must themselves come into force at the expiry of the existing Memorandum of Understanding (MOU) with the automotive industry (i.e., after 31 December 2010), if neither party terminates the MOU before this date.

Finally, new subsection 3(4) requires that, starting in 2011, the standards "shall be benchmarked against leading standards in other jurisdictions considering technical feasibility."

3. Clause 48 – Regulations Design and Development

This clause replaces section 5 of the Act, which currently provides that a fuel consumption standard is valid only if certain conditions are met, with a requirement that the Ministers of Transport, Natural Resources, the Environment and Industry "undertake a regulations design and development exercise" with participants from "provinces and territories, labour organizations, environmental organizations, companies and other interested persons" before publishing a proposed regulation.

4. Clause 48.1 – Fuel Efficiency Labelling Scheme

Clause 48.1 creates new section 22.1, which requires the Governor in Council to develop regulations "regarding a fuel efficiency labelling scheme for motor vehicles." The regulations are to come into force within six months of the coming into force of the new section, and must require that all vehicles intended for sale in Canada "prominently display a verified fuel efficiency rating," including a rating of performance relative to "the best and worst in its class and best and worst overall."

5. Clause 49 – Enforcement

This clause thoroughly amends section 24 of the Act to provide inspectors with additional powers of enforcement. Notably, it adds subsections that empower inspectors to search computer systems and, under specific conditions, to enter a dwelling-place without the consent of its occupant if a warrant has been issued to that effect.

6. Clause 50 – Disclosure of Privileged Information

Under the current subsection 27(2) of the Act, information obtained under the Act may, for example, be disclosed "for the purposes of the administration or enforcement of this Act, legal proceedings related thereto or criminal proceedings under an Act of Parliament." Clause 50 amends this language to restrict disclosure by replacing the quoted phrase with "for the purposes of the administration or enforcement of this Act or legal proceedings related to it."

7. Clause 51 – Coming Into Force of the *Motor Vehicle Fuel Consumption Standards Act*

The *Motor Vehicle Fuel Consumption Standards Act* is not in force. Clause 51 amends its section 39 to provide that this Act comes into force, in its entirety, 30 days after Bill C-30 receives Royal Assent.

D. Clause 52: Coming Into Force of Bill C-30

Clause 52 states that both Part 1 and Part 2 of this Act (Bill C-30) will come into force 30 days after the day on which it receives Royal Assent. (The coming into force of Part 3 of this Act is covered in clause 51.)

COMMENTARY

Bill C-30 was referred to the Legislative Committee on Bill C-30 (the "Committee") before the second-reading stage, essentially reflecting the fact that the bill had not been approved in substance by the House of Commons. Under the rules of parliamentary procedure, this meant that the Committee was afforded greater latitude in amending the bill than would otherwise have been the case.

As well, in a reflection of this Parliament's minority status, opposition party members outnumbered government members on the Committee. The effect of this was that a united opposition was able to significantly redraft the bill where there was majority support for any given proposed amendment. The bill, therefore, had undergone considerable amendment by the Committee before it was reported to the House of Commons on 30 March 2007. Indeed, the changes made to the bill were so extensive that it has been described as being "virtually unrecognizable from its original form."(8)

The focus of the bill has been reoriented to emphasize action to fulfil Canada's international obligations to reduce greenhouse gas emissions. Canada has made a commitment to reducing greenhouse gas emissions through the United Nations Framework Convention on Climate Change and its binding agreement, the Kyoto Protocol, which Canada signed in 1997 and ratified in 2002. Canada, together with other parties to the Convention, agreed in the Kyoto Protocol to reduce average greenhouse emissions in industrial countries to 6% below 1990 levels between 2008 and 2012. Canadian government data in 2004 revealed that Canada's greenhouse gas emissions were almost 27% above 1990 levels and were rising, not declining.

The 2006 Annual Report of the Commissioner of the Environment and Sustainable Development was devoted to climate change programs. The press release accompanying the report concluded: "It is increasingly clear that Canada will not meet its international commitments to reduce greenhouse gas emissions."(9)

Bill C-30 as amended by the Committee enshrines the emissions reduction targets set out in the Kyoto Protocol and introduces fixed amounts of permissible greenhouse gas emissions for defined dates beyond 2012. It also makes explicit references to climate change and the Kyoto Protocol targets in amendments to the Preamble of the *Canadian Environmental Protection Act, 1999*. The bill as it was originally drafted made no reference to the Kyoto Protocol or its targets or timelines.

In conjunction with the first reading of Bill C-30, a *Notice of intent to develop and implement regulations and other measures to reduce air emissions* was published on 21 October 2006. This Notice provided no firm limits on greenhouse gas emissions before the year 2020. Rather, it called for intensity-based targets, which require polluters to reduce the amount of emissions per unit of production but do not limit total emissions.

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(8) "Clean Air Act totally revamped; Whether Conservatives accept changes or use them to trigger election speculated," *The Record* [Kitchener, Cambridge and Waterloo], 28 March 2007, p. A3.

(9) Office of the Auditor General, News Release, "The Commissioner's Perspective – 2006," Ottawa, 28 September 2006.

Bill C-30 seeks to provide a plan for climate change action and to establish air quality and air emissions standards. The main thrust of the amended bill is to introduce into CEPA 1999 Part 5.1, entitled "Climate Change Action," and Part 5.2, entitled "Ambient Air Quality Standards and Air Emissions Standards." These new parts will come after Part 5 of CEPA 1999. Part 5 is central to the Act and deals with the control of certain toxic substances (listed in Schedule 1) after they have been examined through a legislated assessment process.

The original Clause 18 of Bill C-30, which created the new Part 5.1 of CEPA 1999, was entirely replaced by the Committee with three new parts: 5.1, 5.1.1 (together related exclusively to greenhouse gas emissions) and 5.2 (Ambient Air Quality Standards and Air Emissions Standards). As originally proposed (see appendix) , the bill would have removed substances associated with smog and greenhouse gases from the current Schedule 1 of CEPA 1999 (List of Toxic Substances), included them in new definitions of air pollutants and greenhouse gases, and empowered Cabinet to regulate those substances under a new Part 5.1, entitled "Clean Air." The purpose of Part 5.1 would have been to "promote the reduction of air pollution and to promote air quality in order to protect the environment and the health of all Canadians, especially that of the more vulnerable members of society."

As revised by the Committee, the purpose of new Part 5.1 is now to "to reduce Canada's greenhouse gas emissions to below current and historical levels in order to protect the environment and the well-being of all Canadians, especially the vulnerable members of society and Canadians living in the North."

To this end, Part 5.1 introduces national, sectoral and individual "carbon budgets" that would set increasingly strict limits on permissible greenhouse gas emissions and require large industrial emitters to pay escalating penalties into a new green fund (the "Green Investment Bank of Canada") if they are not able to meet these standards.

Companies would be able to access the funds they deposit into the fund if they make technological improvements to reduce their emissions within two years. If no such improvements made within that time, the funds will be spent on other green schemes and "allocated in a manner that maximizes verifiable GHG emission reductions."

The bill also provides for mandatory regulations toward the creation of a greenhouse gas emissions trading system that would require the issuing and trading of transferable carbon permits for the release of any greenhouse gas by large industrial emitters. It further provides for regulations to support the creation of a domestic offset system.

Such a system would require the issuing and trading of transferable carbon credits for incremental and verifiable annual greenhouse gas emissions reductions, to be used to reduce the individual carbon deficit of large industrial emitters.

The bill requires the Minister to prepare and table in Parliament an annual "Climate Change Plan" detailing measures to be taken to ensure that Canada's domestic greenhouse gas emissions are equal to or less than the prescribed national carbon budget. Measures to be described include those respecting market-based mechanisms such as emissions trading or offsets, spending or fiscal measures or incentives, and a just transition for workers affected by greenhouse gas emission reductions.

Each Plan must also include the projected greenhouse gas emission level in Canada for each year from 2013 to 2050, a comparison of those levels with any international commitments and obligations that the government of Canada may have undertaken, and an equitable distribution of greenhouse gas emission reduction levels among the sectors of the economy that contribute to greenhouse gas emissions.

Some interactions between the provisions of the proposed Part 5.1 and the existing provisions of CEPA 1999 might lead to undesirable or unforeseen effects. For example, as amended by Bill C-30, CEPA 1999 would explicitly protect the well-being of the more vulnerable members of society, including Canadians living in the North, from greenhouse gas emissions; however, the same protection is not provided with respect to other toxic substances.

New Part 5.1.1 is entitled "Greenhouse Gases Territorial Approach." Currently the Governor in Council may declare that certain provisions of a regulation do not apply in a region if there are provisions equivalent to a regulation already in place, along with enforcement. The bill contains a similar clause respecting equivalency provisions generally, presumably to facilitate the development of equivalency agreements with the provinces. This new Part would allow for a similar approach with respect to the reduction of greenhouse gas emissions. Other clauses of Bill C-30 would likely permit greater flexibility with regard to equivalency provisions generally, presumably to facilitate the development of equivalency agreements with the provinces.

New Part 5.2 would include a number of clauses under the heading "Ambient Air Quality Standards and Air Emissions Standards." These clauses oblige the Minister to divide Canada into geographic zones for the purpose of setting and applying emissions standards for each air pollutant in each zone and to issue such standards in respect of each air pollutant. The standards are to be reviewed every five years to ensure their consistency with best practices and international standards.

The Minister is also obliged to report annually to Parliament on air pollution and air quality, including on whether emissions standards are being met and the measures that are being or will be taken in order to meet the standards.

A number of statistics and objectives regarding ambient air quality are currently reported on, or will be reported on, through processes that are under development. National Ambient Air Quality Objectives are currently developed under the auspices of the National Advisory Committee Working Group on Air Quality Objectives and Guidelines, which reports to the National Advisory Committee established under CEPA 1999. In addition, Canada-wide standards have been developed by the Canadian Council of Ministers of the Environment; these are considered Environmental Quality Objectives under CEPA 1999. An air quality indicator is also included in the set of Sustainable Development Indicators recently established by Statistics Canada and Environment Canada, and a health-based Air Quality Index is being developed by Health Canada. A key difference between these current and planned efforts and the Ambient Air Quality Standards and Air Emissions Standards proposed under Part 5.2 of Bill C-30 would be the legislated requirement to report.

The constitutionality of CEPA 1999 has been the subject of much discussion since the Act's passage. The legislative authority of the federal and provincial/territorial governments is determined by the Canadian Constitution, which does not assign jurisdiction over the environment or environmental protection to either level of government. Under the *Constitution Act, 1867*, some relevant matters are assigned to each of the federal and provincial levels of government.(10) In other areas, such as the protection of the environment, jurisdiction is joint and responsibilities overlap.

Section 91 of the *Constitution Act* assigns various environment-related heads of power to the federal level, including seacoast and inland fisheries, navigation and shipping, international rivers, and relations with foreign governments. Other important grounds for federal jurisdiction lie with the federal power over criminal law, the power to regulate trade and commerce, and the residual peace, order and good government ("p.o.g.g.") power. The p.o.g.g. power is found in the introductory words of section 91, "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the

(10) For a more detailed analysis, see Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed., Loose-leaf Edition, Vol. 1, Carswell, Toronto, 1997, starting at p. 29-19.

Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces … .” The national concern branch of the p.o.g.g. power permits the federal government to control pollution of air or water that extends beyond the power of an individual province to control.(11)

In the leading Supreme Court of Canada case on the issue of constitutional division of powers and environmental protection legislation, and specifically CEPA, the constitutionality of CEPA was narrowly upheld as a valid exercise of the federal criminal law power. In *R.* v. *Hydro-Québec*,(12) Justice LaForest found that although various other heads of power assigned to the federal government might form the basis for valid environmental protection legislation, CEPA was valid as an exercise of the criminal law power, and therefore its provisions had to be tested against the specific characteristics of that head of power. He cautioned that Parliament’s plenary power over criminal law cannot be employed colourably,(13) thus invading areas of exclusively provincial legislative competence. Justice LaForest also cautioned against an interpretation of the Constitution that would prevent Parliament from exercising the leadership role expected of it by the international community and its role in protecting the basic values of Canadians regarding the environment through the instrumentality of the criminal law power.

As originally drafted, Bill C-30 would have removed substances associated with smog, smog precursors and greenhouse gases from the List of Toxic Substances, Schedule 1 of CEPA 1999, and placed them in the list of definitions in the Act as “air pollutants” and “greenhouse gases” respectively. This raised concerns that the federal government would lose the ability to regulate these substances under the criminal law power, as they were no longer on the List of Toxic Substances.

In the original draft of Bill C-30, clause 2 added a new recital to the Preamble of CEPA 1999, to provide that the government recognizes that “air *pollutants*” [emphasis added] and greenhouse gases pose “a risk to the environment and its biological diversity, as well as to human health and are matters of national and international concern which cannot be contained within geographic boundaries.” In the revised bill, the thrust of the new recital was retained; however, the word “pollutants” was amended to “pollution,” and the words “and are matters” were deleted. In both the original and the revised text, the recognition of “national and international concern” may signal the government’s intention to strengthen the constitutional underpinnings of CEPA 1999 by linking the provisions of the Act to heads of power other than the criminal law power.

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(11) *R.* v. *Crown Zellerbach* [1988] 1 S.C.R. 399, where the Supreme Court of Canada upheld the federal Ocean Dumping Control Act.

(12) *R.* v. *Hydro-Québec*, [1997] 3 S.C.R. 213.

(13) The legal term “colourable” describes that which is one thing in appearance but another in substance.

The Committee added an additional recital explicitly recognizing that "air pollution and greenhouse gases are matters within the jurisdiction of both the Government of Canada and the governments of the provinces."

The Committee amended Bill C-30's changes to the *Energy Efficiency Act*, adding a recital to the Preamble stating that Canada is "committed to ensuring sustained improvement in the efficient use of energy in all sectors of the Canadian economy." As well, the Committee amended the bill to require the creation of regulations establishing energy efficiency standards for all energy-using products that have a significant impact on energy consumption. These standards are to be reviewed at least every three years to ensure that they "are at least equivalent to the levels set by the most stringent standards applicable in other jurisdictions in North America."

The Committee also amended Bill C-30's changes to the *Motor Vehicle Fuel Consumption Standards Act*. A recital to the Preamble now states that "the Government of Canada is committed to a clean environment, healthy Canadians, and the reduction of domestic greenhouse gas emissions" and "is committed to having fuel consumption standards that meet or exceed international best practices." The bill was amended to provide for the mandatory creation of regulations relating to fuel consumption standards, to come into force in 2011, and also for regulations for the establishment of mandatory and fuel efficiency labels for vehicles.

MEDIA REACTION

The proposed legislation has attracted substantial media attention, both before its revision by the Legislative Committee and after. Among commentators who do not support the Kyoto Protocol, reaction to the bill as it was originally drafted was favourable. One editorial, for example, characterized the bill as one that "takes us in the right direction" in reducing emissions. It applauded the bill for recognizing that the targets set under the Kyoto Protocol were "unrealistic" and could not be met.(14) Rather, this bill presents long-term goals "that can be met."(15)

(14) R. Adamson, "Bill signals Kyoto is dead for Canada and so are unrealistic emission targets," *Toronto Star*, 22 October 2006, p. A16.

(15) *Ibid*.

Unsurprisingly, these commentators greeted the new version of Bill C-30 with less enthusiasm. The new pollution reduction targets and accompanying penalties and fines were characterized as "unachievable, and nothing other than a tax on the economic activity in Canada."(16) An editorial referred to it as the "Clean Red Tape Act," noting it created bureaucracies that could prove "onerous" in practice.(17)

Among commentators who support the Protocol, and Canada's commitment to it, reaction to the bill as originally proposed was critical. One focus of media critique was the lengthy timetable: "There are to be no major targets set for industry for several years. Three years of consultations and planning are to begin to set more detailed targets. More consultations? Contrast this with the fact that a vast majority of scientists say climate change is a dangerous problem that needs immediate action. The time to consult is over."(18)

Another focus of criticism was the intensity-based targets described in the *Notice of intent to develop and implement regulations and other measures to reduce air emissions* published on 21 October 2006. One commentator observed that under the proposed Clean Air Act, industry would be required to reduce the amount of energy used per unit of production, which would allow "GHG emissions [to] keep on rising, but at a slower rate."(19)

Thus, for those commentators who support fixed upper limits on emissions and a commitment to Kyoto targets, the revised bill was characterized as an improvement, and one that "sets stronger targets in the short, medium and long term. It does more on energy efficiency and more on smog."(20)

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(16) "New clean-air bill has industry on edge," *The Times Colonist* [Victoria], 31 March 2007, p. C3.

(17) Editorial, "The Clean Red Tape Act," *The Globe and Mail*, 31 March 2007, p. A24.

(18) Editorial, "Backward on clean air," *Sault Star*, 23 October 2006, p. A8.

(19) B. Johnstone, "Tories blow smoke into clean air," *The Leader-Post* [Regina], 21 October 2006, p. B4.

(20) "D. Bueckert, "Environment groups call on Tories to accept reworked Clean Air Act." *Telegraph-Journal* [New Brunswick], 31 March 2007, p. A6, quoting Clare Demerse of the Pembina Institute.

APPENDIX

DESCRIPTION AND ANALYSIS OF CLAUSE 18 OF THE FIRST-READING VERSION OF BILL C-30 – NEW PART 5.1, “CLEAN AIR”

APPENDIX

DESCRIPTION AND ANALYSIS OF CLAUSE 18 OF THE FIRST-READING VERSION OF BILL C-30 – NEW PART 5.1, "CLEAN AIR"*

Clause 18 introduces a substantive amendment to the Act through its addition of the new Part 5.1, sections 103.1-103.15, entitled "Clean Air."

The purpose of this part of the Act is stated in new section 103.01: "to promote the reduction of air pollution and to promote air quality in order to protect the environment and the health of all Canadians, especially that of the more vulnerable members of society."

General provisions for the formulation of guidelines and consultation are set out in proposed new section 103.02. This section repeats the text of other sections of the current Act, with the words "assessing and controlling air pollutants or greenhouse gases" substituted for "the quality of the environment," as found in subsection 47(2), for example.(1)

Similarly, proposed new section 103.03, which permits the Minister of the Environment to conduct research, investigation and evaluation of the substances that will be dealt with under this new Part, substantially reproduces the text of section 68 of the Act and is revised to read "contributes to air pollution or is capable of contributing to air pollution," "air pollutant" and "greenhouse gas" instead of similar wording relating to whether the substances are "toxic." Proposed new section 103.04 contains similar revisions based on the text of section 70 of the Act concerning the circumstances under which notice must be given to the Minister.

Proposed new section 103.05 concerns the assessment of whether a substance should be addressed under the provisions of Part 5.1, i.e., the assessment of whether a substance, including an air pollutant or a greenhouse gas, contributes to or is capable of contributing to air pollution, or whether and how to control it. It addresses notices requiring information, samples or testing and sets out the contents of such a notice. Here again the text of sections of the existing Act(2) is reproduced, edited to reflect this Part's focus on air-polluting substances or products that contain or may release those substances into the air.

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* Although this clause is written as if it has been adopted, it was completely replaced by the House of Commons Legislative Committee.

(1) Similar language appears in subsections 54(3), 61(2), 69(2), 76(2), 121(2), 140(4), 145(2), 197(1), 208(2), 209(3) and 323(1).

(2) See, for example, section 71.

Subsections (3) through (7) of proposed new section 103.05 set out information relating to the content of the notice, compliance information, and the extension of time for compliance with the notice. These are similar to provisions found elsewhere in the Act.(3) It is worth noting, however, that under this proposed new section any person required to provide either Minister with information must then keep that information for seven years. This period is four years longer than the similar provision under existing subsection 46(8).

Proposed new section 103.07 concerns "National Air Quality Objectives for Respirable Particulate Matter and Ozone." This is the section of the proposed legislation that is specifically intended to address smog.

This section obliges the Ministers to issue air quality objectives with respect to respirable particulate matter less than or equal to 10 microns, and to ozone, within three years of the section's coming into force. In addition, the Ministers must monitor the attainment of those objectives and assess the effectiveness of measures taken by governments to attain them.

In carrying out their duties regarding air quality objectives, the Ministers must offer to consult with provincial governments and the members of the National Advisory Committee (established under section 6 of the Act) who are representatives of Aboriginal governments, and may also consult with other agencies, departments or persons (proposed new subsection 103.07(3)). If this offer is not accepted by the other entities they consult, the Ministers may act any time after the 60th day from the date on which the offer to consult was made. The Ministers must publish any objectives issued under this section. These provisions are consistent with other provisions found elsewhere in the Act.(4)

The Ministers are required to table an annual report to Parliament on air pollution or air quality. This report must address the attainment of the air quality objectives set out in proposed subsection 103.07(1), as well as the effectiveness of measures taken by governments to achieve those objectives, and measures the Ministers will take to assist in achieving them.

In addition, the Minister of the Environment must publish projections of air pollution or air quality for any period that the Minister considers appropriate (proposed section 103.08).

Proposed section 103.09 concerns regulatory matters. The federal Cabinet may make regulations prescribing a substance as an air pollutant or a greenhouse gas if it is satisfied that the substance contributes to, or is capable of contributing to, air pollution.

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(3) See, for example, subsections 46(5) and (6) and subsections 71(2), (3) and (4).

(4) See, for example, sections 47(2) and (3), 54(3), (3.1) and (4), 55(2) and (3), and 62(2) and (3).

Further, the federal Cabinet may make regulations concerning any air pollutants or greenhouse gases under subsection 103.09(2). These regulations could include, for example:

> (*a*) the quantity or concentration of air pollutants or greenhouse gases that may be released into the air either alone or in combination with any other substance from any source or type of source;
>
> (*b*) the commercial, manufacturing or processing activity in the course of which air pollutants or greenhouse gases may be released into the air;
>
> (*c*) the manner in which and conditions under which air pollutants or greenhouse gases may be released into the air either alone or in combination with any other substance; […]
>
> (*f*) the quantities or concentrations of air pollutants or greenhouse gases that may be imported, exported, manufactured, processed, used or sold; […]
>
> (*l*) the packaging and labelling of air pollutants or greenhouse gases or a product that contains or may release either into the air.

Before making regulations under proposed subsection 103.09(2), the Ministers must give the National Advisory Committee an opportunity to advise the Ministers. As well, if a matter is already regulated under another Act of Parliament in a manner that provides sufficient protection to air quality and human health, the federal cabinet is prevented from making a regulation under this section.

When enacting regulations under this section, the federal Cabinet or Ministers are directed to consider several factors, including the importance of promoting the continued improvement of air quality, air quality objectives or guidelines, and *Canada's international obligations in relation to the environment and human health* (new text emphasized). This last-mentioned factor would include considering the United Nations Framework Convention on Climate Change and its binding agreement, the Kyoto Protocol, which Canada signed in 1997 and ratified in 2002.

If the federal Cabinet is satisfied that the inclusion of a substance listed in Schedule 3.1 (the List of Excluded Volatile Organic Compounds) is no longer necessary, it may, on the recommendation of the Ministers, make an order deleting it from that Schedule (proposed subsection 103.09(6)).

The Ministers' powers with respect to the subject, content, effect, duration and lapse of interim orders under Part 5.1 are set out in proposed new subsections 103.1(1) through (6). These subsections are similar to other parts of the Act that address interim orders, but are tailored to reflect orders concerning substances that contribute to or can contribute to air pollution, air pollutants or greenhouse gases.(5) Interim orders may be made where the Ministers believe that immediate action is required to deal with a significant danger to the environment or to human life or health.

Proposed new section 103.11 addresses the release of air pollutants or greenhouse gases, as well as remedial measures taken in response to such a release. This section substantially reproduces the text of section 212 of CEPA 1999 ("Release of Substances"), but is modified to replace the words "into the environment" with "into the air."

Where such a release occurs or is likely to occur, any person who has the charge, management or control of a substance before its release must, as soon as possible, notify an enforcement officer or other designated authority and any other person who may be adversely affected by the release, and must take all reasonable measures to prevent or stop the release. Where a person fails to take the required measures, an enforcement officer may intervene, and may have access to property where the release is located in order to take reasonable action (proposed subsections 103.11(1) to (6)). Anyone who is not responsible for the release but who, acting in good faith, provides assistance or advice in taking measures to prevent or stop the release is not personally liable in either civil or criminal law (proposed subsection 103.11(7)).

Proposed new section 103.12 concerns voluntary reports, requests for confidentiality and employee protection. Persons who are not required under the Act to report the occurrence or likelihood of a release of an air pollutant or greenhouse gas may nevertheless make such a report, and may request that their identity and any information that might reasonably disclose their identity not be released. Employers may not dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee, or deny an employee a benefit of employment, by reason that the employee: reported the occurrence or likelihood of a release of an air pollutant or a greenhouse gas; refused or stated an intention of refusing to do anything that is an offence under this Act; or has (in good faith) done or stated an intention of doing anything that is required to be done by or under this Act. Again, these provisions substantially mirror similar provisions elsewhere in the Act.(6)

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(5) See, for example, subsections 94(1) to (7), 163(1) to (5), 173(1) to (7) and 183(1) to (7).

(6) See sections 96, 202 and 213.

Proposed new section 101.13 permits the federal Cabinet to make regulations to carry out the purposes and provisions of sections 103.11 and 103.12.

Proposed new section 103.14 permits the government (the Queen in right of Canada) to recover the reasonable costs and expenses of taking measures under proposed subsection 103.11(4) – that is, where an enforcement officer intervenes to prevent the release or likelihood of release of an air pollutant or greenhouse gas in contravention of a regulation or order under the Act. This section also sets out procedural matters concerning the exercise of this power.

Proposed new section 103.15 sets out powers of the Minister of the Environment to take remedial measures in light of a contravention of proposed new Part 5.1 of the Act or regulations made under this Part. Where the Act is contravened in respect of an air pollutant or greenhouse gas, or a product that contains or may release either into the air, the Minister may direct anyone dealing with the substance or product to: give public notice of any danger posed; replace the substance or product with something less dangerous; or take other necessary measures to protect the environment or human life or health.

These remedial measures are identical with those in section 99 of the Act concerning releases of toxic substances, but are tailored to refer to an “air pollutant or greenhouse gas, or a product that contains or may release either into the air” instead of “a substance or a product containing a substance.”