THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 11, 2008

Bob Mills, M.P.
Chair
Standing Committee on Environment and Sustainable Development
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Mills:

Re: Bill C-377, *Climate Change Accountability Act*

The Canadian Bar Association's National Environmental, Energy and Resources Law Section (CBA Section) appreciates the opportunity to comment on Private Member's Bill C-377. The CBA is a national association representing 37,000 jurists across Canada. Among the Association's primary objectives are seeking improvement in the law and in the administration of justice. The CBA Section includes government lawyers, lawyers acting for conservationists and those who represent resource developers. As such, we represent a broad range of interests related to environmental law from every part of the country.

Bill C-377 addresses Canada's non-compliance in implementing international treaty obligations, specifically in regard to climate change. The CBA Section is certainly concerned about the serious consequences of climate change, and about Canada's failure to implement the Kyoto Protocol (the Protocol) as a breach of Canada's international obligations. However, we believe that Bill C-377 should not be passed in its current form. Rather than the proposed legislated targets, the CBA Section urges the government to take immediate steps to meet Canada's international environmental legal obligations to address climate change.

International treaties are the primary tool used by the international community to promote collective action on global environmental problems. Canada is a party to the *Vienna Convention on the Law of Treaties*, which provides in Article 26 that, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." International customary legal norms from as long ago as 1938[1] recognize a duty among nations to prevent trans-boundary pollution and environmental harm.

[1] See *Trail Smelter Arbitration (United States v. Canada)*, 3 R. Int'l Arb. Awards 1911 (1938), reprinted in 33 A.J.I.L. 182 (1939), 3 R. Int'l Arb. Awards 1938 (1941), reprinted in 35 A.J.I.L. 684 (1941).

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At this time, Canada is entering into an increasing number of international agreements addressing environmental issues. The CBA has urged federal, provincial and territorial governments to cooperate to implement these international agreements in a timely and complete manner, according to their respective areas of jurisdiction.[2] Implementation of international conventions and obligations under international law is a matter of support for the rule of law.

In this letter, we discuss specific points regarding the Bill, review the context to Canada's international environmental obligations, and discuss likely legal consequences to Canada for breaching the Protocol.

Specific Comments about Bill C-377

Bill C-377 begins with a preamble of several broad statements about climate change, including its effects upon Canada and the world generally. The accuracy of those statements is beyond our expertise, given that they are largely scientific rather than legal in nature. Given the effect of the preamble on interpretation of the Bill, its statements should be as verifiable as possible, acknowledging that there may be some scientific uncertainty remaining in the field of global climate change.[3] A preamble's statements are generally intended to be accepted as fact or as binding policy by those who will implement the legislation, and the courts that will enforce it.

Bill C-377 is intended to rectify Canada's non-compliance with the Protocol. It would introduce ambitious, and on the basis of current experience, likely unattainable, deferred targets. Further, the targets proposed in the Bill are different from those required by international law. If legislated targets are to be adopted, they should be linked to, and coherent with current targets in international law. The existence of two, unrelated and incommensurate standards would likely create confusion as to the role of international law in domestic environmental law, and would downplay the importance of Canada's legal obligations under the Protocol and other international environmental treaties. Given that a legal obligation to achieve climate change reductions already exists under Canada's international obligations, domestic legislation that imposes unrealistic incremental goals may not achieve the actual objective.

Much of the structure and underlying compliance mechanisms for Bill C-377 would be provided by way of regulation. If the Bill is passed, the CBA Section would be pleased to comment upon those regulations once a draft is available for review.

Context for Canada's International Environmental Commitments

Canada's legal obligation to reduce climate change has developed over the past several years. In 2002, Canada ratified the Protocol, which subsequently came into force in 2005. Article 3.1 binds Canada to reduce greenhouse gas (GHG) emissions (carbon dioxide, methane, nitrous oxide, peroflourocarbons, sulphur hexafluoride and hydroflourocarbons) to 6% below 1990 levels between 2008 and 2012 (the First Commitment Period). It says:

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2 CBA Resolution 01-07-A (passed at the CBA's August 2001 Canadian Legal Conference in Saskatoon).

3 In this context, we note section 15 of the *Rio Declaration on Environment and Development*, which states:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

> The parties included in Annex 1 shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emissions limitation and reduction commitment inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at lease 5 percent below 1990 levels in the commitment period 2008 to 2012.

According to Canada's Fourth National Communication under the United Nations Framework Convention on Climate Change (UNFCCC), Canadians contributed over 758 megatonnes (Mt) of carbon dioxide equivalent (CO_2 eq.) of GHGs to the atmosphere in 2004.[4] That constitutes a 26.6% increase over the 1990 total of 599 Mt and a contribution in excess of Canada's Kyoto target of 563 Mt by 34.6%. On the basis of the Canadian Energy Outlook 2006, the National Communication estimates Canada's total GHG emissions will reach 828 Mt by 2010 and almost 897 Mt by 2020.

The federal government's recent *Turning the Corner* plan (the Plan) commits to reducing emissions intensity by 18% from 2006 levels in 2010 and to reducing national absolute GHG emissions by 20% from 2006 levels by 2020.[5] The Plan limits Canadian industry's access to certified emissions reductions under the Protocol's Clean Development Mechanism to 10% of each firm's total target. It also stipulates that the government "will determine which types of Clean Development Mechanism credits should be eligible for regulatory compliance in Canada."[6]

When the Plan was announced, the executive secretary of the UNFCCC commented:

> It's interesting that while it would appear that the [Canadian] government has set itself a new target with a new base year, which of course it is free to do, that target is less ambitious than the commitment it has under the Kyoto Protocol.[7]

It is important from a legal perspective to note that the targets in the Plan are based on a 2006 baseline, rather than the Protocol's 1990 baseline. According to the response of the 2007 National Roundtable on the Environment and Economy to its obligations under the *Kyoto Protocol Implementation Act*, the Plan likely overestimated realizable emissions reductions for the 2008-2012 period. Further, its absolute reduction target adopts a 2020 deadline, not the Protocol's 2008-2012 compliance period.

Given limited government support for use of various flexible mechanisms offered in the Protocol, such as the Clean Development Mechanism or Joint Implementation and Emissions Trading, it appears impossible for Canada to buy its way into compliance as the 2008-2012 compliance period expires, which it would otherwise have been eligible to do under the Protocol.

The Prime Minister and the Minister of Environment have publicly acknowledged that Canada will not reach its Protocol target under Article 3.1.

However, at the Bali conference in December 2007, Canada participated in developing a new post-Protocol framework, with new broad targets to reduce emissions by between 25 per cent and 40 per

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4 This excludes Land Use, Land Use Change and Forestry estimates, as defined therein.

5 *Turning the Corner: An Action Plan to Reduce Greenhouse Gases and Air Pollution* (Ottawa : April 27, 2007).

6 *Regulatory Framework for Air Emission*, April 27, 2007 at 15.

7 CTV.ca, « UN official questions Canada's climate plan », April 30th, 2007.

cent from 1990 levels by 2020. A global framework agreement was struck by 190 countries, including the United States, aimed at establishing the "road map" for those countries.[8]

Legal Consequences for Canada Failing to Comply with the Protocol

The Protocol's Marrakesh Accords address non-compliance with Article 3.1 reductions targets. Article 8 establishes Expert Review Teams to conduct annual in-country assessments of a Party's implementation of the Protocol. The Expert Review Teams must put unresolved questions of implementation in review reports submitted to the Protocol's Compliance Committee UNFCCC Secretariat. In May 2006, South Africa, on behalf of the Group of 77 countries and China asked the Compliance Committee to investigate the failure of 15 countries, including Canada, to report on their demonstrable progress (Article 3.2) to reduce GHG emissions. In October 2006 the list was reduced to six, and Canada remains included.

Should the Enforcement Branch of the Compliance Committee determine that Canada's emissions have exceeded its assigned amount,[9] it is required to declare that Canada is not in compliance with its commitments under Article 3.1 and "shall":

- Deduct from Canada's assigned amount for the second commitment period a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions;

- Require Canada to develop a compliance action plan that includes: an analysis of the causes of the non-compliance; action that Canada intends to implement in order to meet its quantified emission limitation or reduction commitment in the subsequent commitment period, giving priority to domestic policies and measures; a timetable for implementing such action, which enables the assessment of annual progress in the implementation; and that Canada make progress report submissions on the implementation of the compliance action plan on an annual basis;

- Suspend Canada's eligibility to make emissions trading transfers under Article 17 of the Protocol.

The UNFCCC regime, the Protocol dictating Canada's international environmental obligations and subsequent negotiated instruments within the framework of UNFCCC are likely to remain the primary international legal structures to address climate change, including climate change impacts in Canada, after the Protocol expires in 2012.[10]

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8 However, the global agreement does not mention emission targets and is quite vaguely worded.

9 See decision 24/CP.7 of the Marrakesh Accords. The calculation is pursuant to its quantified emission limitation or reduction commitment inscribed in Annex B to the Protocol and in accordance with the provisions of Article 3 of the Protocol as well as the modalities for the accounting of assigned amounts under Article 7.4, taking into account emission reduction units, certified emission reductions, assigned amount units and removal units the Party has acquired in accordance with section XIII.

10 At the UNFCCC Conference of the Parties 11 and the 2005 Kyoto Meeting of the Parties held pursuant to Article 3.9 of the Protocol, consideration was given to further commitments by Annex I Parties, including Canada, beyond 2012. Further, some Annex 1 Parties have indicated their willingness to pursue cross-border carbon taxes against other Annex 1 Parties who do not comply with the Protocol.

While recourse by a country against Canada before the International Court of Justice is unlikely, given that both Parties to the action must agree to that venue and also given the political context of climate change, domestic litigation against the federal government can be expected. Already, Canadian environmental non-governmental organizations have launched two applications for judicial review in the Federal Court of Canada. The first, filed on May 28, 2007, is an application under section 166 of the *Canadian Environmental Protection Act*, asking for a declaration that Canada's failure to regulate greenhouse gases violates the Protocol.[11] The second, filed on September 19, 2007, outlines the failure of the Minister of Environment to prepare a climate change plan to comply with the mandatory requirements set out in the *Kyoto Protocol Implementation Act*.[12] The application alleges that the section requires the Minister of Environment to take specified action, rather than permitting Canada to violate an international treaty concerning air pollution. Similar climate change litigation has been launched in the US.[13]

Conclusion

Bill C-377 deals with a subject of profound concern to Canadians and to the international community. However, it would require an eighty percent target by 2050, a significantly higher target than what is currently adopted by most countries, which generally require around 50 or 60 percent reduction targets by 2050.[14] While high standards are desirable, if attainable, they should be linked to and coherent with targets set out in existing international law. The targets in Bill C-377 are not.

We urge the federal government to take immediate steps to honour Canada's international agreements to address climate change before considering the legislated targets proposed in Bill C-377.

Sincerely,

(original signed by Gaylene Schellenberg for Sean Foreman)

Sean Foreman
Chair, National Environmental, Energy and Resource Law Section

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11 *Friends of the Earth* v. *Her Majesty the Queen, The Minister of the Environment and the Minister of Health*, May 28, 2007.

12 *Friends of the Earth* v. *Her Majesty the Queen, The Minister of the Environment and the Minister of Health*, September 19, 2007.

13 For example, *Center for Biological Diversity* v. *Abraham*, 218 F. Supp. 2d 1143 (N.D. Cal. 2002), *City of Los Angeles* v. *National Highway Traffic Safety Administration*, 912 F. 2d 478 (D.C. Cir. 1990) [NHTSA], *Border Power Plant Working Group* v. *Department of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003).

14 No international convention requires such an ambitious reduction obligation by 2050 as that proposed by Bill C-377. The UNFCCC requires reduction of GHG, but does not establish targets.