

# COMMENT

## Manitoba's Sustainable Development Act

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### I. INTRODUCTION

FEW CANADIAN PROVINCES have embraced sustainable development<sup>1</sup> so enthusiastically as Manitoba. Besides activity on the policy front,<sup>2</sup> in the past few years Manitoba has inserted references to sustainable development in amendments to environmental, natural resources, and land-use legislation.<sup>3</sup> Now, following a trend set by the federal government<sup>4</sup> and Ontario,<sup>5</sup> Manitoba has legislated public sector reforms intended to further sustainable development.

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<sup>1</sup> Defined by the World Commission on Environment and Development as "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs": World Commission on Environment and Development *Our Common Future* (Oxford, Oxford University Press, 1987).

<sup>2</sup> Manitoba was among the first provinces to establish a multi-sectoral, non-partisan Round Table on the Environment and the Economy which, alone amongst the Provinces, remains active today. Administrative and policy support was provided by the Sustainable Development Coordination Unit, attached to Cabinet. Numerous Strategies and implementation plans have been prepared for sectors including the public sector, water, land, aboriginal peoples, wildlife, endangered spaces, and others.

<sup>3</sup> These references consist mainly of application and purpose clauses. See, for example, *The Contaminated Sites Remediation and Consequential Amendments Act*, S.M. 1996, c. 40, s. 1; *The Mines and Minerals Act*, S.M. 1991-92, c. 9; *Provincial Land Use Policies Regulation*, Man. R. 184/94.

<sup>4</sup> *Auditor General Act*, R.S.C. 1985, c. A17, as am. by S.C. 1995, c. 43.

<sup>5</sup> *Environmental Bill of Rights*, S.O. 1993, c. 28.

## II. SUSTAINABLE DEVELOPMENT AND GOVERNMENT

THE PURPOSE OF *The Sustainable Development Act*<sup>6</sup> is set out in s. 2:

[T]o create a framework through which sustainable development will be implemented in the provincial public sector and promoted in private industry and in society generally.

The report that emerged from the massive 1992 United Nations Conference on Environment and Development in Rio recognised sustainable development as primarily the responsibility of governments.<sup>7</sup> The report, titled *Agenda 21*,<sup>8</sup> called upon governments to:

[F]oster the evolution of sustainable development law, based on sound economic, social and environmental principles and appropriate risk assessment, and backed up by enforcement.<sup>9</sup>

The Act takes up the challenge in subsection 3(1), an ambitious and deceptively simple provision, which states:

The government shall have regard in all of its activities to sustainable development and the Principles and Guidelines set out in Schedules A and B.

Delineating where the activities of government end and those of the private sector begin is often difficult in the late twentieth century. Virtually all aspects of economy and society are regulated, controlled, policed, enabled, or supported by government in some manner. To make it even more complicated, non-involvement by government in a particular field or activity may itself reflect a deliberate policy choice. Thus the phrase "in all of its activities" carries a tremendously broad scope of application.

This impression, fortified by subsection 3(2) of *Agenda 21*, which stipulates that this duty must be carried out in the development of new legislation, the review of existing legislation and policies, and in developing reporting requirements. The ambit of "legislation" is not defined; presumably it runs the gamut. It is not clear why policy development was left out—surely this is critical for a concept as nascent and evolutionary as sustainable development.

Additionally, the mandatory "shall" wording of the section leaves no room for discretion. Sustainable development must be considered by government<sup>10</sup> in

<sup>6</sup> S.M. 1997, c. 61, [hereinafter the Act].

<sup>7</sup> Earth Summit, *Agenda 21: The United Nations Programme of Action from Rio* (New York: United Nations Publications, 1993).

<sup>8</sup> *Ibid.*, Preamble. See also Centre for Our Common Future: *Agenda For Change: A Plain Language Version of Agenda 21 and the Other Rio Agreements* (Geneva: The Centre, 1993) at 1.

<sup>9</sup> *Agenda for Change, ibid.* at 14.

<sup>10</sup> Oddly enough, "government" is not defined in the Act.

all of its activities. One must question how serious, realistic and achievable such general and open-ended requirements are. What does it mean to "have regard"? How can one determine whether or not government has given regard to sustainable development in a given activity? Are some activities more important than others? What is the consequence of non-compliance with this section? The Act is silent on these questions.<sup>11</sup> At the very least, the Act calls for a greater sensitivity to the roles and functions of government and law in today's world.

Professor Elder points out six functions of law: (i) authoritative decision-making; (ii) providing a framework for the economic system; (iii) proscribing action; (iv) influencing behaviour; (v) modifying the rights of citizens; and (vi) dispute settlement.<sup>12</sup> From the outset these distinctions must be made to ascertain how sustainable development applies to a given type of activity. Only then can those subject to this section and those affected by the activities of government begin to have a clear idea of what s. 3(1) truly entails.

### III. THE PRINCIPLES AND GUIDELINES

SECTION 3 REQUIRES the Manitoba government to acknowledge "sustainable development and the Principles and Guidelines [of sustainable development]." Sustainable development, defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"<sup>13</sup> is too broad and uncertain a concept to stand alone without further clarification. The "Principles and Guidelines of Sustainable Development,"<sup>14</sup> essentially a compendium of the Manitoba's sustainable development philosophy, adds certainty to the Act.

The principles include:

- (i) integration of environmental and economic decisions;
- (ii) stewardship;
- (iii) shared responsibility and understanding;
- (iv) prevention;
- (v) conservation and enhancement;

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<sup>11</sup> It is conceivable that a failure to have regard to sustainable development in accordance with this section would support an application for judicial review. Without being cynical one can easily foresee an opportunity to test this hypothesis arising soon, the sheer immensity of government ensures this.

<sup>12</sup> P.S. Elder, "Sustainability" (1991) 36 McGill L. J. 831 at 838-839.

<sup>13</sup> Section 2 of the Act.

<sup>14</sup> Section 6, Schedules A and B of the Act.

- (vi) rehabilitation and reclamation; and
- (vii) global responsibility.

The Guidelines include:

- (i) efficient use of resources;
- (ii) public participation;
- (iii) access to information;
- (iv) integrated decision making and planning;
- (v) waste minimisation and substitution; and
- (vi) research and innovation.

A review of the Principles and Guidelines discloses a broad preoccupation with the economy, human health, social well-being, and the environment. Most, if not all, of the Principles and Guidelines are recognisable elements of the sustainable development canon. A review of their contents, however, raises a number of concerns.

First, several principles are formulated in very general terms. For example, Principle 1 states:

*Integration of Environmental and Economic Decisions*

- 1(1) Economic decisions should adequately reflect environmental, human health and social effects.
- 1(2) Environmental and health initiatives should adequately take into account economic, human health and social consequences.

The Act provides neither guidance with respect to the adequacy criterion stipulated in Principle 1, nor does it give any assistance regarding the relative weighting of each type of effect referred to. The distinction between “economic decisions” and “environmental and health initiatives” is not explained. Environmental and health initiatives are often simultaneous economic decisions. Whether there is any difference between effects and consequences and whether integration is the real goal of Principle 1 remains unclear. On its face it refers only to a type of reciprocal impact assessment.

Principle 1(2) also implies that environmental and health initiatives<sup>15</sup> do not take economic consequences into account. In fact, economic consequences are seldom far from centre-stage in any environmental decision-making context. This wording could easily be deployed to justify the substantive rolling back of environmental protection standards because of perceived economic conse-

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<sup>15</sup> This term is undefined.

quences. Do economic consequences include, for instance, a Minister's perception of something as nebulous as the investment climate in the Province?

Idiosyncratic formulations also appear. Principle 2, Stewardship, reads as follows:

- 2(1) The economy, the environment, human health and social well-being should be managed for the equal benefit of present and future generations.
- 2(2) Manitobans are caretakers of the economy, the environment, human health and social well-being for the benefit of present and future generations.

Stewardship, which normally conveys the sense of humanity's obligation to other living things and the environment, is transformed into something else altogether by the inclusion of an obligation of stewardship to "the economy."<sup>16</sup>

Notably absent from the Principles and Guidelines are two precautionary principles: the principle of ecosystem management and the principle of intergenerational equity, which have both entered the lexicon of sustainable development.<sup>17</sup> Also lacking are any principles and guidelines specifically tailored to the public sector. Fiscal reform, environmental impact assessment of policies and programs, the need for base-line data collection, and the importance of diligent enforcement of environmental laws should have been added to the list.<sup>18</sup>

#### IV. PUBLIC SECTOR REFORM

FOLLOWING A TREND set by the federal<sup>19</sup> and Ontario<sup>20</sup> governments, the Act establishes a number of public sector reforms. Part 4 of the Act mandates the establishment of a "Sustainable Development Strategy" for Manitoba and more specific "component strategies" for certain sectors.<sup>21</sup>

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<sup>16</sup> Another example, Principle 4, "Prevention," commonly understood to refer to the prevention of pollution and other environmental problems, is construed as imposing a duty to prevent or mitigate significant adverse economic and social effects as well as environmental and health effects.

<sup>17</sup> A. Daniel, "Sustainable Development in the 21st Century—Legal Underpinnings" (Paper presented at the CBA Conference "Emerging Issues in Environmental Law" 29 April 1994) [unpublished].

<sup>18</sup> See *supra* note 10.

<sup>19</sup> *Auditor General Act*, R.S.C. 1985, c. A17, as am. by S.C. 1995, c. 43.

<sup>20</sup> *The Environmental Bill of Rights*, S.O. 1993, c. 28.

<sup>21</sup> Section 7 of the Act.

In a similar vein the Act makes provision for a "sustainable development code of practice,"<sup>22</sup> "financial management guidelines,"<sup>23</sup> and "procurement guidelines."<sup>24</sup> These laudable measures will likely stimulate goal-orientated reform. A "green procurement" policy will put the enormous power of the government purse into the marketplace. Financial management guidelines, properly drafted and applied, may call into question a number of programs and budget items of dubious merit in both economic and environmental terms.

On the other hand, these measures contain significant flaws. First, the vague term "financial management" is left undefined, perhaps deliberately so. An express statement of the purpose of procurement guidelines, is also missing.

Second, the Act neither establishes an enforcement mechanism nor penalties for non-compliance. Little distinguishes these internal government reforms from policy. One must question the rationale and efficacy of legislating non-enforceable, non-binding norms of conduct. Nothing in the Act prevents uneven, haphazard implementation, or outright flouting of the statute by departments unwilling or uninterested in changing their operations.

Compliance with the Act, strategy, code of practice, and guidelines would be bolstered by establishing an independent Sustainable Development Commissioner's Office,<sup>25</sup> or by appointing a similar officer to the provincial Auditor's office.<sup>26</sup> Public access to the reform process would also be enhanced by expanded rights of public participation.<sup>27</sup> A "citizen right" of review or investigation into a given activity or decision would augment accountability without jeopardising flexibility and responsiveness in administration.

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<sup>22</sup> The code of practice in subsection 11(1) is meant "to assist in the integration of sustainable development into the decisions, actions and operations of provincial public sector organizations."

<sup>23</sup> The financial management guidelines in subsection 2(1) are "for evaluating the sustainability of activities and programs."

<sup>24</sup> Subsection 12(2), the procurement guidelines, define procurement in s. 1 of the Act to include the "purchase, lease, rental, use or disposal of goods, facilities, and services, including the acquisition of goods and facilities by construction, renovation or otherwise."

<sup>25</sup> Possibly along the lines of the Environmental Commissioner appointed pursuant to Part III of the *Environmental Bill of Rights*, S.O. 1993, c. 28.

<sup>26</sup> See, for example, the *Auditor General Act*, R.S.C. 1985, c. A17, as am. by S.C. 1995, c. 43, s. 15(1).

<sup>27</sup> Ontario's *Environmental Bill of Rights* includes detailed provisions for public participation in the development of ministerial Statements of Environmental Values (ss. 7-11).

## V. CONCLUSION

UNDERSTANDABLY, legislation of this type is cast in general terms. Excessive generality, however, results in vagueness, ambiguity, and uncertainty. These problems are evident in the Act. This uncertainty could be alleviated to some extent by a strong statement of the Act's normative direction, some recognition that the Act is untenable. As an example, consider the historical perspective deployed by British Columbia's Commission on Resources and Environment in its report, *A Sustainability Act for British Columbia*:<sup>28</sup>

The history of sustainability, until recent years, is one of well-intentioned but inadequate initiatives. This was due in part to insufficient scientific understanding, to increasing industrial efficiency in resource extraction techniques, and to a continuing public confidence in the apparent abundance of the province's natural wealth ... . We are now in a better position to plan for sustainability as a result of increased understanding of ecological and economic relationships and of better ways to co-ordinate government and public involvement in planning ... .<sup>29</sup>

Perhaps this historically-informed perspective distinguishes legislation that merely tinkers with reform from truly remedial legislation.

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<sup>28</sup> British Columbia Commission on Resources and Environment, *A Sustainability Act for British Columbia*, Vol. I (Vancouver, Queen's Printers, 1994).

<sup>29</sup> *Ibid.* at 40.

