

GUIDE TO DOING BUSINESS IN CANADA: ENVIRONMENTAL PROTECTION

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Environmental protection

Canada is an expansive country with a substantial industrial base, plentiful natural resources, extensive bodies of water and significant coastal, Arctic, forested and agricultural regions. As such it faces a wide range of potential environmental issues.

Canada's Constitution Act, 1867 divides legislative power between the federal Parliament and the provincial legislatures.

While the Constitution Act, 1867 sets out many specific areas of jurisdiction, it does not explicitly dictate who has the power to create environmental laws. As a result, Canadian courts have decided that this power is shared between the two levels of government.

A government is able to enact environmental law if it falls under one of the powers listed in the Constitution Act, 1867. For example, federal environmental laws are often enacted under the federal Parliament's jurisdiction to legislate criminal law, fisheries, and peace, order and good government. Provincial environmental laws are generally premised on the provincial power to

legislate property and civil rights, and on matters of a purely local nature.

Canada's three federal territories, the Northwest Territories (including the Mackenzie Valley Region and the Inuvialuit Settlement Region), Yukon and Nunavut, derive their legislative powers from land claims agreements, federal legislation and, in the cases of Yukon and the Northwest Territories, powers devolved from the federal government. The environmental laws and regulatory systems in Canada's territories are based on the unique legal and cultural frameworks of the North.

Municipal governments also play a role in Canadian environmental law. Although municipal jurisdiction is not addressed in the Constitution Act, 1867, it is defined by each province governing statute for matters concerning local government.

In addition to government-created law, environmental obligations and liabilities may be incurred pursuant to contract, common law and civil law.

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1. Federal environmental laws

a. *Canadian Environmental Protection Act, 1999*

The Canadian Environmental Protection Act, 1999 (CEPA) is Canada's primary environmental regulatory statute. It establishes the federal authority to regulate a broad range of environmental concerns, ranging from toxic substances to environmental emergencies.

i. Toxic substances

Any substance listed in Schedule 1 of CEPA is classified as toxic and is subject to a series of specific controls. In particular, requests for samples or information on the substance can be issued by the Minister of the Environment and Climate Change. CEPA also outlines procedures for substances that are newly introduced to Canada. It is prohibited to import or manufacture quantities of any substance not listed on the Domestic Substances List above a certain volume, until that substance can be properly assessed by Environment and Climate Change Canada and Health Canada. Additionally, CEPA imposes a duty to report and a duty to take remedial action on persons who own or are in control of a spilled toxic substance. Anyone who contributes to the release of a toxic substance may also be

subject to the same duties. Under CEPA, the Minister of the Environment is given authority to issue orders in the case of an environmental emergency.

ii. Enforcement

A variety of enforcement powers are provided for under CEPA. Any person in breach of the CEPA's provisions may face monetary penalties or, in certain cases, imprisonment. Officers and directors may be subject to prosecution if they authorize, assent to or acquiesce in the commission of an offence, or if they fail to take all reasonable measures to ensure compliance. However, alternatives to the standard prosecution process may be available through Environmental Protection Alternative Measures agreements.

In June 2012, key provisions of the Environmental Enforcement Act came into force, amending CEPA's sentencing and penalty provisions, and a host of other federal environmental legislation. Most notably, the new penalty provisions introduced mandatory minimum fines and dramatically increased maximum fines. Further, as a result of the changes, minimum and maximum fines are now doubled for subsequent convictions. A conviction is deemed to be a subsequent conviction if the offender was previously convicted of a substantially similar offence under any federal or provincial environmental or wildlife protection act. Under the new regime, smaller corporations are subject to lower fines than large-revenue corporations.

iii. Emissions

The National Pollutant Release Inventory (NPRI) - as authorized by CEPA - makes the reporting of emissions mandatory where the amount of emissions is equal to, or in excess of, the reporting threshold, and where one or more of the substances emitted is included in the NPRI Substances List. Any facility required to report its emissions must submit a detailed account to Environment and Climate Change Canada. This information is made accessible to the public.

b. *Canadian Environmental Assessment Act, 2012*

The Canadian Environmental Assessment Act, 2012 (CEAA) applies nation-wide to projects that are designated in the regulations or by the Minister of Environment and Climate Change, such as large projects in the energy, mining and infrastructure sectors. Designated projects are major projects that may impact areas of federal jurisdiction. This differs from the former Act, under which many types of projects - even very small ones - could require an environmental

assessment if they involved federal government funding or required certain federal regulatory approvals.

CEAA triggers environmental assessment automatically for designated projects that require a decision by the National Energy Board or the Canadian Nuclear Safety Commission. For other designated projects, CEAA triggers a screening process by the Canadian Environmental Assessment Agency (the Agency) to determine whether environmental assessment is required. In certain cases a review panel may be appointed and public hearings held.

Some projects may be subject to both CEAA and provincial environmental assessment legislation - as discussed later under "provincial environmental laws." If the Minister of the Environment is satisfied that the substantive requirements of CEAA can be accomplished through a provincial assessment process, they may substitute the provincial process for the CEAA process. For major projects that engage both CEAA and provincial environmental assessment legislation, a joint federal-provincial review panel may be established.

CEAA seeks to compel proponents to design their projects to prevent significant adverse environmental effects. "Environmental effects" are limited to seven topics: (i) fish and fish habitat, (ii) aquatic endangered species, (iii) migratory birds, (iv) federal lands, (v) interprovincial effects, (vi) international effects and (vii) certain effects on Aboriginal peoples that result from a change in the environment.

A project will be permitted to proceed only when the minister, or other applicable decision-maker, is satisfied that the project is not likely to cause significant adverse environmental effects - or, if such effects are likely, the governor in council then determines that they are "justified in the circumstances." Once the decision is made, a decision statement is issued, which sets out the conditions with which the proponent must comply. Failure to comply with the conditions is an offence under CEAA and can result in fines or an injunction.

The Minister is currently reviewing the federal environmental process associated with CEAA with the goal of developing "new, fair processes that are robust, incorporate scientific evidence, protect our environment, respect the rights of Indigenous peoples, and support economic growth." The first stage of this review started with the Minister's appointment of a 4-person expert panel, including Rodney Northey of Gowling WLG. The panel review included a Canada-wide tour and public and Indigenous peoples' consultation from September to December 2016. The panel's role in this review concluded with the release of their report, *Building Common Ground*, on April 5, 2017. On June 29, 2017, the Government released a discussion paper, identifying "key measures being considered," and invited public comments until August 28, 2017. The government is now reviewing the report and the input received as it considers a path forward including any potential legislative, regulatory or policy changes

required.

c. Fisheries Act

The Fisheries Act contains provisions to ensure the conservation and protection of fish and fish habitats essential to sustaining commercial, recreational and Indigenous fisheries. It prohibits the deposit of deleterious substances into water frequented by fish. It also prohibits carrying out work that results in "serious harm to fish that are part of a commercial, recreational or Indigenous fishery, or to fish that support such a fishery," unless the work is authorized by a permit or the regulations.

Under the Fisheries Act, the federal government exercises certain regulatory authority over water pollution and water quality. A number of sector-specific regulations have been made under the Fisheries Act that establish effluent standards and impose monitoring and reporting requirements. For example, there are separate regulations directed at the mining industry, the pulp and paper industry, and large wastewater systems.

d. Transportation of Dangerous Goods Act, 1992

The shipping, handling and transportation of dangerous goods are regulated by the Transportation of Dangerous Goods Act, 1992 (TDGA), as well as provincial statutes. The TDGA creates a complete and comprehensive system of regulation. All provinces have directly adopted an identical regime with respect to intra-provincial transportation.

Nine classes of "dangerous goods," ranging from organisms to explosives, are defined in a schedule to the TDGA. The TDGA also addresses issues such as labelling requirements and emergencies, and provides a full suite of enforcement measures. Additional specific and detailed requirements can be found in the Transportation of Dangerous Goods Regulations.

e. Other federal legislation

In Canada, special-purpose legislation applies to the approval of fertilizers, pesticides, and food and drugs. The sale, manufacture, distribution, import or export of substances may be prohibited if they are not otherwise approved under the applicable legislation.

f. Review of federal legislation

In June 2016, the Canadian government launched a review of federal environmental

assessment and regulatory processes, including reviews of CEAA, the Fisheries Act, the Navigation Protection Act and the National Energy Board Act. The Canadian government is also currently conducting a separate review of CEPA, which began in March 2016.

2. Provincial environmental laws

Environmental laws and their enforcement vary from province to province. Matters under provincial jurisdiction notably include:

- Air emissions
- Water and wastewater treatment and discharges
- Water withdrawals
- Waste management
- The release of contaminants, including issues relating to contaminated lands and brownfield redevelopment
- Pesticide use
- Underground and above-ground storage tanks
- Hazardous materials and residual hazardous materials management
- The transportation of dangerous substances

Provincial environmental laws prohibit the discharge of pollutants into the environment, but the definitions of a "pollutant," a "contaminant" and the "environment" vary across the provinces.

A new emission source or facility that may impact the environment typically requires an environmental approval, which may be subject to strict conditions. Existing sources of emissions may also be subject to further controls through the issuance of administrative orders.

Canada's three federal territories, the Northwest Territories (including the Mackenzie Valley Region and the Inuvialuit Settlement Region), Yukon and Nunavut, derive their legislative powers from land claims agreements, federal legislation and, in the cases of Yukon and the Northwest Territories, powers devolved from the federal government. The environmental laws and regulatory systems in Canada's territories are based on the unique legal and cultural frameworks of the North.

a. Environmental assessment

Several provinces also have environmental assessment laws, the details of which vary from province to province. In Ontario, environmental assessment legislation primarily applies to

public sector undertakings. However, significant private sector undertakings may be required to undergo a comprehensive environmental assessment in order to identify and evaluate the need for the undertaking, the alternatives to the undertaking, and alternative methods of accomplishing the undertaking.

In Québec, environmental assessment processes have been applied in the north of the province since 1975 - with the James Bay and Northern Québec Agreement - and in the south since 1980. The Environment Quality Act sets out a rigorous process to assess the impacts of major projects on communities and the environment. Different regimes apply depending on whether any part of the project takes place on territory subject to the James Bay and Northern Québec Agreement and the Northeastern Québec Agreement, and where the process involves an active participation of the Indigenous communities living there (e.g. Crees, Inuit and Naskapis). In southern Québec, the process also favours the participation and consultation of the public through an environmental public hearing board called the Bureau d'audiences publiques sur l'environnement (BAPE).

In March 2017, the Québec Parliament adopted the Act to amend the Environment Quality Act to modernize the environmental authorization scheme and to amend other legislative provisions, in particular to reform the governance of the Green Fund. The former provisions of the Environment Quality Act (EQA) which govern the environmental impact assessment and review procedure were notably modified by this amendment Act.

More specifically, the new EQA provides that, on an exceptional basis, the Government will be able to make a project subject to the procedure even though it is not subject to it under a regulation, provided the Government is of the opinion that the project involves major environmental issues, such as climate change issues. The new EQA also gives the public an opportunity to submit observations to the Minister as to the issues that should be addressed by an environmental impact assessment. Furthermore, if such an assessment is considered incomplete, the Minister may declare it to be inadmissible. In addition to conferring investigation and public hearing mandates on the BAPE, the Minister may mandate the latter to hold mediation sessions and targeted consultations. The notion of frivolousness with regard to a public consultation application made to the Minister is also clarified in this new EQA.

Under Alberta and British Columbia laws, environmental assessments for a wide range of public and private sector proposals are required. These laws tend to target larger infrastructure and natural resource projects exceeding prescribed operational or other criteria.

Given Canada's division of constitutional powers, many proposals will trigger both provincial and federal environmental assessment requirements. This dual jurisdiction is commonly addressed by provincial and federal laws intended to harmonize environmental assessments

and, when possible, facilitate the substitution of a federal environmental assessment for a provincial assessment and vice versa.

A fundamental feature of both provincial and federal environmental assessments is the consideration of constitutionally entrenched Indigenous and treaty rights. These rights differ in many ways from those exercisable by the public at large. In many environmental assessments, Indigenous groups rely on judicial principles governing consultation with Indigenous communities, Indigenous consent respecting lands subject to Indigenous rights (including land title), and criteria governing justifiable government infringement of such rights. In certain jurisdictions, specific environmental processes have been entrenched in constitutionally protected agreements negotiated between the federal and provincial governments, and Indigenous groups - such as the James Bay and Northern Québec Agreement.

b. Environmental enforcement

A breach of provincial environmental laws may be enforced through voluntary abatement measures, administrative orders, administrative fines or prosecutions. For example, in Ontario, which introduced stiff provincial penalties for major environmental offences in 2000, a repeat corporate offender may face a fine of up to \$10 million for each day the offence occurs or continues. A repeat individual offender may face up to \$6 million per day, plus five years less a day in prison. There may also be a forfeiture of profits gained through non-compliance and liability for cleanup costs, as well as a series of other remedies. Similarly, other provincial regimes - such as those in Québec - can rely on strong enforcement measures to sanction non-compliance of environmental laws and regulations within their jurisdiction, which include specific provisions with respect to directors' and officers' liability. Under the new EQA, the Minister's powers to issue orders and intervene in other ways are also adjusted. In that regard, the Minister or the Government, as applicable, is also granted the power to limit the exercise of an activity carried on in compliance with the law or to stop the activity or make it subject to new conditions in order to remedy a situation that, on the basis of new or additional information that has become available or new or additional scientific knowledge, is considered to present a serious risk for health or the environment.

c. Contaminated sites

For land development, property sales and other decisions, provincial laws governing contaminated sites tend to be central considerations. Most provinces apply site investigation and remediation guidelines developed through various inter-provincial efforts. British

Columbia's Environmental Management Act differs from many other provinces in three respects:

- Relying less on regulators' broad discretion to apply guidelines, the Act prescribes legally binding standards for contamination (in part per million terms), investigation methodologies and remediation.
- Remediation approvals are informed largely by recommendations by private sector "approved professionals."
- The Act further enhances plaintiff remediation cost recovery remedies by establishing a cause of action that supplements common law remedies (and thus is analogous to the United States' Superfund law).

In Québec, the land protection and rehabilitation regime, introduced by Bill 72, entered into force in 2003. It requires mandatory site characterization study and rehabilitation work for certain events or activities, such as a change in use of land in certain circumstances and the cessation of designated activities. The process promotes transparency by requiring the publication of contamination, decontamination and use restriction notices in the land register. Municipalities are also required to maintain a list of contaminated sites within their borders.

The regime in Québec relies on qualified experts to certify the site assessment reports that are required under the Environment Quality Act. The Land Protection and Rehabilitation Regulation determines the limit values for a range of contaminants, and defines the types of industrial activities contemplated by the regulation. It also establishes the conditions under which groundwater quality must be monitored downstream of the lands where some of those activities take place.

The information about the existence of contaminated sites is made public through various means. In Québec, the province publishes an inventory containing information on sites that have been contaminated by industrial and commercial activities, or accidental spills, and have been brought to the authorities' attention.

It should be noted that the new EQA introduces new measures governing the cessation of certain activities and the carrying out of certain projects on a former hazardous materials elimination site. The depollution attestation applicable to municipal water treatment or management works is modified, partly in order to replace the current renewal mechanism by a more flexible system of periodic review.

d. Climate change

Climate change is a significant and current law reform issue in most Canadian provinces.

Different approaches have been implemented and others are being carefully considered.

British Columbia began legislating greenhouse gas (GHG) emissions in 2007 and in 2008 introduced a carbon tax, which applies to the purchase or use of fossil fuel in the province. This was followed by low-carbon fuel standards implemented in 2010, and legislation to manage GHG emissions in the liquefied natural gas industry. More recently, performance standards for select industrial facilities and sectors have come into force, including greenhouse gas emissions benchmarks for liquid natural gas facilities and coal-based electricity generation operations. Concurrently, new reporting regulations require industrial operations that emit over 10,000 carbon dioxide equivalent tonnes per year to report their GHG pollution each year. British Columbia has also recently established infrastructure and requirements for issuing emission offset units and funded units.

Regulations adopted in Québec established a cap-and-trade system to regulate GHG emissions and meet the Québec government's GHG reduction targets. On January 1, 2013, the regulatory regime added compliance obligations for certain Québec emitters to offset their reported GHG emissions with allowances. Allowances can be acquired at inter-jurisdictional auctions, government reserve sales and from other participants in cap-and-trade programs that have excess to allowances for sale. In the case of industrial emitters other than fuel distributors, allowances are also allocated by the government at no charge, but on a declining basis. Emissions can also be offset by credits from certain government-recognized GHG reduction projects that have been validated in accordance with the protocols set by the regulations. Cap-and-trade in Québec is harmonized with the California regime, and is intended to be linked with similar cap-and-trade regimes adopted by other Canadian and U.S. jurisdictions that are members of the Western Climate Initiative. In that regard, it is worth to mention that Québec and Ontario signed in September 2015 a Memorandum of Understanding focusing on concerted climate change actions and market-based mechanism. Its aim is to harmonize methods of data collection and inventory GHG emissions, to accelerate the transition to a low carbon economy, to collaborate on the linkage of Ontario's carbon markets to Québec's and California's market and to intensify the collaboration on offset protocols. Moreover, in December 2015, Québec signed a Memorandum of Understanding with Manitoba and Ontario on concerted climate change actions and market-based mechanisms. Finally, in August 2016, Québec, Ontario and Mexico signed a Joint Declaration to collaborate in the fight against climate change. This declaration lays the foundation for the exchange of information and know-how on carbon-markets.

In May 2016, the Ontario government passed legislation establishing a cap-and-trade program to reduce GHG emissions. The first four-year compliance period begins on January 1, 2017. Subsequent compliance periods will be three years in duration.

Corporations that emit 25,000 tonnes or more of GHG are required to participate. Mandatory participants also include importers of electricity, distributors of natural gas associated with over 25,000 tonnes of emissions per year, or persons who have supplied petroleum products for consumption in Ontario. Market participants who meet regulatory requirements are also permitted to register and participate in the cap and trade system. Only registered participants (mandatory, voluntary and market) may participate in the market. Mandatory and voluntary participants in Ontario's cap-and-trade system are required to submit emission allowances and credits (including offsets) equal to the aggregate amount of all GHG emissions attributed to them under Ontario's cap-and-trade legislation and associated regulations. Participants will only be able to emit the amount of GHG permitted by their emission allowances. As in Québec, free allowances will be available to mandatory participants, but the number of available free allowances will decrease over time.

The Ontario Minister of Environment and Climate Change is required to auction Ontario emissions allowances on four separate occasions each year. Proceeds of the September 6, 2017 auction fund programs such as the Green Ontario Fund and the Low Carbon Innovation Fund, among others. Manufacturing, institutional and commercial operations may be able to take advantage of funding under the Green Ontario Fund, in particular, to support audits and studies, upgrade equipment and operations, receive training and support low carbon facilities and new builds.

The system also allows participants to submit offset credits to meet their compliance obligation under the program. The Ontario Ministry of Environment and Climate Change is developing a regulation to allow for compliance offset credit creation.

Increasingly, carbon markets in North America are being harmonized. The governments of Quebec, California and Ontario signed the Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions on September 22, 2017. This agreement provides for Ontario's participation in the California-Quebec carbon market starting January 1, 2018, which would create the world's second-largest carbon market (an approximate \$4 trillion in GDP).

In 2016, Alberta developed a new strategy on climate change based on recommendations put forward by the Climate Change Advisory Panel. Pursuant to this strategy, Alberta has adopted a carbon levy which is applied to heating and transportation fuels such as diesel, gasoline, natural gas and propane. Further, Alberta has signaled its intent to phase out pollution from coal-fired electricity generation by 2030. To accomplish this goal, Alberta intends to replace one-third of its coal generating capacity with renewable energy, and the remaining two-thirds with natural gas. Finally, Alberta has also implemented a \$30/tonne carbon price for oil sands facilities, and has legislated a maximum emissions limit of 100Mt in any year, with provisions

for cogeneration and new upgrading capacity.

3. Municipal measures

Municipalities may regulate activities through legislation, including sewer-use bylaws, noise bylaws and property-standards bylaws. In addition, municipalities in Ontario and Québec integrate environmental approvals with planning approvals.

Some municipalities require comprehensive environmental site investigations and public notification prior to issuing certain permits. For example, before issuing a planning approval or building permit, a municipality may require verification of contamination for the subject property, and may impose a remedial plan plus financial assurance as conditions of approval.

In Québec, a municipality cannot issue a construction permit or approve a subdivision of land where the land in question is listed in the municipal registry of contaminated lands - unless the project or subdivision is consistent with an approved rehabilitation plan.

4. Common law and civil law

Common law causes of action relating to environmental matters include the torts of nuisance, negligence, strict liability and trespass. Although judicial decisions may vary, the common law principles generally apply to every common law jurisdiction in Canada.

A particular challenge in contaminated lands torts is the issue of limitation periods, which only start to run when a claim is "discovered". The Ontario Court of Appeal recently released an important decision in *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc. (Taxaco Canada Limited)*, 2017 ONCA 15, regarding when "knowledge" of contamination arises for the purpose of understanding when applicable limitation periods may be deemed to have expired. The Court found that knowledge of possible contamination obtained in a Part I Environmental Site Assessment may be enough to put a plaintiff on inquiry and trigger due diligence, but it does not automatically amount to knowledge of actual contamination or discovery of a claim. Suspicion of contamination can give rise to a duty of inquiry and, if a reasonable person would have discovered the existence of a claim, the limitation period will be deemed to have begun. This decision is relevant for those who rely on environmental investigations as part of their due diligence in a land transaction.

In Québec, which is a civil law jurisdiction, contractual and extra-contractual disputes are governed by the Civil Code of Québec. Additional opportunities for litigation exist through class-action legislation in specific provinces and through specific provisions within certain

provincial legislation.

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