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Environmental

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JURISDICTION

In Canada, the federal government has a much smaller role in environmental regulation than does the U.S. federal government. The authority to create laws dealing with the environment is shared between the provincial and federal government. Each province and territory in Canada has its own environmental protection legislation, whose statutes are the primary regulatory tools. In Ontario, the primary environmental statute is the *Environmental Protection Act* ("**OEPA**"), first enacted in 1971. Other environmental statutes in Ontario include the *Ontario Water Resources Act, Safe Drinking Water Act, 2002* (and the related *Clean Water Act, 2006*) and the *Environmental Assessment Act*. Similar types of legislation are found in most provinces.

The federal government is responsible for limited interprovincial environmental legislation. For instance, the transportation of dangerous goods that occurs across provincial borders or international borders is governed by federal legislation. The federal government also takes the lead in negotiating international environmental initiatives and treaties (e.g., Paris Agreement or the Great Lakes Treaty). In addition, the federal government presides over the *Canadian Environmental Protection Act* ("**CEPA**") which, despite its name, has limited applicability beyond federal lands and toxic substances. Municipalities, using localized health impacts as justification, have entered the environmental domain (e.g., lawn pesticides, sewer discharges and local emissions), enacting by-laws that can have a significant impact on facility design, operation and development. It is important to appreciate that particular requirements vary from municipality to municipality which may be in addition to federal and provincial requirements in the same area.

Most governments have endorsed "polluter pays" and "get tough on polluters" policies. These policies have resulted in several governments amending their environmental statutes to permit the issuance of administrative penalties, or environmental tickets, for relatively minor events of non-compliance and characterizing events of non-compliance as continuing offences with each day constituting a new offence. However, even these "minor" administrative penalties can result in significant payments and may also serve as an aggravating factor in any subsequent prosecution. Most jurisdictions provide director and officer liability for certain issues of environmental non-compliance with some requiring an actual environmental harm to impose such liability.

Government ministries or agencies, such as the Ontario Ministry of the Environment Conservation and Parks ("**MOECP**"), can issue orders to persons who have management or control of property (i.e., officers and directors) to investigate, mitigate and/or remediate. Director's Orders have been issued under the OEPA, which attribute no-fault liability personally to directors and officers of bankrupt corporations. In one case, prior to a determination on the merits, the MOECP entered into a settlement agreement with the former directors and officers of the bankrupt corporation who paid approximately C$4.75 million for remediation costs. The extent of liability will be an issue for directors, especially where insolvency of the company is a risk.

The courts also regulate environmental matters at common law. Individuals and businesses operating in Canada may be exposed to civil liability in nuisance, negligence and trespass, amongst other claims or failure to comply with statutory obligations. The potential for class proceedings greatly increases the quantum of damages that may be available.

WATER

Canada has no single over-arching water quality protection statute administered by the federal government akin to the *Clean Water Act* in the United States. That being said, the federal government is responsible for the *Fisheries Act* which, although ostensibly directed at the regulation of Canadian fisheries, has been used increasingly in recent years by the federal Department of Fisheries and Oceans to regulate water pollution in Canadian waterways. Aside from the federal *Fisheries Act* and the *Navigation Protection Act*, each province and territory has its own water quality statute(s) which it administers through its Ministry of the Environment or Natural Resources. These statutes generally establish water quality standards, water taking/transfer limits, permitting and approval regimes and enforcement measures. The quantum and quality of water takings (ground and surface) and discharges by industry are also regulated with water transfers becoming increasingly controversial.

AIR

The federal government has air emission regulatory tools contained in the CEPA. The federal government passed a number of regulations to limit or reduce air emissions, including regulations for heavy duty vehicles (including full-size pick-ups, semi-trucks, garbage trucks and buses) and electricity generation from coal. CEPA necessitates the reporting of emissions where the substance is listed in the National Pollutant Release Inventory substance list and the amount of the emission is in excess of the reporting threshold. The National

Pollutant Release Inventory is a publicly accessible database that tracks the release, disposal and transfer of pollutants. However, provincial and territorial legislation is generally of more importance to commercial and industrial emitters in Canada. For large emitters the federal government has reporting obligations while the provinces tend to issue permits and approvals for emissions related to facilities. Ontario has incorporated several of the U.S. Environmental Protection Agency's air modeling practices into its legislation. Reporting obligations of emissions are increasingly becoming the norm as reporting thresholds are progressively lowered.

Climate change-related legislation is a patchwork across the country. Several provinces have worked with certain U.S. states through the Western Climate Initiative ("**WCI**") on emissions trading programs. In addition, carbon taxes are used in some jurisdictions, including British Columbia and Alberta. In late 2011, Quebec, a WCI Partner, adopted a regulation under its *Environmental Quality Act*, which creates a cap and trade system for greenhouse gas emissions. In 2016, Ontario enacted the *Climate Change Mitigation and Low-carbon Economy Act* ("**Climate Change Act**"), which created a cap and trade system. Ontario began trading in 2017 and joined the emissions trading bloc in place between Quebec and California with its first participation in a joint auction occurring in early 2018. In July 2018, the newly-elected Ontario government repealed the *Climate Change Act* and ended Ontario's participation in cap and trade. However, the province of Nova Scotia joined the WCI in May 2018 and began auctioning in 2020.

In early 2019, the federal government implemented a federal carbon pricing system for provinces that have not designed their own pollution pricing systems in accordance with the federal government's climate action plan. The *Greenhouse Gas Pollution Pricing Act* is comprised of an output-based pricing system and a fossil fuel tax. In September 2020, the Supreme Court of Canada heard appeals from three provincial Courts of Appeal (Ontario, Saskatchewan and Alberta) regarding the constitutionality of this legislation and additional provinces joined these proceedings as intervenors. The Supreme Court of Canada handed down its decision in March 2021, ruling that the federal government has the right to impose minimum carbon-pricing standards on the provinces.

LAND

Important to cross-border transactions, an entity cannot contract out of its regulatory liability under Canadian law as easily as may be done in the United States. The U.S. expectation is often that a U.S. corporation that wishes to engage in business with or by a Canadian corporation can, in its agreement with the Canadian entity, insert provisions whereby the U.S. entity limits liability that may result from the Canadian operations or assets. However, Canadian law is such that a party cannot contract out of its regulatory liability for events or actions that occur in Canada. The best that can be done is to negotiate indemnities. Thus, a U.S. corporation that acquires contaminated land in Ontario one day could be subject to statutory orders and penalties to clean-up the property the next day. That being said, environmental legislation across Canada is drafted and interpreted by the courts in accordance with the "polluter-pays" principle. Accordingly, the focus of regulators and the courts should properly be on the entity responsible for the pollution, whether that entity was the immediate previous owner or a more remote former owner.

Ontario is one of the provinces to have substantive and directed legislation for the remediation of contaminated lands or brownfields. The OEPA provides certain basic immunity from the MOECP orders under the OEPA (the MOECP's primary enforcement tool). These include orders with respect to a once-contaminated property where prescribed remediation has been conducted and proper filings with the MOECP have been made by a property owner or entity in control. What is not included in the amendments is any funding mechanism similar to the *Comprehensive Environmental Response, Compensation, and Liability Act* in the United States, meaning that the remediation of brownfields in Canada, including Ontario, remains primarily market-driven. In some instances, municipalities may work with the developer to create incentives for the remediation of brownfields through a community improvement plan and property tax incentives.

Where a proposed land use, such as mining and waste disposal, may result in long-term environmental management costs even after operations have ceased, the government may require financial assurance to be provided at the time of permitting the facility to avoid the potential for a legacy of unfunded environmental contamination. Financial assurance is intended to ensure that legacy environmental issues are properly funded and to avoid issues should a company get into financial distress. The adequacy of such financial assurance and the priority ranking of environmental obligations in bankruptcies and restructurings continues to be a highly-contentious area.

TOXIC SUBSTANCES

The CEPA regulates the production, manufacture, use and disposal of toxic substances, excluding pesticides which have a separate combination of federal and provincial regulation. Through this legislation, the Minister of the Environment can require samples and information with respect to a substance. The CEPA contains penalty provisions, including mandatory minimum fines and maximum fines up to C$12 million. The federal government continues to review its classification of several substances to ensure that the proper safeguards are in place given the current state of scientific knowledge about the health and environmental impacts of the substance. Provincial legislation or municipal by-laws may impose similar or more restrictive standards, including the preparation of plans to reduce the use of certain toxic products.

ENDANGERED SPECIES

Regulation exists at both the federal (e.g., *Species at Risk Act*) and provincial levels (e.g., in Ontario, the *Endangered Species Act, 2007*) to protect both species and the habitat of such species. These acts set out permitting, monitoring, reporting and remediation requirements for activities that affect a listed species or its habitat, with considerable fines for non-compliance. Endangered species legislation can have a significant impact on the timing and costs of infrastructure development.

ENVIRONMENTAL AND IMPACT ASSESSMENT

Canada has recognized infrastructure deficits in transportation, energy and water/sewer which necessitate large capital investments over a number of years. Infrastructure projects usually require the completion of provincial and/or federal environmental assessment processes to ensure any potential impacts are properly mitigated. Infrastructure will also benefit from funds received from the sale of carbon allowances.

The previous federal government made significant alterations to the federal environmental assessment process with the enactment of the *Canadian Environmental Assessment Act, 2012* ("**CEAA, 2012**"). The CEAA, 2012 restricted the type of projects subject to a federal environmental assessment, stipulated timeframes for completing assessments and permitted the federal government to delegate an environmental assessment to another jurisdiction or substitute the process of another jurisdiction to help avoid duplication of environmental assessments for both federal and provincial governments. The current federal government passed the *Impact Assessment Act* ('**IAA**") to repeal and replace the CEAA, 2012. The IAA broadens the scope of assessments to include positive and negative environment, economic, social and health impacts, as well as to require gender-based analysis and an assessment of the impacts of a project on Indigenous Peoples and their rights. The federal assessment agency was rebranded the Impact Assessment Agency of Canada and will lead all federal impact assessments, including coordinating between regulatory bodies and provinces in the case of joint reviews. Each province also has requirements for environmental and impact assessment for certain projects within provincial jurisdiction.

Public and agency consultation is a mandatory requirement of the environmental and impact assessment process. Consultation with Indigenous Peoples usually forms a significant part of such assessments as treaty and Indigenous rights are protected by the Canadian Constitution. Several recent court cases have provided further clarification of the Crown's consultation obligations which vary depending upon the existence and wording of a treaty, the nature of the historic Indigenous claim and the potential infringement of such rights. The traditional use of impact benefit agreements has in many cases been replaced as governments have encouraged project proponents to align or partner with Indigenous Peoples as equity partners.

WASTE & RECYCLING

The storage, transfer and disposal of hazardous and non-hazardous waste is regulated provincially and, in some circumstances, federally. Development of new waste facilities, such as landfills, can be controversial and subject to significant review and public consultation. Most governments are actively encouraging recycling and mandate industry-funded stewardship programs to divert certain waste streams (e.g., tires, paper, cardboard, electronic) from landfills. Some provinces, like Ontario, are moving toward a "producer responsibility model" where instead of funding recycling programs, producers are made responsible for the full life-cycle of their products and packaging. Several jurisdictions have mandated goals to reduce waste to specified targets providing new opportunities for innovation. Failure to register, file and remit payments can lead to fines. Regulation of recycling and waste diversion is expected to increase.

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AIRD BERLIS

We are committed to being the Canadian gateway for our clients.

Brookfield Place, 181 Bay Street, Suite 1800
Toronto, Canada M5J 2T9
T 1.416.863.1500 F 1.416.863.1515

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airdberlis.com

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