Environmental

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Doing Business in Canada

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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*, the *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 as well as international rules. 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. It is through CEPA that greenhouse gasses have been listed as toxic and allow for their regulation by the federal government.

Municipalities, using localized public health and welfare as justification, have entered the environmental domain for more than two decades (e.g., lawn pesticides, green roof standards, 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, though legislation does not necessarily rely on this principle to find liability and obligations to address pollution. 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 potential for class proceedings greatly increases the quantum of damages that may be available, though to date no "traditional", or otherwise, environmental class proceeding has succeeded in Canada. Novel torts however are arising in the context of climate change litigation, including youth successfully arguing in an Australian court that a duty of care is owed by governments to children when making regulatory decisions under environmental protection legislation. Similar claims have not succeeded in Canada to date.

In Ontario, using class proceedings to prosecute environmental torts has also just become harder as the *Class Proceedings Act* was recently significantly amended to make certification under it even more difficult than it was before.

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 *Canadian Navigable Waters 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 pickups, 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.

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. As a result, any province that does not have its own equivalent program is obligated to follow the federal rules.

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 primarily (but not exclusively) drafted and interpreted by the courts in accordance with the "polluter-pays" principle. Accordingly, the focus of regulators and the courts is typically on the entity responsible for the pollution, at least as a first option, whether that entity was the immediate previous owner or a more remote former owner. Nonetheless, it is clear that under the OEPA, persons can be ordered to take measures to address contamination they did not cause.

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, waiver of development charges, 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.

Most recently, the federal government has weighed in on plastics pollution, releasing regulations under CEPA which prohibit single-use plastics. These regulations prohibit the manufacture, import and sale of single-use plastic checkout bags, cutlery, foodservice ware made from or containing certain plastics, ring carriers, stir sticks and straws, subject to accessibility laws for persons with disability related needs. These rules were the subject of a judicial challenge in the Federal Court of Canada in March 2023. No decision has been released yet.

SPECIES PROTECTION

Regulation exists at both the federal (e.g., *Species at Risk Act*) and provincial levels (e.g., in Ontario, the *Endangered Species Act, 2007,* "**ESA**") 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 every kind of development, from infrastructure to housing.

More recently, the ESA has been amended to create exemptions, including conditional exemptions, for certain types of activities. Recently established is also a "species conservation charges" regime for the Species at Risk Conservation Fund. This will allow proponents to undertake activities to contribute to the fund, instead of completing beneficial actions for species affected by their activities. This will be administered by the Species Conservation Action Agency and is for species designated as conservation fund species. This regime came into force on April 29, 2022.

Canada's oldest environmental statute is the *Migratory Birds Convention Act*, first enacted in 1917 which was significantly updated in 1994. This federal statute contains regulations to protect migratory birds, their eggs, and their nets from destruction by wood harvesting, hunting, trafficking and commercialization. Prosecutions continue under this statute. The U.S. has a corresponding law to implement the treaty.

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.

In Canada, the primary legislation in place federally for environmental assessment was the *Canadian Environmental Assessment Act*, first passed in 1992. Under this regime, if the federal government was the proponent or if the project involved federal funding, permits, or licencing, the Act would apply.

In 2012, significant amendments were made to the regime, which resulted in 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.

In 2019, the federal government repealed CEAA, 2012 and passed the *Impact Assessment Act* ("**IAA**"). 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. Like the plastics regulation under CEPA, the IAA is currently the subject of a court proceeding challenging the regime as unconstitutional. The Supreme Court of Canada heard arguments in March 2023. The court's opinion is pending.

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 AND 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. Several provinces, including 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, including its collection through either a single agency or, uniquely in Ontario, multiple organizations through the private sector. Ontario is also transitioning hazardous and special waste to a producer responsibility model. 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.

ENVIRONMENT, SOCIAL AND GOVERNANCE CONCERNS

CORPORATE GOVERNANCE AND SECURITIES REGULATION

In addition to the common law, exposing individuals and businesses to civil liability in nuisance, negligence and trespass, other claims are possible under statutory regimes, such as capital market regulation. In 2022, the Canadian Securities Administrators proposed a *National Instrument for Climate-Related and Environment, Social and Governance Disclosure Requirements*, but no final decision has come of this yet.

The *Canadian Business Corporations Act*, since 2019, has explicitly recognized that environmental considerations are relevant when directors and officers are considering the best interests of the corporation.

GREENWASHING

In Canada, misleading marketing related to the "green credentials" of products are regulated through the *Competition Act* and other federal legislation.

Under the *Competition Act*, promoting, directly or indirectly, the supply or use of a product which is false or misleading in a material respect is reviewable and can and has led to substantial fines for greenwashing. Companies should be aware of Canada's guidelines for environmental claims, updated in December 2021, addressing the *Competition Act*, the *Consumer Packaging and Labeling Act*, and the *Textile Labelling Act*, and their associated regulations.

HOUSING

Developers are frequently addressing natural heritage and natural hazard limitations in development applications related to development proposals. Zoning and natural features are regulated at the provincial level in Canada, though federally regulated lands are not subject to provincial zoning rules.

Ontario, in an attempt to address the critical need for housing, has for more than a year been introducing changes to the planning framework in Ontario, impacting both municipal approval processes, appeal rights from municipal decisions, and permitting functions by conservation authorities.

In broad strokes, Ontario has taken steps to remove protections from previously protected lands for increased housing development, used existing ministerial zoning powers more frequently and introduced new ministerial zoning powers. It has also moved to limit the function of conservation authorities to a review of natural hazards. Natural heritage concerns are to be redirected to others to manage and review.

Conservation authority permits are now required to be issued in all cases where ministerial zoning order powers are used, and new regulations are anticipated which will make conservation authority permits exempt from formal application requirements when regulatory requirements are met, paralleling similar changes in other environmental spheres, such as the management pollution releases and species at risk.

Among other proposed changes, setbacks from provincially significant wetlands are also expected to be reduced through changes to regulations administered by conservation authorities.

Ontario has also released a draft proposal which will make both the expansion of settlement boundaries and the creation of new housing lots in prime agricultural areas easier, while eliminating the requirement for density targets, except in very specific situations.

In addition, Ontario has changed the manner in which wetlands are evaluated and identified, with the likely impact that fewer wetlands will be protected, including by eliminating the concept of "wetland complexes."

NOTABLE CANADIAN CLIMATE LITIGATION

Worldwide, there is significant litigation aimed at addressing governments and corporations' obligations to address climate change, with varying degrees of success.

Most recently in Canada, in the case of *Mathur et al. v. Ontario*, seven youth garnered significant attention through their lawsuit aimed at the Ontario government, following the province's decision to cancel its involvement in the cap-and-trade program. The claim was based in the theory that this decision was a violation of their *Charter of Rights and Freedoms* rights under section 7, the right to life, liberty and security of the person, and section 15, the right to non-discrimination, guaranteeing equal protection under the law. It further sought a declaration that Ontario violated an unwritten constitutional principle that governments cannot engage in conduct that will, or unreasonably be expected to, result in future harm, suffering or death of a significant number of its own citizens.

Most lawsuits of this nature have failed at the preliminary stage of "justiciability," but this litigation passed that initial hurdle and was ultimately heard on the merits in September 2022. The Superior Court released reasons dismissing the application in April 2023, but while doing so made a number of notable comments and findings, including:

- Ontario's target fell severely short of what scientific consensus required, thus increasing the risk to Ontarians' life and health;
- The court rejected Ontario's arguments that its emissions were globally insignificant, recognizing that "every tonne of CO2 emissions adds to global warming and leads to a quantifiable increase in global temperatures that is essentially irreversible on human timescales"; and
- Positive rights are not currently recognized under the Charter. But the court found that the applicants made a compelling case that climate change and the existential threat that it poses to human life could justify the imposition of positive obligations under section 7 of the Charter, though it did not find so on the facts of this case.

The applicants are seeking leave to appeal to the Court of Appeal.

NOTABLE CANADIAN INDIGENOUS RIGHTS LITIGATION

In Canada, the Crown, federally and provincially, has what is known as a duty to consult. This duty requires the Crown to understand how and when their activities could have an adverse impact on Aboriginal and treaty rights. It reflects the "honour of the Crown." It is a corollary of section 35 of the *Constitution Act, 1982*, which states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

More recently, we see, for example in Ontario, governments infusing this obligation to consult into land-use planning decisions by ensuring that First Nations are consulted as part of land-use planning decisions, as well as through infrastructure projects under environmental assessment regimes. However, it should be noted that the substantive duty rests with the Crown and cannot be delegated to municipalities. Municipalities may address the procedural obligations but not the substantive obligations of the duty to consult.

Duty to consult litigation in Canada has been robust. There is a low bar to trigger a threshold to consult: "When the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it." The honour of the Crown gives rise to different duties in different circumstances; in instances where there is significant impairment of a right, greater consultation will be required.

Case law also addresses breaches of treaty rights. A particularly significant decision was released in 2021, *Yahey v. British Columbia*. It considered whether the treaty rights of the Blueberry River First Nations and had been infringed by the cumulative impacts of industrial developments within their territory, including forestry, oil and gas, renewable energy and agriculture.

The court concluded British Columbia had, over a period of many years – by allowing industrial development in the First Nation's territory at an extensive scale without assessing cumulative impacts and ensuring that the First Nation would be able to continue meaningfully exercising its treaty rights in its territory – breached Treaty 8. This decision was not appealed.

This critical decision was a departure from prior litigation and is likely to have an impact on regulatory risks where similar claims may be made.

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