THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW

SIXTH EDITION

Editor
Theodore L Garrett

THE LAWREVIEWS

THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW

SIXTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in January 2022
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Theodore L Garrett

THE LAWREVIEWS

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADERS
Joel Woods, Jack Bagnall

BUSINESS DEVELOPMENT MANAGERS
Rebecca Mogridge, Katie Hodgetts, Joey Kwok

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Leke Williams

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Felicia Rosas

SUBEDITOR
Martin Roach

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-534-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALLEN & OVERY

ANKURA

ARIAS, FÁBREGA & FÁBREGA

BAKER & MCKENZIE LIMITED

BLAKE, CASSELS & GRAYDON LLP

COVINGTON & BURLING LLP

HENGELER MUELLER PARTNERSCHAFT VON RECHTSANWÄLTEN MBB

LEE & KO

LINKLATERS

NAGASHIMA OHNO & TSUNEMATSU

SCHULTZ CARRASCO BENITEZ

TRIPLEOKLAW LLP

URÍA MENÉNDEZ

VIEIRA DE ALMEIDA

VILDE – VILLATA, DEGLI ESPOSTI E ASSOCIATI

WHITE & CASE LLP

CONTENTS

PREFACE

Environmental law is global in its reach. Multinational companies make business plans based on the laws and regulations of the countries in which they are headquartered and have manufacturing facilities, as well as the countries in which they distribute and sell their products. Moreover, such companies have global environmental, health and safety goals and practices that tend to be worldwide in their scope for reasons of policy and operational consistency.

For these and other reasons, this sixth edition of *The Environment and Climate Change Law Review* continues to be timely and significant. This book offers a review, by leading environmental lawyers, of significant environmental laws and issues in their respective countries around the world, with updates since last year's edition.

Climate change continues to dominate international environmental efforts, and we have also witnessed efforts to promote sustainability. Many countries are making efforts to promote conservation and renewable or green energy. Changes in reliance on coal and nuclear energy have an impact on the demand for other energy sources. All of these changes affect efforts to reduce greenhouse gases.

Environmental law continues to change and evolve, as new policies and regulations are adopted and existing rules are amended or challenged in courts or interpreted by agencies. In the United States, for example, President Trump withdrew from the Paris climate agreement and his administration pursued a more business-friendly approach, which was criticised by environmental groups. January 2021 witnessed the beginning of a new administration headed by President Biden, who has now rejoined the Paris agreement and has advocated more aggressive environment and energy policies. Future editions of this book will continue to focus on such changes and developments around the globe.

This book presents an overview and, of necessity, omits many details. The book should thus be viewed as a starting point rather than a comprehensive guide. Each chapter of this book, including mine, represents the views of the author or authors in their individual capacities, and does not necessarily reflect the views of the authors' firms or clients, the authors of other chapters, or my views as the editor. This book does not provide legal advice, which should be obtained from the reader's own lawyers.

I wish to thank the many authors who contributed their time and expertise to the preparation of the various chapters to this book. I also wish to thank the editors at Law Business Research for their continued support and attention. We hope this book helps you to gain a better understanding of the international scope of environmental law.

Theodore L Garrett
Covington & Burling LLP
United States
January 2022

Chapter 1

CANADA

Tony Crossman and Don MacLeod[1]

I INTRODUCTION

Canadian federal and provincial governments have taken active roles in environmental protection and climate change, with increasing legislative action in recent years. Climate change has become a forefront issue, with governments enacting legislation or policies aimed at addressing this challenge through reducing emissions or mitigation measures. Federal and some provincial governments have also introduced new legislation for the assessment of major projects, and such assessments now directly include an assessment of certain factors related to climate change and Canada's international climate commitments. This year, the federal government enshrined Canada's international greenhouse gas emission reduction targets into Canadian law.

The new federal climate change legislation has not been without its challenges. Canada's primary legislation regarding greenhouse gas (GHG) emissions was challenged by several provinces. Although Canada's top court, the Supreme Court of Canada, ultimately upheld the legislation, anticipated future federal climate change laws and policies regarding caps on emissions may also be challenged.

Climate change and the transition to a low-carbon economy has also featured prominently in environmental, social and governance (ESG), with the Canadian Securities Administrators (CSA) recently proposing requiring all public companies in Canada to publish ESG disclosures consistent with the recommendations of the Taskforce on Climate-related Financial Disclosures (TCFD).

II LEGISLATIVE FRAMEWORK

In Canada, jurisdiction over the environment is shared among various levels of government as the environment is not named specifically in the Canadian Constitution. Jurisdiction is instead based upon other named heads of power, including natural resources, fisheries, criminal law, property and civil rights in the province and the power over peace, order and good governance. Consequently, all levels of government have enacted legislation to regulate impacts on the natural and human environment.

---

1 Tony Crossman is a partner and Don MacLeod is an associate at Blake, Cassels & Graydon LLP. The authors wish to thank Paulina Adamson, an associate at Blake, Cassels & Graydon LLP for her contributions to a previous version of this chapter.

i International

Canada has been an active participant in international agreements and initiatives. In 2016, Canada ratified the Paris Agreement.[2] The federal government then released the Pan-Canadian Framework on Clean Growth and Climate Change, a plan to meet Canada's emission reduction targets and mitigate climate change. To achieve these goals, the key objective of the Framework was a Canada-wide carbon pricing system implemented by the provinces with a federal backstop if provincial governments do not implement federal targets. The federal government passed the Greenhouse Gas Pollution Pricing Act in 2018, which sets out standards for carbon pricing across Canada.[3] In December 2020, the federal government released A Healthy Environment and a Healthy Economy[4] (Climate Plan), a climate plan to exceed Canada's 2030 emission reduction targets and achieve net-zero greenhouse gas emissions by 2050. The federal government also signed the Glasgow Climate Pact in 2021 and released an updated nationally determined contribution plan (NDC) to match its commitments in the Climate Plan.[5]

Canada also participates in a number of bilateral and multilateral treaties. These include the MARPOL protocol preventing pollution from ships,[6] the Ramsar Convention on protection of wetlands,[7] the Protocol on Environmental Protection of the Antarctic,[8] and the Rotterdam Convention on the prior informed consent procedure for hazardous chemicals.[9]

ii Federal

The Canadian Environmental Protection Act, 1999 (CEPA) is the main federal environmental statute regulating activities under federal jurisdiction.[10] CEPA establishes a comprehensive scheme regulating toxic substances, disposal at sea, cross-border air and water pollution, federal works and undertakings and activities on federal land. In May 2021, the federal government added 'plastic manufactured items' to the List of Toxic Substances under CEPA and is considering banning or restricting several plastic waste products.

The Impact Assessment Act came into force in August 2019, replacing the Canadian Environmental Assessment Act, 2012.[11] It establishes a comprehensive process for assessing the environmental, health, social and economic effects of designated projects to prevent adverse effects and foster sustainability. Certain projects cannot proceed without undergoing

2 United Nations Framework Convention on Climate Change, 'The Paris Agreement'.

3 SC 2018, c 12.

4 Environment and Climate Change Canada, A Healthy Environment and a Healthy Economy, Canada's strengthened climate plan to create jobs and support people, communities and the planet, available online: www.canada.ca/content/dam/eccc/documents/pdf/climate-change/climate-plan/healthy_environment_healthy_economy_plan.pdf.

5 Government of Canada, Canada's 2021 Nationally Determined Contribution under the Paris Agreement, available online: https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Canada%20First/Canada%27s%20Enhanced%20NDC%20Submission1_FINAL%20EN.pdf.

6 International Convention for the Prevention of Pollution from Ships 1973, as amended by the Protocol of 1978 (MARPOL 73/78).

7 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar).

8 Protocol on Environmental Protection to the Antarctic Treaty (Environmental Protocol).

9 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

10 SC 1999, c 33.

11 SC 2019, c 28, replacing SC 2012, c 19.

an impact assessment. Assessments must take into account several legislated factors, including the changes to the environment that are likely to be caused by the project, alternative means of carrying out the project (including the use of best available technologies), the extent to which the effects of the project hinder or contribute to Canada's ability to meet its environmental obligations and commitments in respect of climate change and changes to the designated project that may be caused by the environment.

The Fisheries Act is the key federal law protecting Canada's fisheries and waters.[12] It applies to both coastal and inland waters and contains provisions protecting fish and fish habitat. It requires authorisations for work, undertakings or activities that may harm fish or fish habitat and prohibits deposits of deleterious substances into water frequented by fish.

Other key federal legislation regulating the environment includes the Transportation of Dangerous Goods Act, 1992,[13] Species at Risk Act[14] and the Migratory Birds Convention Act, 1994.[15]

In June 2021, the Canadian Net-Zero Emissions Accountability Act (CNZEAA) came into force.[16] It enshrines the federal government's commitment to net-zero emissions by 2050 into law and promotes transparency and accountability in relation to achieving emission targets and supporting Canada's international commitments to mitigate climate change. Emission targets are to be based on the best scientific information available.[17] CNZEAA requires emission targets set in five-year intervals between 2030 and 2050, accompanied by an emission reduction plan and key reduction measures.[18] It also requires progress reports for each emission target, including updates on the progress made towards achieving those targets, the implementation of federal measures, sectoral strategies and information on additional measures that could be taken to increase the probability of achieving the targets.[19]

iii Provincial

The provinces also have jurisdiction to regulate the environment, and each province and territory has its own regime for environmental protection. This generally includes legislation concerning environmental assessment, pollution prevention, water protection, wildlife, hazardous substances, contamination and waste. As jurisdiction over the environment is shared, compliance with both federal and provincial laws is generally required. For impact and environmental assessments, the provinces may enter into agreements with the federal government to avoid duplication of assessments. For example, in 2019, British Columbia and Canada entered into a Cooperation Agreement regarding environmental assessment for projects that require impact and environmental assessment under both federal and provincial legislation. Under the Cooperation Agreement, the governments may cooperate by conducting coordinated or joint assessments or by substitution.[20]

12 RSC 1985, c F-14.

13 SC 1992, c 34.

14 SC 2002, c 29.

15 SC 1994, c 22.

16 SC 2021, c 22.

17 SC 2021, c 22, s 4.

18 SC 2021, c 22, s 7, 9 and 10.

19 SC 2021, c 22, s 14.

20 Impact Assessment Cooperation Agreement Between Canada and British Columbia, available online: www.canada.ca/en/impact-assessment-agency/corporate/acts-regulations/legislation-regulations/canada-british-columbia-impact-assessment-cooperation/canada-bc-cooperation-agreement.html.

iv Municipal

Municipalities may participate in environmental protection and climate change policy through the implementation of bylaws. These powers include the ability to regulate waste disposal and recycling. Municipalities may also regulate stormwater and wastewater disposal. For example, Metro Vancouver's Sewer Use Bylaw sets out standards for discharge to municipal sewers with a view to protecting human health and the environment. Increasingly, municipalities have introduced bylaws prohibiting the use of certain single use plastics.

v Indigenous groups

There has been an increasing focus on Indigenous participation in environmental regulation. Under treaties, Indigenous groups may have rights to be involved in environmental protection and regulation. Aboriginal title has also been recognised in British Columbia.[21] The courts have played an active role in clarifying Indigenous rights and participation in regulatory processes. Key cases have established that the crown has a duty to consult and, where appropriate, accommodate Indigenous groups where the crown's conduct may adversely affect an Indigenous or treaty right.[22] The duty to consult and accommodate often arises in the context of major natural resource projects. The scope of the duty 'stresses the need to balance competing societal interests with aboriginal and treaty rights'.[23] The duty to accommodate may arise when consultations with Indigenous groups indicate the proposed project or authorisation may adversely affect Indigenous rights. In practice, accommodation has resulted in rerouting proposed roads, timing construction to reduce impacts on wildlife, reducing the size of projects and environmental monitoring to assess and mitigate environmental impacts. Accommodation may also include denying a project the ability to proceed or relevant permits.

In 2021, several legal decisions have expanded the role of Indigenous groups in environmental regulation. In *Yahey v. British Columbia*,[24] the court held that British Columbia had violated the treaty rights of the Blueberry River First Nation (Blueberry) over the previous 120 years. Throughout that period, British Columbia had approved extensive, forestry, oil and gas, hydro-electric, mining and agriculture projects in Blueberry's traditional territory. The environmental impact on Blueberry's traditional territory was significant as less than 14 per cent of Blueberry's traditional territory now consists of intact forest landscape. The court held that British Columbia had unjustifiably infringed Blueberry's treaty rights by permitting the cumulative impacts of industrial development, such that it has meaningfully diminished Blueberry's ability to exercise its treaty rights and prohibited British Columbia from authorising any other activities that would infringe on Blueberry's treaty rights.

In *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*,[25] the court overturned a decision by the federal government's Minister for the Environment and Climate Change Canada to designate a proposed expansion of a coal mine to undergo an environmental assessment under the Impact Assessment Act. The minister had designated

21 *Tsilhqot'in Nation v. British Columbia* [2014] SCJ No. 44, [2014] 2 SCR 257, 2014 SCC 44.

22 *Haida Nation v. British Columbia (Minister of Forests)* [2004] SCJ No. 70, 2004 SCC 73 (SCC) (*Haida*) and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388, 2005 SCC 69 at Paragraph 53 (*Mikisew*).

23 *Chippewas of the Thames First Nation v. Enbridge Pipelines, Inc.* [2017] SCC 41 at Paragraph 59.

24 2021 BCSC 1287.

25 2021 FC 758 (*Ermineskin*).

the project for review without informing Ermineskin Cree Nation (Ermineskin), despite being aware that Ermineskin had signed impact benefit agreements with the mine operator to compensate Ermineskin for the potential impacts of the operations on Ermineskin's Aboriginal and Treaty rights. In overturning the designation, the court held that Ermineskin had 'inexplicably frozen out of this very one-sided process'.[26]

Recent environmental legislation also includes direct roles for Indigenous groups. For example, the Impact Assessment Act recognises Indigenous governing bodies as a level of government with shared jurisdiction over the environment.[27] It allows for the government to enter into agreements delegating parts of the impact assessment process to Indigenous governing bodies.[28] It also requires the regulator to consult with Indigenous groups at various stages of an assessment. The British Columbia Environmental Assessment Act requires consultation and for the regulator to consider Indigenous knowledge during environmental assessments.[29] It also requires the regulator to seek to achieve consensus with participating Indigenous groups at several points during the assessment.[30] In 2019, British Columbia passed the Declaration on the Rights of Indigenous Peoples Act to implement the United Nations Declaration on the Rights of Indigenous Peoples in British Columbia.[31] In June 2021, the federal government passed the United Nations Declaration on the Rights of Indigenous Peoples Act,[32] which affirmed that the United Nations Declaration applies in Canada. On the basis of the introduction of these laws both federally and in British Columbia, increasing consultation and agreements with Indigenous groups are likely, particularly in the regulation of natural resources.

III THE REGULATORS

The primary federal regulator is Environment and Climate Change Canada (ECCC), which is responsible for enforcing and administering CEPA. Fisheries and Oceans Canada (also known as DFO) is the lead regulator for managing and enforcing legislation regarding Canada's waters, fisheries and oceans. Fisheries and Oceans Canada administers the majority of the Fisheries Act, though the pollution prevention provisions are enforced by ECCC. Transport Canada oversees the regulation of dangerous and hazardous goods and substances to ensure their safe transport and storage across Canada.

The provinces have their own regulators for environmental protection and enforcement. In British Columbia, the Ministry of Environment and Climate Change Strategy is the primary agency responsible for environmental regulation, including water, land and air quality, climate change, environmental emergencies and wildlife, fish and protected areas. The Ministry of Energy, Mines and Petroleum Resources regulates the mining and energy sectors and the permitting of major mineral exploration projects. In Ontario, the Ministry

26 *Ermineskin* at Paragraph 129.

27 Impact Assessment Act, s 2.

28 Impact Assessment Act, s 29.

29 Environmental Assessment Act, SBC 2018, c 51, s 2.

30 Environmental Assessment Act, s 16, 19 and 27.

31 SBC 2019, c 44.

32 Bill C-15, An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples, 2nd Sess, 43rd Parl, 2020 (First Reading).

of Environment, Conservation and Parks regulates environmental protection, authorisations, waste management, species at risk and air and water quality. The Ministry of Energy, Northern Development and Mines regulates Ontario's mining and energy sectors.

Environmental offences in Canada are quasi criminal offences, and offenders may face prosecution for non-compliance. Upon conviction, the courts can impose sentences of imprisonment or fines, which in recent years have become substantial. Some environmental statues also provide the courts with creative sentencing options, including the discretion to require restoration of the environment, compensation for damage to the environment, payments of fines to environmental funds, and requiring the offender to take action or build infrastructure to prevent a recurrence or publish details of the offence.

IV ENFORCEMENT

Generally, environmental enforcement officers are given broad powers to investigate non-compliance, issue stop-work orders and order that measures be undertaken to achieve compliance and restore the environment. These include pollution prevention orders and remediation or restoration orders, requiring persons who have possession, charge or control of a substance to prevent the release of substances or to remedy the adverse effects on the environment. Environmental legislation also often provides that authorisations may be suspended or cancelled for non-compliance.

For example, under the British Columbia Environmental Assessment Act, if the regulator considers there is or is likely to be a contravention of the Act or a certificate issued under it, the regulator may order the certificate holder to stop doing the activity that is or is likely to be a contravention, take any measures considered necessary to comply or cease construction or any other activities authorised by the certificate.[33]

Federal and provincial environmental laws contain offence provisions for non-compliance and penalties are substantial. Offences can result in imprisonment under many statutes and fines can be up to several million dollars. For example, fines under CEPA and the Fisheries Act are up to C$12 million.[34] Additionally, many laws allow for these fines to be imposed for each day the offence continues, and some have mandatory minimum penalties.[35] Various environmental laws also impose liability on employees, agents, officers and directors if they authorise, permit or acquiesce in the commission of an offence.[36]

Many environmental laws also permit administrative penalties (fines) to be levied for non-compliance by enforcement officers if the regulator is satisfied on a balance of probabilities that an offence occurred. This is an out-of-court process, but fines may still be significant. Enforcement by way of administrative penalties has been increasing in recent years. Various jurisdictions also provide for tickets for non-compliance. Prosecutions may also be published on the environmental offender's registry.

Limited defences are available to avoid penalties and prosecution under environmental law. These include necessity, impossibility and due diligence. The defence of necessity only applies in circumstances of imminent danger where the actions were taken to avoid some greater risk or peril. For the defence to be successful, there must be an imminent peril, a

33 Environmental Assessment Act, s 53.

34 Fisheries Act, s 40.

35 See, for example, Fisheries Act, s 40 and 78(1).

36 See, for example, Fisheries Act, s 78(2).

lack of an alternative, and the harm caused by the non-compliance is less than the harm that was being avoided. The defence of impossibility applies where compliance with the law is impossible. The due diligence defence is the most common defence in environmental prosecutions. To make a successful due diligence defence, the accused must demonstrate that they took all reasonable steps to prevent the commission of the offence.[37]

Some environmental laws create civil liability where compensation can be claimed by those adversely affected. For the most part, these laws are focused on providing that right to governments, who are usually the ones that take action. Pollution and contamination are areas where private parties have rights of action against those who cause or contribute to the pollution or contamination. Most of these causes of action are based in the common law (negligence, nuisance, strict liability) or contract, though some laws provide statutory rights of action, such as the cost recovery action in the BC Environmental Management Act.

V REPORTING AND DISCLOSURE

Many environmental laws have reporting and disclosure requirements. For example, the Fisheries Act requires owners or persons who have charge, management or control of a deleterious substance of works, undertakings or activities that have contributed to a deposit to report the deposit or the serious and imminent danger of such a deposit.[38] Failure to immediately report a deposit is an offence and may result in charges. Under CEPA, persons who own or have charge, management or control of a substance that causes or contributes to an environmental emergency must report the environmental emergency, take all reasonable measures to protect the environment and mitigate any effects.[39]

In 2017, a comprehensive spill reporting regime came into force in British Columbia. It requires 'responsible persons', those who have possession, charge or control of a substance when a spill occurs or is at imminent risk of occurring, to report spills. Reportable spills are the spill of a prescribed quantity of a substance listed in the Spill Reporting Regulation, or the spill of any quantity of a substance that enters or is likely to enter a body of water.[40] Reporting is required immediately, every 30 days after the spill and at the end of the spill (once the spill is under control, waste has been removed from the spill site and disposed of appropriately).[41] The Spill Reporting Regulation sets out a comprehensive list of information that is required to be reported, including the date, time and location of the spill, a description of the spill site, the source of the spill and a description of the circumstances, cause and effects of the spill and details of actions taken or proposed to monitor, evaluate and mitigate the spill.[42]

Many authorisations (federal and provincial) will require the permittee to report non-compliance with the permit to regulators. Authorisations also often contain monitoring and general reporting requirements. For example, authorisations for effluent and air discharge often include monitoring of discharge points and reporting to ensure discharges are within permitted limits.

37 *R v. Sault Ste Marie* [1978] 2 SCR 1299.

38 Fisheries Act, s 38(5).

39 CEPA, s 95.

40 BC Reg 187/2017, s 2 [Spill Reporting Regulation].

41 Spill Reporting Regulation, s 4, 5 and 6.

42 Spill Reporting Regulation, s 4.

Reporting of environmental risks by regulated companies is evolving in Canada. Companies are required to disclose material information that affect their business, and environmental information may be material, and climate change has been identified as a particular risk. The Canadian Securities Administrators (CSA) issued a staff notice on 'Reporting of Climate Change-related Risks'[43] that reinforces and expands upon the guidance provided in CSA Staff Notice 51-333 'Environmental Reporting Guidance'.[44] Regulators have noted that companies should disclose material risks related to both physical risk (such as extreme weather events or rising sea levels) and material risk that the business faces in the transition to a low-carbon economy (including reputational risk, policy risk, regulatory risk and market risk). In October 2021, the CSA proposed National Instrument 51-107 Disclosure of Climate-related Matters, which, if adopted by the provincial securities regulators would introduce disclosure requirements regarding climate-related matters for reporting issuers.[45] This will align Canadian disclosure standards with the core elements of the TCFD recommendations, with certain modifications.[46] Notably, issuers would be required to disclose their Scope 1, Scope 2 and Scope 3 GHG emissions and the related risks, or their reasons for not doing so, but would not need to issue a scenario analysis.

VI ENVIRONMENTAL PROTECTION

i Air quality

Air emissions are regulated at the federal, provincial and territorial levels (and often at the local government level) in Canada. Federally, CEPA regulates air pollution, with several regulations aimed at industry-specific and multi-industry emissions, including asbestos mines and mills, lead smelters and releases of halocarbons. Regulations under CEPA are also targeted at emission reduction, including regarding renewable fuel content, vehicle and engine GHG emissions and carbon dioxide emissions from natural gas-fired electricity generation. The National Pollutant Release Inventory requires owners or operators to report emissions if those emissions exceed certain thresholds.[47]

The provinces also generally regulate air emissions. The British Columbia Environmental Management Act (EMA) prohibits the introduction of waste into the environment in the course of conducting a prescribed industry and the introduction of waste into the environment

43 Canadian Securities Administrators, CSA Staff Notice 51-358 Reporting of Climate Change-related Risks (1 August 2019), available online: www.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy5/51358-CSA-Staff-Notice-August-1-2019.pdf

44 Canadian Securities Administrators, CSA Staff Notice 51-333 Environmental Reporting Guidance (15 October 2010), available online: www.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy5/CSA-Staff-Notice-51333.pdf

45 Canadian Securities Administrators, Consultation Climate-related Disclosure Update and CSA Notice and Request for Comment Proposed National Instrument 51-107 Disclosure of Climate-related Matters (18 October 2021) [CSA Consultation], available online: www.bcsc.bc.ca/-/media/PWS/New-Resources/Securities-Law/Instruments-and-Policies/Policy-5/51107-CSA-Notice-and-Request-for-Comment-October-18-2021.pdf

46 CSA Consultation at p. 2.

47 Environment and Climate Change Canada, National Pollutant Release Inventory, available online: www.canada.ca/en/services/environment/pollution-waste-management/national-pollutant-release-inventory.html

so as to cause (air) pollution.[48] Authorisations are required for air emissions and often include monitoring and reporting requirements. In Ontario, air emissions are regulated under the Environmental Protection Act (EPA).[49] Regulations under the EPA set out limits for air contaminants determined at 'points of impingement' and include permitting and monitoring requirements.[50] Quebec's Clean Air Regulation includes standards for air emissions, and Quebec also has a cap-and-trade system for GHG emissions.[51]

ii Water quality

The federal Fisheries Act is the primary federal statute regulating Canada's coastal and inland waters. It prohibits the deposit of deleterious substances into waters frequented by fish. 'Deleterious substance' includes any substance that would degrade or alter or contribute to the degradation or alteration of the quality of water frequented by fish so as to render the water deleterious to fish or fish habitat.[52] Although some industries are specifically regulated and allowed to discharge deleterious substances up to certain thresholds, there is generally no ability to obtain an authorisation for such deposits, and the federal government regularly pursues charges for water pollution. The federal government also regulates the boundary waters between Canada and the United States, the Great Lakes and Canada's territorial waters.

In British Columbia, the Water Sustainability Act (WSA) requires licences for the use of all fresh water in the province.[53] Licence holders are permitted to divert, store, distribute and use water for the purpose specified in their licence. Approval is also required prior to making any changes in and about a stream. 'Stream' is defined broadly and includes natural watercourses and bodies of water, lakes, ponds, rivers, springs and wetlands.[54] The WSA also prohibits the deposit of foreign matter (including debris) into a stream.[55]

The British Columbia EMA prohibitions on the introduction of waste into the environment also apply to bodies of water. The definition of waste includes effluent, which is a substance added to water capable of injuring life forms or damaging the environment.[56]

Recent amendments to Quebec's Environment Quality Act (EQA) now require all work and construction in bodies of water and wetlands to receive ministerial authorisation prior to commencing.[57] If adverse effects cannot be avoided, financial compensation is required, subject to certain exceptions for adverse effects set out in the regulations. The minister may refuse to issue an authorisation if:

a the applicant has not satisfied the minister that the work would avoid adversely affecting the wetlands and bodies of water;

b the proposed mitigation measures would not reduce the impact on the wetlands and bodies of water;

c the minister is of the opinion that the project would have adverse effects on the wetlands and bodies of water; or

48 EMA, s SBC 2003, c 53, s 6 [EMA].

49 RSO 1990, c E 19, s 175.1.

50 Air Pollution – Local Air Quality, O Reg 419/05.

51 Clean Air Regulation, CQLR c Q-2, r 4.1.

52 Fisheries Act, s 34(1).

53 SBC 2014, c 15, s 6 [WSA].

54 WSA, s 1.

55 WSA, s 46(1).

56 EMA, a 1.

57 CQLR c Q-2, s 22 [EQA].

d the applicant refuses to pay the required financial compensation.[58]

The Ontario Water Resources Act is aimed at providing for the protection, conservation and management of Ontario's waters for their sustainable use and long-term environmental well-being.[59] It requires authorisation from the regulator prior to discharging into bodies of water any discharge that may impair the quality of any waters.[60]

iii Chemicals

The manufacture, import, export, handling, storage and transport of chemicals (sometimes referred to as hazardous or dangerous substances or goods) are regulated by federal, provincial and territorial laws.

At the federal level, CEPA regulates toxic substances. Importers and manufacturers are required to notify the federal government of new substances that are not already listed pursuant to CEPA. New substances must be assessed before they are permitted to be used or imported into Canada. Substances that may present a danger to the environment or human health may be added to the Toxic Substances List, which requires regulators to implement measures to manage these substances, including pollution prevention. Substances that are deemed particularly harmful, bio accumulative and persistent in the environment may be listed on the Virtual Elimination List.[61] Such substances will be prescribed a maximum quantity or concentration that may be released into the environment.

The federal Pest Control Products Act regulates pest-control products with a view to protecting human health and the environment.[62] It is prohibited to manufacture, possess, distribute or use pest-control products unless they are registered under the Act. Products may only be registered after undergoing a risk assessment that includes consideration of aggregate and cumulative effects.

iv Solid and hazardous waste

Solid and hazardous waste is regulated at the federal, provincial and territorial levels (and at times the local government level) in Canada.

Federally, CEPA regulates the interprovincial and international movement of hazardous waste, recyclable material and certain non-hazardous wastes.[63] The definitions of hazardous waste and hazardous recyclable materials are based on the Basel Convention. Waste may not be transported across provincial borders without appropriate waste manifests. Exporters and importers of hazardous waste are required to notify the regulators and obtain a permit before importing or exporting the waste. Notification requirements include the nature and quantity of the waste, information of exporters, importers and carriers, proposed disposal or recycling operations, contracts between exporters and importers and insurance information. Insurance

58 EQA, s 46.0.6.

59 RSO 1990, c O.40, s 0.1 [OWRA].

60 OWRA, s 30.

61 SOR/2006-298.

62 SC 2002, c 28.

63 Interprovincial Movement of Hazardous Waste Regulations, SOR/2002-301; Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations, SOR/2005-149.

coverage is required for potential damage to third parties and costs that may be imposed on the importer, exporter or carrier to clean up the environment owing to a release of the hazardous waste or recyclable material.

The provinces also regulate hazardous waste within their borders. Provinces generally require that hazardous substances be appropriately labelled before transport, with notification provided to the provincial government. In British Columbia, the Hazardous Waste Regulation sets out various requirements for hazardous waste transport, facilities and disposal.[64] Hazardous waste includes dangerous goods that are no longer used for their original purpose, leachable toxic wastes, waste oil and biomedical waste. Requirements include operational and siting requirements for facilities, and requirements for hazardous waste generators to register and maintain identification numbers.

The federal Transportation of Dangerous Goods Act, 1992[65] (TDGA) applies to the transportation of dangerous goods within Canada. It applies to companies that package and offer dangerous goods for shipment, loaders and unloaders, carriers and those who receive the dangerous goods. 'Dangerous goods' are listed in the regulations and arranged into nine classes of goods based on international standards. The TDGA also applies to any good that 'by its nature' would be included in one of the classes set out in the regulations.[66] The regulations set out requirements for packaging, marking, safety standards, transport and record keeping. No permit is required so long as the TDGA and regulations are complied with. However, if non-compliance is not possible, permits may be issued for transport with an equivalent level of safety. The provinces also regulate dangerous goods within provincial boundaries with schemes substantially similar to the federal TDGA.

Ontario requires government approvals for the collection, transport, treatment and disposal of solid waste and has a comprehensive product stewardship and producer responsibility regime aimed at reducing waste and protecting the environment. The British Columbia EMA regulates solid waste management, requires waste discharge authorisations for the deposit of waste into the environment and establishes requirements for waste management plans for municipal solid waste. The Landfill Gas Emission Regulation sets out criteria for landfill gas capture in order to minimise landfill gas emissions.[67]

v Contaminated land

Contaminated land is regulated in Canada by the federal, provincial and territorial governments. Generally, these regimes identify contaminated sites and set standards for the remediation of such sites, provide regulators with the power to require assessment and remediation of such sites and issue remediation orders; and provide for government sign-off on completion of remediation. Several jurisdictions provide for the recovery of remediation costs from those who caused the contamination (under the 'polluter pays' principle) or owned or operated on the site (under the 'beneficiary pays' principle), and for the allocation of liability for those costs.

In Alberta, the Environmental Protection and Enhancement Act regulates the release of certain substances into the environment and requires reporting by any person who released

64 BC Reg 63/88.

65 Transportation of Dangerous Goods Act, 1992, SC 1992, c 34.

66 Transportation of Dangerous Goods Regulations, SOR/2001-286; TDGA, s 2.

67 BC Reg 391/2008.

or caused or permitted the release of those substances into the environment.[68] It also provides the regulator with the ability to issue environmental protection orders (including orders to restore the affected environment) and governs the issuance of remediation certificates in respect of land where remediation has been carried out.

In British Columbia, the EMA and Contaminated Sites Regulation (CSR) sets out a comprehensive scheme for the identification and remediation of contaminated sites, including the assessment and allocation of liability for remediation of contamination on such sites.[69] Under this regime, 'responsible persons' are responsible for the costs of remediation and may be liable to anyone who has incurred costs to remediate the site. 'Responsible person' is defined broadly and includes various categories of persons who are connected to the site. These include current and past owners and operators and transporters and producers of contaminants.

The EMA contains a statutory right of action for the recovery of the costs of investigating and remediating a contaminated site. Such actions can be initiated by private parties or the government. Liability is absolute, retroactive, joint and separate. A responsible person who caused only some of the contamination may be named to fund the costs of all the site remediation, subject to a right of contribution from other responsible persons. The CSR sets out factors that a court may consider in determining compensation under a cost recovery action.[70]

Under the Ontario Environmental Protection Act, those in control of spills or discharges must notify the regulator and take action to clean up and restore the environment.[71] Those who suffer loss or damage as a result of a spill have a statutory right recovery from those in control of the spilled substances. If the government incurs clean-up costs, it may recover those costs from persons in control of spilled substances or from current and past owners, even where those owners did not cause or contribute to the contamination. For certain changes of use of land, a record of site condition is required that confirms the site has been investigated and remediated if the land is contaminated.

VII CLIMATE CHANGE

The federal Climate Plan addresses emissions from many sources, including buildings, transportation, heavy industry, and oil and gas production. A key feature of the Climate Plan is an increase in the price on carbon to C$170 per tonne by 2030. The Climate Plan also sets out 64 policies and programmes to achieve Canada's emission reduction goals and transition to a low-carbon economy. For example, the federal government intends to launch a Net-Zero Challenge for large industrial emitters to transition facilities to net-zero emissions by 2050. It also seeks to substantially reduce greenhouse gases from buildings while reducing owner-operator expenses by incentivising energy-efficient retrofitting. The Climate Plan also includes policies and programmes aimed at clean fuel, energy and waste reduction.

The Greenhouse Gas Pollution Pricing Act[72] (GGPPA) sets out the framework for the federal carbon pricing system to meet Canada's carbon emission targets under the Paris

68 RSA 2000, c E-12, Part 5.

69 BC Reg 375/96 [CSR].

70 CSR, s 35.

71 RSO 1990, c E 19, Part X.

72 SC 2018, c 12, s 186.

Agreement by reducing GHG emissions across Canada. The GGPPA implements a carbon tax (administered by the Canada Revenue Agency) on fuel for 21 different types of fuel and waste. It also sets out an output-based pricing system for industrial facilities with significant emissions (administered by ECCC). The GGPPA establishes a federal backstop for provinces and territories that do not adopt their own carbon pricing systems, which meet the federal requirements. If provinces implement their own carbon pricing system that complies with the federal requirements, the GGPPA does not apply in those provinces.

Ontario, Saskatchewan and Alberta (among others) launched court challenges to the GGPPA on the basis that the Act was unconstitutional and infringed on provincial jurisdiction. The Supreme Court of Canada upheld the validity of the GGPPA on a split decision. The majority held that the federal government had authority to enact the GGPPA under the national concern branch, as, in the majority's view, to mitigate climate action, 'federal action is indispensable'.[73] GHG emissions represent a pollution problem that is 'not merely interprovincial, but global, in scope'.[74] Therefore, the federal government had the authority to establish 'minimum national standards of GHG price stringency to reduce GHG emissions'.[75] It is anticipated that this decision will have significant effects on consumers and large industrial emitters, permitting a federally mandated price floor that imposes consistent and increasing GHG emissions compliance costs for consumers, small businesses and large industrial emitters. The federal government has indicated that, in addition to the carbon pricing mechanism, it will impose emission caps on industry sectors, including the oil and gas sector. Further federal legislation that imposes such caps is likely to be challenged.

Ontario, Manitoba, New Brunswick, Saskatchewan, the Yukon, Nunavut and Alberta are subject to the federal system under the GGPPA.

British Columbia has implemented its own carbon pricing system. In British Columbia, several statutes regulate GHG emissions and seek to address climate change. The Climate Change Accountability Act sets out provincial targets for reductions of GHG emissions by 2050.[76] Under the Carbon Tax Act, a carbon tax is imposed on the purchase of different types of fossil fuels.[77] The Greenhouse Gas Emission Reporting Regulation requires industrial operations in British Columbia tha emit 10,000 tonnes or more of CO2e annually to report emissions. Industrial operations emitting over 25,000 tonnes or more of CO2e annually must also have their emissions verified independently.[78] The Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act provides the government with the ability to set standards for renewable fuel in transportation fuel blends to meet its commitments for a new low-carbon fuel standard.[79]

Alberta's Emission Management and Climate Resilience Act sets out Alberta's GHG emission reduction targets, emission offsets, and trading regime and reporting requirements.[80] It also regulates the Technology Innovation and Emissions Reduction Fund for the purposes of energy conservation and efficiency, demonstrating the use of new technologies to reduce emissions and the development of opportunities for the removal of specified gases from the

73 *References re Greenhouse Gas Pollution Pricing Act* [*References re GGPPA*], 2021 SCC 11 at Paragraph 191.

74 *References re GGPPA* at Paragraph 173.

75 *References re GGPPA* at Paragraph 53.

76 SBC 2007, c 42.

77 SBC 2008, c 40.

78 BC Reg 249/2015, Part 2.

79 SBC 2008, c 16.

80 SA 2003, c E-7.8, s 3, 5, 6 [EMCRA].

atmosphere, among others.[81] In late 2020, Alberta announced it was providing significant funding to three new programmes to reduce GHG emissions. These include programmes for operational and energy efficiencies, GHG reduction, low-carbon products, alternative power sources and energy-saving measures for businesses.

Recently, several legal actions have been commenced against the Canadian government, to try to compel the government to better address climate change. Similar to lawsuits in other countries, the Canadian actions have not met with success to date.

In *Misdzi Yikh v. Canada*,[82] the court struck a claim by an Indigenous group on the basis that it was not justiciable and did not disclose a cause of action. The plaintiff had alleged that the Canadian government's approach to climate change had violated their constitutional and human rights. The plaintiffs claimed to have experienced significant impacts on their territories caused by warming, and expect to experience negative health impacts because of climate change. In striking the claim, the court noted that 'the issue of climate change, while undoubtedly important, is inherently political, not legal, and is the realm of the executive and legislative branches of government'. The decision is currently under appeal.

In *La Rose et al v. Her Majesty the Queen*,[83] 15 children and youths from across Canada sued the Crown, alleging that GHG emissions violated their Charter rights and breached the Crown's obligations under the 'public trust' doctrine. This claim, too, was struck by the court.

In *Environnement Jeunesse v. Attorney General of Canada*,[84] the court dismissed a motion to certify a class action by a group of citizens claiming that the Canadian government failed to set up a GHG emission reduction target and plan to avoid dangerous climate change impacts. The decision is currently under appeal.

VIII OUTLOOK AND CONCLUSIONS

The past year in Canada saw increasing legislation and a focus on ESG issues. As climate change remains a key issue both globally and in Canada, including for the current government, more regulation (and challenges) are expected. The CSA's proposal to require public companies to disclosure their performance on ESG issues is likely to become mandatory in 2022. The Supreme Court of Canada upholding the GGPPA and national carbon pricing system as constitutional will have a significant impact on the future of Canadian climate policy and legislation, though the imposition of emission caps is likely to be challenged.

81 EMCRA, s 10.

82 [2020] FCJ No. 1109.

83 2020 FC 1008.

84 2019 QCCS 2885.

Appendix 1

ABOUT THE AUTHORS

TONY CROSSMAN

Blake, Cassels & Graydon LLP

Tony Crossman is a leading expert in Canadian environmental law who assists in identifying and managing environmental risks, providing advice on day-to-day operational issues, and solving complex issues. His work specifically includes advising on environmental regulation and management, climate change, corporate compliance and due diligence, and litigation matters. Tony's experience includes work in the energy, mining and natural resource sectors as well as manufacturing, real estate, municipal, waste management and transportation.

DON MACLEOD

Blake, Cassels & Graydon LLP

Don MacLeod's practice focuses on environmental law, including corporate compliance and regulatory and litigation matters. He has experience with provincial, territorial, and federal environmental and regulatory regimes, permitting, environmental assessments, administrative penalties and appeals, and federal regulatory prosecutions.

BLAKE, CASSELS & GRAYDON LLP

Suite 2600
595 Burrard Street
Vancouver
BC V7X 1L3
Canada
Tel: +1 604 631 3300
Fax: +1 604 631 3309
tony.crossman@blakes.com
don.macleod@blakes.com
www.blakes.com

an LBR business

ISBN 978-1-83862-534-4