

Environmental Protection



1. Overview

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

Canada's *Constitution Act, 1867* divides legislative power between the federal Parliament and the provincial legislatures. While many specific areas of jurisdiction are enumerated in the Act, the power to enact legislation with respect to the environment is not. Canadian courts have decided that the power to create environmental law is shared between the two levels of government.

Authority to enact environmental law is within the scope of a government's powers so long as the primary purpose falls under at least one of its enumerated powers listed in the *Constitution Act, 1867*. For example, federal environmental laws are often enacted under the federal Parliament's exclusive jurisdiction to legislate concerning criminal law; fisheries; and peace, order and good government. Provincial environmental laws are generally premised on the provincial power to legislate concerning property and civil rights, and matters of a purely local nature.

Municipal governments also play a role in Canadian environmental law but to a much lesser extent. As municipal jurisdiction is not addressed in the *Constitution Act, 1867*, it is defined by each province's governing statute concerning local government.

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

2. Federal Environmental Laws

a. *Canadian Environmental Protection Act*

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

Under CEPA, any substance listed in Schedule 1 is classified as a toxic substance and subject to a series of specific controls. In particular, the Minister of the

Environment has authority to require any person to provide samples and information with respect to a substance. Additionally, CEPA outlines procedures for substances that are newly introduced to Canada. The importation or manufacture of any substance not listed on the Domestic Substances List is prohibited without express federal authorization by the director of CEPA.

CEPA also imposes a duty to report and a duty to take remedial action on persons who own or are in control of a spilled toxic substance. Persons who contribute to the initial release of a toxic substance may also be subject to the same duties. Under CEPA, the director is given authority to issue orders in the case of environmental emergencies.

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

The National Pollutant Release Inventory (NPRI) as authorized by CEPA makes the reporting of emissions mandatory where the amount of emissions is equal to or in excess of the reporting threshold and where one or more of the substances emitted is included in the NPRI Substances List. Facilities that are required to report must submit a detailed accounting of their emissions to Environment Canada. The collected information is made publicly accessible.

b. *Canadian Environmental Assessment Act*

The *Canadian Environmental Assessment Act* (CEAA) may apply to projects involving federal-government financing or federal lands, or where certain federal approvals are required. Regulations under the CEAA define those instances where the Act applies. Certain classes of projects may be expressly included or

exempted from assessment. If the CEAA applies, then an environmental assessment of the project will be required.

Projects are subject to differing levels of scrutiny and varying review processes depending on the nature of the projects and their potential effects. Some projects may be subject to both provincial and federal environmental assessments (as discussed later under “Provincial Environmental Laws”) and there may be a need to coordinate the two. A project will be permitted to proceed only where the Minister is satisfied that there will be no significant environmental impacts associated with the project, taking into account the implementation of any mitigation measures that are considered appropriate.

c. *Fisheries Act*

Under the *Fisheries Act*, the federal government has regulatory authority over water pollution and water quality. While the Act is generally focused on the protection of recreational and commercial fisheries, it includes provisions concerning the deposit of deleterious substances into water frequented by fish and the harmful alteration or destruction of fish habitat. These provisions result in virtual zero tolerance for unapproved water discharges and disruptive water works.

Regulations made under the *Fisheries Act* are applicable to specific industry sectors and prescribe monitoring and reporting requirements.

d. *Transportation of Dangerous Goods Act, 1992*

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

Eight classes of “dangerous goods,” ranging from organisms to explosives, are defined in a schedule to the Act. The Act also addresses issues such as label-

ling requirements and emergencies and provides a full suite of enforcement measures. Additional specific and detailed requirements can be found in the *Transportation of Dangerous Goods Regulations*.

e. *Other Federal Legislation*

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

3. Provincial Environmental Laws

Environmental laws and their enforcement vary from province to province. Matters under provincial jurisdiction include air emissions; water and wastewater treatment and discharges; waste management; and the release of contaminants, including issues relating to contaminated lands and brownfield redevelopment. Listed industrial or commercial establishments in Québec permanently ceasing their activities are required to perform a site characterization study and may be required to submit a land rehabilitation plan for approval. Additional areas of provincial regulation include pesticide use, underground and above-ground storage tanks, and the transportation of dangerous goods.

Provincial environmental laws prohibit the discharge of pollutants into the environment, but definitions of a pollutant and the environment vary from province to province.

A new emission source or facility that may impact the environment requires an environmental permit, licence or certificate of approval for the particular emission. Strict conditions may accompany such an approval. Existing sources of emissions may also be subject to further controls through the issuance of administrative orders.

Several provinces also have environmental assessment laws. While these laws primarily apply to public-sector

undertakings, significant private-sector undertakings may be required to undergo a comprehensive environmental assessment for the purpose of identifying and evaluating the need for the undertaking, the alternatives to the undertaking and alternative methods of accomplishing the undertaking. Details of the environmental assessment legislation vary from province to province.

A breach of provincial environmental laws may be enforced through voluntary abatement measures, administrative orders, administrative fines or prosecutions. In Ontario, which introduced the stiffest provincial penalties for major environmental offences in 2000, a repeat corporate offender may face a fine of up to \$10 million for each day the offence occurs or continues. A repeat individual offender may face up to \$6 million per day plus five years less a day in prison. There may also be a forfeiture of profits gained through non-compliance and liability for cleanup costs, as well as a series of other remedies.

In Ontario, the *Environmental Bill of Rights* imposes on the province public-notification obligations with respect to legislation or regulatory initiatives as well as to proposed applications and activities. This also allows for enhanced public participation and the ability of the public to initiate law-enforcement activities.

Canada's three federal territories, the Northwest Territories, Yukon and Nunavut, are not specifically empowered by the *Constitution Act, 1867*. Their legislative powers are derived from the powers granted to them by the federal government through enabling legislation. Environmental law in the three territories is generally similar to federal environmental law.

4. Municipal Measures

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

comprehensive environmental site investigations and public notification prior to issuing certain permits. For example, before issuing a planning approval or building permit, a municipality may require verification of contamination of the subject property and impose the implementation of a remedial plan plus financial assurance as conditions of approval. In Québec, a municipality cannot issue a construction permit or approve a subdivision of land where the land in question is listed in the municipal registry of contaminated lands, unless the project or subdivision is consistent with an approved rehabilitation plan.

Details of bylaws and municipal requirements vary from municipality to municipality.

5. Common Law

Common law causes of action relating to environmental matters include nuisance, negligence, strict liability and trespass. Although judicial decisions may vary from jurisdiction to jurisdiction, the common law principles generally apply to every jurisdiction in Canada except Québec, which is a civil law jurisdiction. Additional opportunities to commence litigation exist through class-action legislation in specific provinces and through specific provisions within certain provincial legislation.



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