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Environmental Law 2021

Canada: Trends & Developments

Bryan Buttigieg, Adina Georgescu,
Darin Hannaford and Christie McLeod
Miller Thomson LLP

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Trends and Developments

Contributed by:
Bryan Buttigieg, Adina Georgescu, Darin Hannaford and Christie McLeod
Miller Thomson LLP see p.9

National Developments

Courts adapt to COVID-19

Courts around the country significantly revised their procedures in response to the COVID-19 pandemic. Many court appearances, which traditionally took place in person, are now facilitated by remote technology such as audio and videoconference. In many cases, this has resulted in a more efficient system for managing busy courtroom dockets.

The elimination of travel time for counsel and litigants, the use of virtual "waiting rooms" – and other efficiencies realised by these changes – may well become permanent fixtures that survive the pandemic.

Enhanced focus on environmental, social and governance (ESG)

Momentum on issues surrounding ESG has continued to swell as more companies integrate ESG matters into their practices. While some organisations voluntarily report on ESG issues, others are mandated to do so in compliance with strengthened regulatory requirements.

The Task Force on Climate-Related Financial Disclosures (TFCD), commonly referred to as the global standard for corporate climate reporting, has continued to gain recognition in Canada. In response to the COVID-19 pandemic, the federal government launched an emergency loan programme for large Canadian businesses which required loan recipients to commit to publishing annual climate-related disclosure reports consistent with the TFCD. In the 2021 budget, the federal government also committed to engaging with provinces and territories to make climate disclosures consistent with the TFCD.

Responding to the climate crisis

Canadian climate laws and policies continue to evolve. Under the federal Impact Assessment Act, the Minister of Environment and Climate Change is directed to consider how a designated project would help or hinder Canada's abilities to meet its domestic and international climate commitments. The Strategic Assessment of Climate Change outlines what climate and emissions information project proponents ought to submit throughout a federal impact assessment, as well as providing guidance on how climate change will be considered throughout the impact assessment process.

The Supreme Court of Canada upheld the constitutionality of the Greenhouse Gas Pollution Pricing Act, finding that Parliament has jurisdiction to enact this law. The court acknowledged that the climate crisis "poses a grave threat to humanity's future" and addressed the difficulty of the "collective action problem" in which greenhouse gas emissions in one province may be offset by increased emissions in another province. While this ruling allows the federal carbon pricing scheme to continue applying in provinces and territories that lack an appropriate carbon pricing scheme, the power of Parliament to regulate provincial emissions reductions more broadly remains unclear.

In April 2021, the federal government increased Canada's 2030 emissions reduction target from a 30% to a 40–45% reduction below 2005 lev-

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els by 2030. This target, however, remains less ambitious than the targets of the USA and EU.

Canada's first-ever climate accountability legislation was passed into law in June 2021. The Canadian Net-Zero Emissions Accountability Act enshrines Canada's 2050 target of reaching net-zero emissions, and sets out a framework to set and report on milestone emissions reduction targets.

In July, the Minister of Natural Resources launched an engagement process to provide feedback on potential elements of legislation regarding a just and equitable transition to a low-carbon future for impacted workers and communities. The federal 2021 budget also allocated CAD2 billion to create new employment opportunities over the next five years, with CAD250 million of that funding focused on helping workers transition.

Heightened attention to indigenous peoples' issues

In May 2021, the remains of 215 indigenous children were found at the site of a former residential school in British Columbia (BC), sparking investigations at other school sites. As of August 2021, more than 1,300 unmarked graves had been found at five former residential school sites; many more sites remain unsearched. These discoveries, coupled with coverage of the 45 long-term drinking water advisories in 32 First Nations communities, continue to increase awareness of indigenous issues and are likely to result in greater attention to all impacts on indigenous rights including those arising from environmental laws and policies.

In September 2019, the United Nations Special Rapporteur on human rights and hazardous substances reported that indigenous peoples in Canada are disproportionately affected by toxic waste. MP Lenore Zann introduced a Private Member's Bill in February 2020 to develop a national strategy to redress "environmental racism" which she defined as "*the disproportionate number of environmentally hazardous sites established in areas inhabited primarily by members of Indigenous and other racialized communities*". Parliament recessed before the bill was passed.

After BC passed the Declaration on the Rights of Indigenous Peoples Act in 2019, requiring the province to harmonise its laws with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), it has been entangled in numerous high-profile resource conflicts. In December 2019, the BC Supreme Court granted Coastal GasLink an injunction against Wet'suwet'en First Nation members who were blocking its access to the pipeline project in protest of the project being built on their traditional territory. While a Memorandum of Understanding (MoU) was signed in May 2020 between Canada, BC and Wet'suwet'en hereditary chiefs which outlined a process for negotiating shared jurisdiction, the MoU did not address the Coastal GasLink pipeline, and Wet'suwet'en protests continue to date.

In June 2021, Canada passed the United Nations Declaration on the Rights of Indigenous Peoples Act, which similarly requires the federal government to harmonise its federal laws with UNDRIP. Progress on the alignment of federal laws with UNDRIP remains to be seen.

British Columbia (BC)

Provincial hydrogen strategy released

Shortly after Canada released a national hydrogen strategy in December 2020, BC released its comprehensive hydrogen strategy in July 2021, and declared itself the first Canadian province to do so.

The primary goals of the strategy are to: (i) encourage the use and adoption of low-carbon hydrogen to help it meet its 2050 net-zero emissions target; and (i) encourage the innovation and production of low-carbon hydrogen in BC to grow the sector and position the province as a leader in hydrogen research and production.

Given that two-thirds of BC's energy used for transportation, buildings and industry currently comes from fossil fuels, transitioning to a cleaner, low-carbon energy system will be pivotal for BC to meet its 2050 target. BC is geographically well-positioned in its proximity to key trading partners, with the export markets of China, Japan, South Korea and California predicted to account for nearly half of the total global hydrogen demand by the year 2050.

Court holds legal fees recoverable as remediation costs

In March 2021, the BC Court of Appeal held that legal costs which were reasonably incurred in connection with the remediation of a contaminated site could be fully recoverable under the Environmental Management Act. In Victory Motors (Abbotsford) Ltd v Actton Super-Save Gas Stations Ltd (2021 BCCA 129), the Court noted that nothing indicated that the words "all costs of remediation" in the Act could not include "full indemnification" for reasonably incurred remediation legal costs.

Prairie Provinces

Extension of time to commence an environmental contamination claim

In most cases, in Alberta, a claimant must commence an action in the earlier of (i) two years after the date on which the claimant first knew, or ought to have known, about the alleged injury or damage attributable to the defendant, or (ii) within ten years after the claim arose,

The ten-year limitation period operates as an absolute bar, as it prohibits a claim from being initiated regardless of when (or even whether) the claim was discovered. This "ultimate drop-dead rule" was designed to give parties some finality to legal exposure.

However, bringing an environmental claim within ten years is often not possible due to factors such as: the time it takes for pollution to develop or be detected; the difficulty of ascertaining the cause, nature or extent of the contamination; and the uncertainty of whether or not there is need for remediation.

While strict application of the ten-year ultimate drop-dead rule would satisfy the objective of ensuring timely resolution of liability and disputes, it would run directly contrary to the established "polluter pays" principle that is enshrined in case law from the Supreme Court of Canada, as well as in Alberta's Environmental Protection and Enhancement Act.

To try to resolve this conflict, Section 218 of the EPEA expressly gives the court discretion to extend the ten-year limitation period in certain cases.

Case law in Alberta

In Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited, 2019 ABCA 35 ("Brookfield") and United Inc. v Canadian National Railway Company, 2020 ABQB 413 ("United") the Alberta courts provided some guidance on the application of that discretion under Section 218.

In Brookfield, Imperial Oil sold the property in question decades before it was acquired by Brookfield from a later owner. During excavation for re-development, Brookfield discovered contamination and initiated the claim against Imperial Oil – more than 60 years after Impe-

rial had sold the property. The Court of Appeal was not willing to extend the limitation period in this case, as there was a complete lack of evidence available to speak to the events that had occurred. The court ultimately found that the prejudice suffered by Imperial Oil as a result of this passage of time was too great to allow the claim to proceed.

In United, the plaintiff, a residential developer, purchased lands formerly owned by CN Rail. Similar to Brookfield, United had purchased the lands from an intervening owner, and discovered significant contamination some three to four years after expiry of the ten-year period.

The court in United paid particular attention to CN's allegations of prejudice, and closely tested each potential issue raised, including:

- loss of documents;
- fading witness memories;
- any loss of ability to test the contamination;
- inability to call evidence to establish the proper standard of care;
- loss of ability to assess causation and whether that was an issue; and
- the death of a key witness.

The court found that, while the passage of time had resulted in some prejudice to CN in its ability to defend the claim, there was not enough evidence of real prejudice that arose during the almost 15 years between when the contamination occurred and when the claim was filed to deny the extension of the limitation period.

Timing is everything

These decisions make it clear that undue prejudice to the defendant is by far the most critical factor to be considered in exercising the discretion under Section 218. Of course, greater prejudice is more likely to be inferred with greater passage of time. For example, in Brookfield, the court was particularly concerned that the parties would not even be able to establish what the standard of care was back in 1949 when the contamination was alleged to have occurred.

While these decisions add some much-needed clarity, we will undoubtedly see more applications under Section 218 given the nature of environmental claims and the broad discretion that has been given to the courts under the section.

Ontario

Regulatory developments

Several regulatory initiatives were announced in 2021, including proposed amendments to the Low Carbon Fuels Regulation (Ontario Regulation 79/15). The regulation was intended to streamline the approvals process for certain manufacturers so they are able to switch from fossil fuels to alternative fuel materials that would otherwise be disposed of as waste. The proposed changes expand eligible fuel sources, eliminate some reporting obligations, increase limits on demonstration projects and reduce some of the pre-conditions to permit applications.

Ontario continues to have limited regulatory control over odour emissions beyond broad legislative prohibitions against emissions that may cause an "adverse effect". In May 2021, an update to the guideline to specifically address odour mixtures was announced. However, the absence of specific regulation in this area continues to create uncertainty and remains a barrier to even benign development proposals such as composting facilities, faced with an inability to point to objective compliance measures in response to local opposition raising odour concerns.

Ontario Land Tribunal absorbs ERT and others

In June 2021, the Ontario Land Tribunal was established to hear matters formerly heard by five separate tribunals, including the Environmental Review Tribunal. While this amalgamation allows for the possible elimination of the need for multiple hearings where an undertaking requires multiple approvals, it does create the potential for loss of tribunal expertise and, in turn, the potential for reduced judicial deference to the tribunal by courts undertaking judicial review of a tribunal decision.

Continued implementation of Excess Soils Regulation

Ontario's long-awaited Excess Soils Regulation finally saw implementation of its first phase in January 2021. The regulation is intended to create better management and control of excess soil generated during construction excavations. The second phase of the regulation comes into effect in January 2022, with the third and final phase coming into effect in 2025. Although the regulation has no doubt increased some of the immediate costs of handling, storing and disposing of excess soils, in the long term many of the problems cause by the previous unregulated system should be greatly reduced, if not eliminated entirely.

Court rules Ontario government acted unlawfully

In September 2021, the Divisional Court declared the Minister of Municipal Affairs acted unlawfully in failing to comply with the public consultation requirements of Ontario's Environmental Bill of Rights (EBR) regarding the expansion of ministerial powers related to Ministerial Zoning Orders (MZOs). Both the use of MZOs and the decision attracted a lot of controversy, with developers favouring the expanded powers over the objection of several environmental groups. The decision, while hailed as a victory by the latter, may well have little practical effect in that Section 37 of the EBR specifically protects the validity of any instrument even if it was issued in a manner that did not comply with the Act.

Court rules against tactical decisions made by litigants in contaminated land cases

Continuing a trend seen in in the 2019 decision of Soleimani v Rolland Levesque, 2019 ONSC 619 (Canadian Legal Information Institute, Canlii), Ontario courts once again ruled against what they saw as tactical decisions by a litigant that created the potential for unfairness. In Soleimani, the court ruled that the plaintiff could not rely on Section 5(1)(iv) of the Limitations Act to stop its limitation period from running. Under the unique exemption created by that subsection, the limitation period is suspended if "having regard to the nature of the injury, loss or damage" a proceeding would not be "an appropriate means to seek a remedy". The court found that Mr Soleimani made a "manifestly tactical decision" to avoid litigation costs in allowing the Ministry of Environment to direct the defendant's actions for four years before commencing litigation. The court found that the elements required to rely on the Section 5(1)(iv) of the Limitations Act had not been established.

Similarly, in Tre Memovia Developments Ltd. v 1491316 Ontario Inc. (2020 ONSC 1568) the plaintiff developer delayed seeking an order to conduct environmental testing of the neighbour's property until after it had completed the construction of a new development on its lands. The plaintiff had discovered unexpected contamination when the development started. The court found the plaintiff's tactical decision to delay the inspection request until after construction was completed resulted in prejudice to the defendant in that the plaintiff's site had been so disturbed as to render evidence obtained from the inspection to be of limited probative value. Furthermore, the construction had taken away

any meaningful opportunity for the defendant to undertake its own testing of the plaintiff's property. Leave to appeal to the Divisional Court was denied in April 2020.

Both decisions are consistent with a longstanding trend in Ontario civil litigation in which courts look unfavourably on what they consider to be tactical practices by one litigant that lead to a potential for unfairness. Contrast these decisions with Aragon Investments Ltd. v Moloney Electric Inc. (2021 ONSC 4686) issued in June 2021, in which a very late application to conduct an environmental investigation of a non-party's lands was granted. In Aragon, the matter had already been set down for trial when the plaintiff's expert, in preparing a responding expert report in accordance with the rules of practice, unexpectedly advised that additional evidence was required which could only be obtained by the additional subsurface investigation. It is clear from the decision that the court accepted that the plaintiffs were caught by surprise by this development and that the timing of the proposed investigation would not result in any unfairness to the defendants.

Quebec

Energy transition in Quebec

On 7 April 2016, the government of Quebec released the 2030 Energy Policy, which sets out Quebec's goal of becoming a North American leader in energy efficiency and renewable energy by 2030. On 16 November 2020, the government unveiled the 2030 Plan for a Green Economy, which prioritises the development of the green hydrogen and bioenergy sector, as well as its action plan for the implementation of the policy covering the 2021–26 period.

The 2030 Energy Policy and its implementation

The policy defines Quebec's energy transition strategy until 2030. Its objectives include promoting a low-carbon economy, making optimal use of Quebec's energy resources and taking full advantage of the potential of energy efficiency.

To achieve these objectives, the government has adopted five targets to be met by 2030, including increasing the share of renewable energy in total energy production by 25% and increasing bioenergy production by 50%. The policy is implemented through amendments to the existing legislative and regulatory framework.

The first implementation action amended the Act respecting the *Régie de l'énergie* (Quebec's energy regulator) to introduce the concept of renewable natural gas (RNG), which in turn led to the adoption of a regulation that requires natural gas distributors to deliver a minimum volume of RNG to their customers each year. This volume will gradually increase by 2025, from 1% to 5% of the total volume of natural gas delivered in a year.

The Minister of Energy and Natural Resources is now responsible for ensuring effective governance of the energy transition, innovation and efficiency.

The 2030 Plan for a Green Economy

The Plan aims to reduce greenhouse gas emissions by 37.5% by 2030, compared to 1990, through the implementation of measures such as increasing the electrification of transportation and buildings, reducing the free allocation of emissions allowances to the industrial sector and increasing the use of other forms of renewable energy.

In addition, the government announced, in early 2021, the allocation of funding to support the development of the green hydrogen industry.

While several renewable hydrogen production projects aimed at adding hydrogen to natural gas are already under development in Quebec,

these projects have evolved until now in the absence of standards and regulations adapted to allow the development of this new form of renewable energy. The Quebec legislative and regulatory framework only deals with hydrogen as a hazardous material.

However, on 30 September 2021, the National Assembly adopted Bill 97, which, among other things, amends the Act respecting the *Régie de l'énergie* to include hydrogen as a "gas from renewable sources" that can be added to traditional natural gas. This legislative change should allow for the accelerated development of the green hydrogen industry in Quebec.

The rapid changes put in place by the Quebec government suggest that renewable energy projects will be accelerated and are intended to facilitate the achievement of the objectives of energy transition and reduction of GHG emissions by 2030.

Contaminated soil management

While the province is working to promote the development of green energy, it is also taking action to regulate the treatment, transportation, reclamation and landfill of contaminated soil.

In June 2021, Quebec adopted the final version of the highly awaited regulation respecting the traceability of excavated contaminated soil. It will be gradually enforced as of 1 November 2021. The adoption of this new regulation aims, among other things, to put an end to the unethical practice of burying contaminated soil excavated in Quebec outside of the province, particularly in Ontario.

This regulation is part of the many changes to environmental law in Quebec that began in 2015 with the tabling of a green paper on the reform of the Environmental Quality Act.

Other measures have also been taken to tighten the framework for contaminated soils. These include amendments to the Land Protection and Rehabilitation Regulation and to the regulation respecting contaminated soil storage and contaminated soil transfer stations, as well as the adoption of the regulation respecting the regulatory scheme applying to activities on the basis of their environmental impact (REAFIE).

Under the latter regulation and in accordance with the EQA, the vast majority of activities involving contaminated soil require an authorisation from the Quebec Minister of the Environment prior to carrying out such activities. The application for an authorisation must include a monitoring programme for soil entering or leaving the facility, station or site.

Based on the modular approach of the REAFIE, the reception of contaminated soils on or under land may be eligible for a declaration of conformity or an exemption allowing a relaxation of the measures governing this activity – however, such an exemption applies under very limited conditions that present a lower risk to the environment.

Conclusion

Canadian environmental law continues to evolve at a rapid pace. Climate change, issues impacting indigenous peoples and day-to-day pollution regulation remain the active focus of most Canadian lawmakers and courts. All signs point to these trends continuing for the foreseeable future.

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Miller Thomson LLP is comprised of approximately 500 lawyers, situated in 12 strategically placed offices across Canada. National and multinational businesses must navigate Canada's environmental laws and regulations, which evolve constantly and vary from province to province. Miller Thomson's environmental law group is a trusted partner when it comes to managing environmental risk, including undertaking environmental due diligence, ensuring environmental regulatory compliance, preventing and defending against regulatory prosecutions, pursuing or defending environmental civil claims, structuring transactions involving environmental risk, and keeping up with this fast-moving area of the law. Its lawyers include legal planners, negotiators, former regulators and advocates who have the expertise that comes with deep experience and an understanding of the complex issues that face corporate decision-makers, lenders and regulators.

AUTHORS

Bryan Buttigieg is recognised as one of the leading practitioners of environmental law in Canada and is certified by the Law Society of Ontario as a specialist in environmental law. His practice includes a combination of litigation and transactional advice involving civil litigation and regulatory defence representation in environmental and occupational health and safety matters. Bryan has provided extensive advice in support of brownfields developments, site remediation and financing of properties with environmental issues. Bryan is a trained mediator and a panel member of the Canadian Centre for Environmental Arbitration and Mediation.

Adina Georgescu practises in the areas of administrative, municipal, urban planning, environmental and energy law. In environmental law, Adina advises her clients on questions related to private nuisance; project and activity compliance with federal, provincial or local environmental standards; issuance of environmental authorisations; environmental issues such as the characterisation of soil, rehabilitation programmes, drafting and publication of contamination and decontamination notices, contaminated soil management and decontamination; and recycling and recovery of residual materials.

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Darin Hannaford is an experienced litigator working with a wide range of industries in Western Canada. For more than two decades, Darin has provided practical legal advice to clients in a variety of contractual, construction, transportation, environmental and regulatory matters.

Christie McLeod focuses on environmental, Aboriginal, administrative, and other litigation matters. Christie joined Miller Thomson as a student in 2019 and concluded her articles in 2021. She completed the joint JD/Masters in the environmental studies programme at Osgoode Hall Law School and York University, with the latter focusing on Canadian climate accountability. During her education, Christie also worked with Human Rights Watch in New York City and Toronto to research the impact of climate change on food security in indigenous communities in Canada, and with West Coast Environmental Law as a summer student and legal researcher.

Miller Thomson LLP

40 King Street West
Suite 5800
Toronto
ON
M5H 3S1
Canada

Tel: +1 416 595 8500
Fax: +1 416 595 8695
Email: toronto@millerthomson.com
Web: www.millerthomson.com

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