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Environmental Law 2023

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Canada: Trends and Developments

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Trends and Developments

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Miller Thomson LLP

Miller Thomson LLP is comprised of approximately 500 lawyers, situated in 12 strategically placed offices across Canada. Its 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.

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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 the financing of properties with environmental issues. He 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, she advises clients on questions related to:

private nuisance; project and activity compliance with federal, provincial or local environmental standards; the issuance of environmental authorisations; environmental issues such as the characterisation of soil, rehabilitation programmes, the drafting and publication of contamination and decontamination notices, contaminated soil management and decontamination; and the recycling and recovery of residual materials.

CANADA TRENDS AND DEVELOPMENTS

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Selina Lee-Andersen is a senior environmental lawyer with in-depth experience and leading industry insights that enable her to provide practical advice to address clients' most

challenging legal issues. Having worked in an advisory capacity in both the public and private sectors, she is well positioned to deliver innovative legal solutions and value-added guidance on the opportunities and impacts of regulatory developments. Clients value Selina's ability to understand the business environment in which they operate and to tailor legal solutions best suited to meet their needs.



Christie McLeod focuses on environmental, Aboriginal, administrative and other litigation matters. She joined Miller Thomson as a student in 2019 and concluded her articles

in 2021, completing 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.

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Environmental Law in Canada: an Introduction

National Developments

Challenges to federal jurisdiction could impact net-zero emissions goals

In October 2023, Canada's highest court ruled that those parts of the federal Impact Assessment Act affecting the assessment of "designated projects" were outside federal jurisdiction and unconstitutional. The court found that the legislative scheme granted the decision maker "a practically untrammelled power to regulate projects qua projects, regardless of whether Parliament has jurisdiction to regulate a given physical activity in its entirety".

The federal government has indicated it will propose new legislation that is consistent with the ruling. In the meantime, however, the ruling also casts doubt on the constitutionality of other federal initiatives, including the draft Clean Electricity Regulations, released in August 2023, which are intended to limit carbon emissions from large-scale electricity generating plants. Public response from Alberta, one of the provinces most impacted by this proposal, has been strongly critical and leaves little doubt that another constitutional challenge would be likely.

These cases continue to illustrate the difficulty any Canadian federal government has in setting and meeting national emissions targets. While the federal government has the power to make international commitments promising emission reductions, the implementation of these promises often involves steps that are purely within provincial constitutional authority.

British Columbia (BC)

Building Code requires newbuilds to be more energy efficient

The 2022 BC Building Code update came into effect on 1 May 2023. Most new buildings will be required to comply with the BC Energy Step Code, which means they must be evaluated to ensure their design and construction meet the Step Code's energy efficiency performance targets.

Projects such as single family homes or townhouses will be required to meet a Step 3 standard (20% more energy efficient), while projects such as multi-unit residential or large commercial offices will be subject to a Step 2 standard (20–40% more energy efficient). Those applying for building permits in BC on or after 1 May 2023 must now show how a project meets or exceeds the relevant standard.

These new requirements demonstrate an incremental progression towards achieving BC's 2032 target of having all new buildings reach a net-zero energy-ready level of efficiency. A building that is net-zero energy-ready has been designed and constructed to be compatible with renewable energy technologies, such that it could achieve net-zero if these technologies were added to it.

Court ruling to change province's mineral tenure system

In September 2023, the British Columbia Supreme Court (BCSC) released a landmark judgment in *Gitxaala v British Columbia* (Chief Gold Commissioner), 2023 BCSC 1680 ("Gitxaala"), finding that the province's mineral tenure system must be modernised to provide for consultation with Indigenous peoples before mineral claims are granted.

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In this case, the Gitxaala Nation and the Ehattesaht First Nation (the “First Nations”) claimed that the province was constitutionally obliged to consult with them prior to the registration of mineral claims in their asserted traditional territories. In the current tenure system under the Mineral Tenure Act, RSBC 1996, c 292 (the “Mineral Act”), a prospector could receive mineral rights automatically by simply selecting sections of land on an online map and paying a fee; there was no requirement for prior consultation with potentially affected Indigenous groups.

The BCSC found that granting mineral tenures results in adverse impacts on First Nations and therefore triggers a duty to consult. Justice Ross stated that the granting of mineral claims had the following adverse impacts to the First Nations:

- it permanently removed minerals from their asserted territories, which reduces the value of the area;
- it transferred the rights of minerals to the mineral holder;
- it conferred the exclusive right to explore for minerals in an area and provided a financial benefit, an opportunity of which the First Nations were correspondingly deprived; and
- it afforded the recorded mineral holder the right to disturb the land.

While the duty to consult was triggered, Justice Ross ruled that the Mineral Act was not constitutionally invalid, as the Chief Gold Commissioner who administers the Mineral Act has discretion to create a consultation process prior to granting mineral claims.

The BCSC gave the province 18 months to consult with the mining industry and Indigenous groups, and to establish a regime that allows for consultation, or to amend the Mineral Act.

Notably, this ruling does not reverse or impact existing mineral claims, and the province can continue to grant mineral claims under the existing mineral tenure system during the 18-month window.

Gitxaala was also the first case to consider the legal effect of the Declaration on the Rights of Indigenous People Act, SBC 2019, c44 (DRIPA), the province’s legislation affirming the United Nations Declaration on the Rights of Indigenous People (UNDRIP). The First Nations sought a declaration that the mineral tenure system under the Mineral Act was inconsistent with UNDRIP.

Justice Ross ruled that DRIPA does not implement UNDRIP into BC’s domestic laws and that UNDRIP remained a “non-binding international instrument”. Justice Ross did use DRIPA as an interpretative aid, however, to address the proper reading of the Mineral Act.

Alberta Mandate for Alberta Environment and Protected Areas

Following the provincial election on 29 May 2023, the Premier issued a mandate letter to the provincial Minister of Environment and Protected Areas, who has been tasked with the following, among other things:

- working with the federal government, First Nations and industry to develop and implement an accelerated strategy for oil sands mine water management and tailings pond reclamation;
- co-ordinating with the Minister of Energy and Minerals to implement the Emissions Reduction and Energy Development Plan;
- reviewing Alberta’s water management strategy to increase the availability of water and

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- water licences to Alberta municipalities, businesses and agricultural producers;
- working with the Minister of Energy and Minerals to develop a plan to improve the current reclamation certificate issuance process and streamline reclamation requirements for new and emerging energy sources;
- supporting continued technology and innovation through the Technology, Innovation and Emissions Reduction (TIER) programme, including establishing new protocols to develop and trade carbon credits;
- conducting an analysis into Alberta's carbon sink capacity to establish an understanding of Alberta's position in relation to carbon neutrality;
- implementing extended producer responsibility systems and creating a circular economy for plastics development and recycling in Alberta; and
- working with the Minister of Energy and Minerals to develop and implement a regulatory framework for the use of small modular reactor technology.

Updated climate change plan

In April 2023, the Alberta government released the Emissions Reduction and Energy Development Plan (the Plan), which sets out eight strategic principles to guide actions on reducing emissions across industry sectors and maintaining energy security. These principles include:

- an Alberta plan based on practical, achievable pathways;
- delivering Alberta energy to the world while reducing emissions;
- affordability and reliability;
- energy security;
- partnership with Indigenous communities and organisations;
- industrial policy and systems approach;

- sustainable finance; and
- conservation, protection and enhancement of nature-based solutions.

While the Plan also includes an aspiration to achieve a carbon-neutral economy by 2050, it does not include an interim 2030 target to help guide emission reduction activities. As it relates to emissions from the oil and gas sector, the Plan indicates that the province will engage with stakeholders to assess potential pathways to achieve a 75–80% methane emission reduction target from the conventional oil and gas sector by 2030 (from 2014 levels).

The Plan also contains a commitment to review the Technology Innovation and Emissions Reduction Regulation by the end of 2026, to ensure that the policy is delivering the intended outcomes of emission reductions while protecting competitiveness. With respect to carbon markets, the province will look into a framework for a voluntary credit market in Alberta for certain activities or sectors, including objectives that support Article 6 of the Paris Agreement and the objectives of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSA).

Furthermore, the Plan indicates that the province will explore partnerships in emissions trading and market linkages with other provinces, such as British Columbia, in order to support carbon capture, utilisation and storage and liquefied natural gas.

Moratorium on renewable energy approvals

In August 2023, the Alberta government announced that, pursuant to Section 75(1)(a) of the Alberta Utilities Commission Act, it had directed the Alberta Utilities Commission (AUC) to suspend approvals of new renewable electricity projects (power plants as defined in the

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Renewable Electricity Act) over 1 MW for a period beginning 3 August 2023, and ending 29 February 2024. Microgeneration projects, projects under 1 MW and isolated generation projects (ie, a power plant that serves an isolated community that is not served by the transmission system) are exempted from the pause, as they are not expected to affect the assessment of impacts on agricultural and other significant land.

In its announcement, the Alberta government cited the rapid growth and development of renewable electricity in Alberta as having created issues relating to land use, electricity system reliability and concerns from rural municipalities and landowners. The suspension of new project approvals is intended to provide time for the AUC to undertake a review of the policies and procedures for the development of renewable electricity generation in the province.

The AUC inquiry will include a review of:

- the development of wind and solar projects on specific types or classes of agricultural land and public land;
- the impact of power plant development on Alberta's pristine landscapes;
- the mandatory reclamation security requirements for power plants;
- the impact of the increasing growth of renewables on Alberta's generation supply mix and electricity system reliability; and
- the role of municipal governments in land selection for project development and review.

According to the Alberta Electric System Operator and Alberta Major Projects, approximately 3,400 MW of wind and solar projects were under construction as of May 2023, worth an estimated value of more than CAD2.7 billion.

Saskatchewan

Net-zero by 2050 electricity plan

In May 2023, Saskatchewan released its plan for electricity to 2035 and beyond, entitled "Saskatchewan's Power Future: Looking to 2035 and Beyond", under which Saskatchewan has committed to achieving net-zero by 2050. The plan is targeted at keeping utility rates affordable for consumers, and contemplates using existing coal and natural gas-powered generation facilities until their end of life. The province has also indicated that it will continue working toward small modular reactors and expanding intermittent power sources such as wind and solar.

Saskatchewan's net-zero by 2050 target for electricity generation falls short of the federal government's target for a net-zero electricity grid starting in 2035 (to achieve a net-zero emissions economy by 2050) under the proposed federal Clean Electricity Regulations.

Moratorium on associated gas royalties

The Ministry of Energy and Resources of Saskatchewan has implemented a five-year Associated Gas Royalty Moratorium on the collection of Crown Royalty and Freehold Production Tax on associated gas produced from wells other than gas wells (including natural gas produced from oil wells), in an effort to mitigate methane emissions in Saskatchewan. In particular, the moratorium fulfils a commitment announced in the Government of Saskatchewan's Growth Plan 2020-2030 to assist producers in meeting their regulatory obligations to reduce methane-based greenhouse gas emissions by 40–45% between 2020 and 2025. The moratorium applies to natural gas produced between 1 April 2021 and 1 April 2026.

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Ontario

Greenbelt controversy and political fallout

Most of 2023 was dominated by the fallout from the Ontario government's controversial decision in late 2022 to take some lands out of the Greater Golden Horseshoe Region's protected "Greenbelt" and open it up for development, ostensibly to help with Ontario's lack of "affordable housing".

The Greenbelt was created in 2005 to permanently protect productive farmland and natural features from uncontrolled urban development. Overwhelming public opposition to the decision and suggestions of improper special treatment to developers friendly to the government led to an investigation and special report by the Office of the Auditor General of Ontario. The report was published in August. Its conclusions were scathing and included a statement that "In its haste to promote housing development, the government sought to remove (or re-designate) land sites from the Greenbelt without gathering and using complete information and without effectively leveraging the expertise of provincial experts in land-use planning, Indigenous communities, or the municipalities and conservation authorities that would have to address the impact of the changes".

Direct access to the Housing Minister's Chief of Staff resulted in certain prominent developers receiving preferential treatment. About 92% of the approximately 7,400 acres ultimately removed from the Greenbelt are five land sites put forward by two developers (which included a land site associated with a third developer) who had access to the Chief of Staff in September 2022.

On 21 September, following the resignations of some of the key government and staff mem-

bers involved in the initial decision, the Premier announced a reversal of the plan to open up the lands in question for development and admitted the original decision was "a mistake". The fallout from this decision is likely to continue into 2024 as a result of the Royal Canadian Mounted Police announcement in October that it had launched a criminal investigation "into allegations associated to the decision from the Province of Ontario to open parts of the Greenbelt for development".

Small modular nuclear reactors

Ontario is home to almost 40% of Canadians, and obtains about 58% of its power supply from 18 of Canada's 19 commercial nuclear reactors. In an effort to meet Ontario's future energy needs while minimising GHG emissions, it seems inevitable that nuclear power will continue to play an important role well into the future.

In an attempt to avoid the notorious delays and cost-overruns associated with the large-scale facilities currently in use, Ontario is looking to small modular reactors (SMRs) as a solution. Ground was broken on the first SMR in December 2022. In July 2023, the Ontario government announced that a total of four SMRs are now in the planning and licensing stage at the Darlington Nuclear Site. Once deployed, these are expected to produce 1,200 MW of electricity, equivalent to powering 1.2 million homes. The current plan is for these SMRs to become operational between 2034 and 2036, with learning from the first SMR being taken into account in completing the other three.

Carbon capture and storage (CCS) coming to Ontario?

In June, the Ontario government enacted legislation that repealed Ontario's ban on underground carbon dioxide injection. Amendments to the Oil, Gas and Salt Resources Act enable the regu-

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lation of projects that are to test, assess, pilot or demonstrate an activity, method or technology that is new or innovative to Ontario (special projects), including projects for carbon storage. However, no special projects may seek authorisation under this act, including carbon storage, until regulation proposals are developed, consulted on, and approved. Public consultation on the proposed changes, pursuant to Ontario's Environmental Bill Of Rights, took place in the spring. No firm timeline has been announced for the publication of the proposed implementing regulations.

Quebec

Energy transition in Quebec: 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 first implementation action amended the Act requiring 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.

The 2030 Plan for a Green Economy

The Plan aims to reduce greenhouse gas emissions by 37.5% compared to 1990, by 2030, through the implementation of measures such as increasing the electrification of transporta-

tion and buildings, reducing the free allocation of emissions allowances to the industrial sector and increasing the use of other forms of renewable energy.

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.

However, on 30 September 2021, the National Assembly adopted Bill 97, which, among other things, amends the Act requiring the *Régie de l'énergie* to include hydrogen as a "renewable source" natural gas. Thus, like RNG, hydrogen will now be qualified as natural gas from a renewable source, which should allow for the accelerated development of the green hydrogen industry in Quebec.

In May 2023, the government of Quebec presented the 2023-2028 Implementation Plan (the "Implementation Plan") of the 2030 Plan for a Green Economy. The Implementation Plan is structured around five axes:

- to mitigate climate change;
- to build the economy of tomorrow;
- to adapt to climate change;
- to create a predictable environment that is conducive to the climate transition; and
- to accelerate the development of knowledge.

Under the third axis, the *ministère des Affaires municipales et de l'Habitation* (Ministry of Municipal affairs and Housing) must aim to ensure that all municipalities can assess their climate risks and draw up an adaptation plan. Accordingly,

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all municipalities should have developed a risk assessment and adaptation plan by 2030.

Net zero GHG for Quebec buildings as soon as 2040

In December 2020, the City of Montreal adopted its 2020-2030 Climate Plan (the “Climate Plan”), which aims to achieve carbon neutrality by 2050. Specifically, the Climate Plan calls for a complete ban on the use of fossil fuels in all municipal buildings and their replacement with renewable energy by 2030.

While the city’s carbon neutrality goal was set to be met by 2050, the current administration announced in May 2022 that it was bringing it forward by ten years by publishing its Roadmap towards zero-emission buildings in Montreal by 2040 (the “Roadmap”).

For new buildings, the roadmap called for the adoption of a new regulation by 2023 that would require a zero-emission performance threshold for new building permit applications. At the time of writing, this had not yet been done. The city plans to impose gradual GHG reduction performance thresholds for existing buildings, so that all buildings will be supplied with 100% renewable energy by 2040.

These new obligations are in addition to By-law 21-042 regarding GHG emission disclosures and ratings of large buildings adopted in 2021, which requires building owners to disclose the level of GHG emissions resulting from energy consumption of their buildings. As of January 2023, this By-law applies to any building with a floor area of 5,000 sq m or more, or with 50 or more dwelling units.

Other cities and municipalities in the province are moving to adopt climate plans and to impose

new obligations for building owners, with the objective to reduce GHG emissions. This will have a direct financial and administrative impact on building owners, who will need to comply with new standards and requirements within a relatively short timeframe.

Contaminated soil management

In June 2021, Quebec adopted the final version of the highly awaited regulation regarding the traceability of excavated contaminated soil.

The regulation applies to all transportation of excavated contaminated soils on or after 1 January 2023, regardless of the date on which the excavation work began. In addition, as of that date, stakeholders involved in the management of contaminated soils – such as owners of contaminated soil, transporters and receiving sites – must register with Traces Québec, which is the government system for the traceability of excavated contaminated soils.

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 regarding contaminated soil storage and contaminated soil transfer stations, as well as the adoption of the regulation regarding the regulatory scheme applying to activities on the basis of their environmental impact (REAFIE).

Decarbonisation of buildings

The municipality of Prévost became the first municipality in Quebec to regulate the decarbonisation of buildings on its territory: By-law 831 on the decarbonisation of buildings and other measures to reduce greenhouse gases came into force on 2 October 2023.

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Starting on 31 December 2023, By-Law 831 will limit the use of propane and natural gas in the municipality's future residential and institutional buildings, and also prohibit the installation of certain new natural gas-powered appliances, such as patio heaters.

Conclusion

Canadian environmental law continues to evolve at a rapid pace. The federal government and the provinces do not always agree on how to address fundamental issues such as climate change. Nevertheless, all jurisdictions are expected to continue to actively promote new legislative initiatives.

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