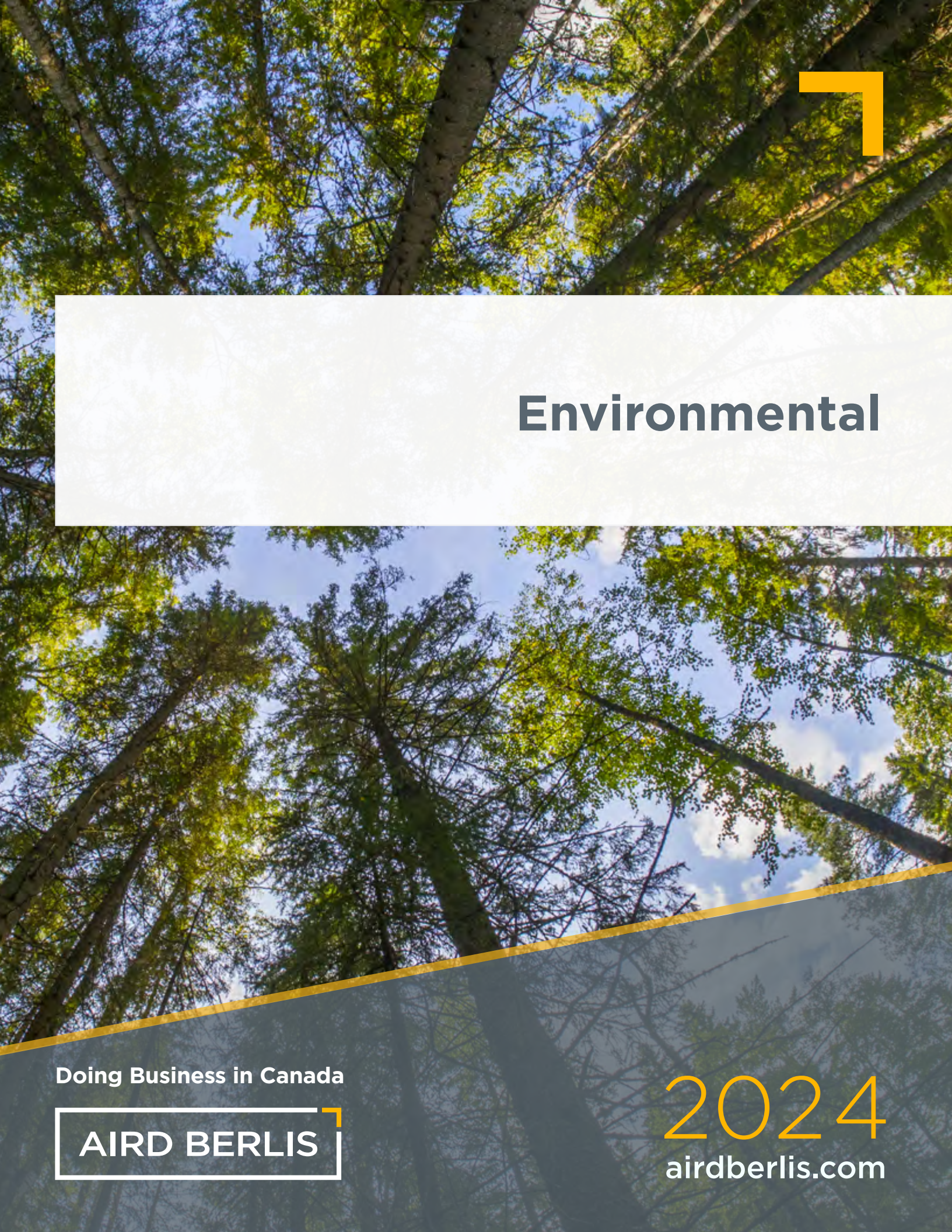

Environmental

Doing Business in Canada

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JURISDICTION

In Canada, the federal government has a much smaller role in environmental regulation than does the U.S. federal government. The authority to create laws dealing with the environment is shared between the provincial and federal government. Each province and territory in Canada has its own environmental protection legislation, whose statutes are the primary regulatory tools. In Ontario, the primary environmental statute is the *Environmental Protection Act* ("**OEPA**"), first enacted in 1971. Other environmental statutes in Ontario include the *Ontario Water Resources Act, Safe Drinking Water Act, 2002*, the *Clean Water Act, 2006*, and the *Environmental Assessment Act*. Similar types of legislation are found in most provinces.

The federal government is responsible for limited interprovincial environmental legislation as well as international rules. For instance, the transportation of dangerous goods that occurs across provincial borders or international borders is governed by federal legislation. The federal government also takes the lead in negotiating international environmental initiatives and treaties (e.g., Paris Agreement or the Great Lakes Treaty). In addition, the federal government presides over the *Canadian Environmental Protection Act* ("**CEPA**") which, despite its name, has limited applicability beyond federal lands and toxic substances. It is through CEPA that greenhouse gasses have been listed as toxic, subsequently allowing for their regulation by the federal government.

Municipalities, using localized public health and welfare as justification, have entered the environmental domain for more than two decades (e.g., lawn pesticides, green roof standards, sewer discharges and local emissions), enacting by-laws that can have a significant impact on facility design, operation and development. It is important to appreciate that particular requirements vary from municipality to municipality, which may be in addition to federal and provincial requirements in the same area.

Most governments have endorsed "polluter pays" and "get tough on polluters" policies, though legislation does not necessarily rely on this principle to find liability and assign responsibility for addressing pollution. These policies have resulted in several governments amending their environmental statutes to permit the issuance of administrative penalties, or environmental tickets, for relatively minor events of non-compliance and characterizing events of non-compliance as continuing offences with each day constituting a new offence. However, even these "minor" administrative penalties can result in significant payments and may also serve as an aggravating factor in any subsequent prosecution. Most jurisdictions provide director and officer liability for certain issues of environmental non-compliance with some requiring an actual environmental harm to impose such liability.

Government ministries or agencies, such as the Ontario Ministry of the Environment, Conservation and Parks ("**MOECP**"), can issue orders to persons who have management or control of property (i.e., officers and directors) to investigate, mitigate and/or remediate pollution. Director's Orders have been issued under the OEPA, which attribute no-fault liability personally to directors and officers of bankrupt corporations. In one case, prior to a determination on the merits, the MOECP entered into a settlement agreement with the former directors and officers of the bankrupt corporation who paid approximately C$4.75 million for remediation costs. The extent of liability will be an issue for directors, especially where insolvency of the company is a risk.

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

WATER

Canada has no single over-arching water quality protection statute administered by the federal government akin to the *Clean Water Act* in the United States. That being said, the federal government is responsible for the *Fisheries Act* which, although ostensibly directed at the regulation of Canadian fisheries, has been used increasingly in recent years by the federal Department of Fisheries and Oceans to regulate water pollution in Canadian waterways. Aside from the federal *Fisheries Act* and the *Canadian Navigable Waters Act*, each province and territory has its own water quality statute(s) which it administers through its Ministry of the Environment or Natural Resources. These statutes generally establish water quality standards, water taking/transfer limits, permitting and approval regimes and enforcement measures. The quantum and quality of water takings (ground and surface) and discharges by industry are also regulated, with water transfers becoming increasingly controversial.

AIR

The federal government has air emission regulatory tools contained in the CEPA. The federal government passed a number of regulations to

limit or reduce air emissions, including regulations for heavy duty vehicles (including full-size pickups, semi-trucks, garbage trucks and buses) and electricity generation from coal. CEPA necessitates the reporting of emissions where the substance is listed in the National Pollutant Release Inventory substance list and the amount of the emission is in excess of the reporting threshold. The National Pollutant Release Inventory is a publicly accessible database that tracks the release, disposal and transfer of pollutants.

Provincial and territorial legislation is generally of more importance to commercial and industrial emitters in Canada. For large emitters the federal government has reporting obligations while the provinces tend to issue permits and approvals for emissions related to facilities. Ontario has incorporated several of the U.S. Environmental Protection Agency's air modeling practices into its legislation. Reporting obligations of emissions are increasingly becoming the norm as reporting thresholds are progressively lowered.

Climate change-related legislation is a patchwork across the country. Several provinces have worked with certain U.S. states through the Western Climate Initiative ("**WCI**") on emissions trading programs. In addition, carbon taxes are used in some jurisdictions, including British Columbia and Alberta. In late 2011, Quebec, a WCI Partner, adopted a regulation under its *Environmental Quality Act*, which creates a cap-and-trade system for greenhouse gas emissions. In 2016, Ontario enacted the *Climate Change Mitigation and Low-carbon Economy Act* ("**Climate Change Act**"), which created a cap-and-trade system. Ontario began trading in 2017 and joined the emissions trading bloc in place between Quebec and California with its first participation in a joint auction occurring in early 2018. In July 2018, the newly elected Ontario government repealed the Climate Change Act and ended Ontario's participation in cap and trade. However, the province of Nova Scotia joined the WCI in May 2018 and began auctioning in 2020.

In early 2019, the federal government implemented a federal carbon pricing system for provinces that have not designed their own pollution pricing systems in accordance with the federal government's climate action plan. The *Greenhouse Gas Pollution Pricing Act* is comprised of an output-based pricing system and a fossil fuel tax. In September 2020, the Supreme Court of Canada heard appeals from three provincial Courts of Appeal (Ontario, Saskatchewan and Alberta) regarding the constitutionality of this legislation and additional provinces joined these proceedings as intervenors. The Supreme Court of Canada handed down its decision in March 2021, holding that the federal government has the right to impose minimum carbon-pricing standards on the provinces. As a result, any province that does not have its own equivalent program is obligated to follow the federal rules.

NOTABLE CANADIAN CLIMATE LITIGATION

Worldwide, there is significant litigation aimed at addressing governments and corporations' obligations to address climate change, with varying degrees of success. Novel torts are arising in the context of climate change litigation, including youth successfully arguing in an Australian court that a duty of care is owed by governments to children when making regulatory decisions under environmental protection legislation.

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

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

- Ontario's target fell severely short of what scientific consensus required, thus increasing the risk to Ontarians' life and health;
- The court rejected Ontario's arguments that its emissions were globally insignificant, recognizing that "every tonne of CO2 emissions adds to global warming and leads to a quantifiable increase in global temperatures that is essentially irreversible on human timescales;" and

- Positive rights are not currently recognized under the Charter. But the court found that the applicants made a compelling case that climate change and the existential threat that it poses to human life could justify the imposition of positive obligations under section 7 of the Charter, though it did not find so on the facts of this case.

The Ontario Court of Appeal heard the appeal of *Mathur* on January 15, 2024. At the date of drafting, no decision has been rendered by the Ontario Court of Appeal.

The Federal Court of Appeal is expected to hear two challenges to federal climate policy this year: the *La Rose* claim, brought by a group of 15 children and youth from across Canada, and the *Misdzi Yikh* claim, brought by two houses of the Wet'suwet'en First Nations. In both claims, the plaintiffs alleged that the federal government's approach to climate change infringes on their constitutional rights. The plaintiffs did not specify any particular regulations and statutes; instead, they claimed that Canada's overall approach to climate change is deficient. In 2020, the Federal Court rejected both claims without leave to amend on the grounds that they were not justiciable.

However, the Federal Court of Appeal disagreed—at least in part—holding that the claimants' section 7 claims could proceed, while their section 15 claims could not. The Court held that the section 7 claims were linked to Canada's failure to meet its commitments under the Paris Agreement, which were later ratified by Parliament. The Federal Court of Appeal seemingly opened the door to further environment-related Charter challenges, explaining that while the claims were "novel," they were not doomed to fail: "The law is not static and unchanging—actions that were deemed hopeless yesterday may succeed tomorrow." The Court noted that the effects of climate change are widespread and grave, and disproportionately threaten Indigenous communities and youth; climate change might thus constitute the "special circumstances" necessary to establish positive rights under section 7 of the Charter.

LAND

Crucially for cross-border transactions, contracting out of regulatory liability under Canadian law is much more difficult than it is in the United States. The U.S. expectation is often that a U.S. corporation that wishes to engage in business with or by a Canadian corporation can, in its agreement with the Canadian entity, insert provisions whereby the U.S. entity limits liability that may result from the Canadian operations or assets. However, Canadian law is such that a party cannot contract out of its regulatory liability for events or actions that occur in Canada. The best that can be done is to negotiate indemnities. Thus, a U.S. corporation that acquires contaminated land in Ontario one day could be subject to statutory orders and penalties to clean-up the property the next day.

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

Ontario is one of the provinces to have substantive and directed legislation for the remediation of contaminated lands or brownfields. The OEPA provides certain basic immunity from the MOECP orders under the OEPA (the MOECP's primary enforcement tool). These include orders with respect to a once-contaminated property where prescribed remediation has been conducted and proper filings with the MOECP have been made by a property owner or entity in control. What is not included in the amendments is any funding mechanism similar to the *Comprehensive Environmental Response, Compensation, and Liability Act* in the United States, meaning that the remediation of brownfields in Canada, including Ontario, remains primarily market driven. In some instances, municipalities may work with the developer to create incentives for the remediation of brownfields through a community improvement plan, waiver of development charges and property tax incentives.

Where a proposed land use, such as mining and waste disposal, may result in long-term environmental management costs even after operations have ceased, the government may require financial assurance to be provided at the time of permitting the facility to avoid the potential for a legacy of unfunded environmental contamination. Financial assurance is intended to ensure that legacy environmental issues are properly funded and to avoid complications should a company fall into financial distress. The adequacy of such financial assurance and the priority ranking of environmental obligations in bankruptcies and restructurings continues to be a highly contentious area.

TOXIC SUBSTANCES

The CEPA regulates the production, manufacture, use and disposal of toxic substances—excluding pesticides, which have a separate combination of federal and provincial regulation. Through this legislation, the Minister of the Environment can require samples and information with respect to a substance in order to assess toxicity. Under the CEPA, a substance is defined as "toxic" if it has an immediate or long-term harmful effect on the environment or biological biodiversity, or if it constitutes, or may constitute, a danger to human life or health. The CEPA contains penalty provisions, including mandatory minimum fines and maximum fines up to C$12 million. The federal government continues to review its classification of several substances to ensure that the proper safeguards are in place given the current state of scientific knowledge about the health and environmental impacts of the substance.

Provincial legislation or municipal by-laws may impose similar or more restrictive standards for the release, storage and disposal of hazardous materials, including the preparation of plans to reduce the use of certain toxic products. Provinces and territories generally adopt federal standards for the transportation of dangerous goods.

Most recently, the federal government has weighed in on plastics pollution, releasing regulations under CEPA which add "plastic manufactured items" to the List of Toxic Substances (in Schedule 1 of the CEPA). These regulations prohibit the manufacture, import and sale of single-use plastic checkout bags, cutlery, foodservice ware made from or containing certain plastics, ring carriers, stir sticks and straws—subject to accessibility laws for persons with disability-related needs.

These new rules were the subject of a judicial challenge in the Federal Court of Canada in March 2023. In its decisions from November 16, 2023, the Federal Court struck down the classification of plastics as unconstitutional and unreasonable. The federal government has since appealed the decision. On January 25, 2024, the Federal Court of Appeal granted an interim stay of the Federal Court's initial decision, meaning that the regulation of single-use plastics under the CEPA remains in effect. The Federal Court of Appeal also ordered an expedited appeal, but a hearing date has not yet been set.

SPECIES PROTECTION

Regulation exists at both the federal (e.g., *Species at Risk Act*, "**SARA**") and provincial levels (e.g., in Ontario, the *Endangered Species Act, 2007*, "**ESA**") to protect both species and the habitat of such species. These acts set out permitting, monitoring, reporting and remediation requirements for activities that affect a listed species or its habitat, with considerable fines for non-compliance. Endangered species legislation can have a significant impact on the timing and costs of every kind of development, from infrastructure to housing.

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

SARA is designed to meet Canada's commitments under the international Convention on Biological Diversity. The Act seeks to prevent wildlife from disappearing and to manage wildlife of special concern through protection of both threatened species and their habitats. Under SARA, an independent committee identifies at-risk species and assesses their conservation status. If the species is designated as extirpated, endangered or threatened, SARA dictates that the federal government must prepare a Recovery Strategy (designed to stop or reverse species decline).

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

ENVIRONMENTAL AND IMPACT ASSESSMENT

Canada has recognized infrastructure deficits in transportation, energy and water/sewer which necessitate large capital investments over a number of years. Infrastructure projects usually require the completion of provincial and/or federal environmental assessment processes to ensure

any potential impacts are properly mitigated. Infrastructure will also benefit from funds received from the sale of carbon allowances.

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

In 2012, significant amendments were made to the regime, which resulted in the enactment of the *Canadian Environmental Assessment Act, 2012* ("**CEAA, 2012**"). The CEAA, 2012 restricted the type of projects subject to a federal environmental assessment, stipulated timeframes for completing assessments and permitted the federal government to delegate an environmental assessment to another jurisdiction or substitute the process of another jurisdiction to help avoid duplication of environmental assessments for both federal and provincial governments.

In 2019, the federal government repealed CEAA, 2012 and passed the *Impact Assessment Act* ("**IAA**"). The IAA broadens the scope of assessments to include positive and negative environment, economic, social and health impacts, as well as to require gender-based analysis and an assessment of the impacts of a project on Indigenous peoples and their rights. The federal assessment agency was rebranded the Impact Assessment Agency of Canada and will lead all federal impact assessments, including coordinating between regulatory bodies and provinces in the case of joint reviews. Each province also has requirements for environmental and impact assessment for certain projects within provincial jurisdiction.

Like the plastics regulation under CEPA, the IAA has resulted in litigation. On October 13, 2023, the Supreme Court handed down its holding on a judicial challenge to the IAA, originally raised as a reference question by the provincial government of Alberta. The Supreme Court held that while the assessment scheme in the IAA that governs federal lands or matters outside Canada was constitutional, the "designated projects" scheme for non-federal lands was unconstitutional. In response, the federal government issued interim guidance on the IAA. These guidelines stipulate that the federal government will revise the IAA. In the meantime, the discretionary designation process has been paused, and the federal government will review all projects in the planning or impact statement phases to ensure federal jurisdiction.

In Ontario, the *Environmental Assessment Act* ("**EAA**") serves as the primary statute governing the environmental assessment process. The EAA's stated purpose is to "consider potential environmental effects before an infrastructure project begins." In past iterations of the Act, major infrastructure projects triggered a full environmental assessment unless narrow exemption criteria were met, with the requirement largely depended on the identity of the proponent. However, the provincial government has subsequently introduced a "streamlined" project-list environmental assessment process. Under this process, projects are classified and subjected to either comprehensive environmental assessments or an environmental screening process based on their listed categorization. If a project is not expressly listed or designated, no environmental assessment is required. In other words, the past focus on who is undertaking the project has shifted to what the project is.

In addition, class environmental assessments are required for a variety of projects in Ontario, including minor transmission facilities, municipal infrastructure projects, provincial parks and conservation reserves, government property, remedial flood and erosion control projects, resource stewardship and facility development projects, waterpower projects, provincial transportation facilities and municipal expressways, and activities of the Ministry of Northern Development and Mines under the *Mining Act*. Once a Notice of Completion has been issued for a project as per section 16, a request can be made to ask the Minister to require a comprehensive environmental assessment. This request will be considered under the grounds listed in section 16(5) of the EAA, including the purpose of the Act, factors suggesting that the proposed undertaking differs from other undertakings in the same class, the significance of the aforementioned factors and differences, a mediator's report (if any), and any other matter the Minister considers appropriate.

DUTY TO CONSULT: NOTABLE CANADIAN INDIGENOUS RIGHTS LITIGATION

Public and agency consultation is a mandatory requirement of the environmental and impact assessment process. Consultation with Indigenous peoples usually forms a significant part of such assessments as treaty and Indigenous rights are protected by the Canadian Constitution. Several recent court cases have provided further clarification of the Crown's consultation obligations which vary

depending upon the existence and wording of a treaty, the nature of the historic Indigenous claim and the potential infringement of such rights. The traditional use of impact benefit agreements has in many cases been replaced as governments have encouraged project proponents to align or partner with Indigenous peoples as equity partners.

In Canada, the Crown, federally and provincially, has what is known as a duty to consult. This duty requires the Crown to understand how and when their activities could have an adverse impact on Aboriginal and treaty rights. The duty to consult reflects the "honour of the Crown," which is a constitutional principle that requires that the government acts honourably and in good faith in all dealings with Indigenous peoples. The duty to consult is not expressly set out in any legislation; rather, it is a corollary of section 35 of the *Constitution Act, 1982*, which states: "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed." In *Tsilhqot'in Nation v. British Columbia* (2014), the Supreme Court explained that section 35 and the Duty to Consult doctrine is intended to protect Aboriginal and treaty rights while also furthering reconciliation.

Because the duty to consult and accommodate is not defined in statute, the doctrine has been set out—and subsequently clarified—by jurisprudence. Duty to consult litigation in Canada has been robust. In its landmark 2004 decisions, *Haida Nation v. British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v British Columbia*, the Supreme Court of Canada established that the Crown has the duty to consult Indigenous peoples. There is a low bar to trigger a threshold to consult: "When the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it." This means that the duty to consult can and does arise in instances of asserted but unproven Aboriginal rights.

Subsequent decisions have further clarified how the duty to consult and accommodate functions. In *Delgamuukw v. British Columbia* (1997), the Supreme Court stated the nature and scope of the duty of consultation varies with circumstances; in instances where there is significant impairment of a right, greater consultation will be required. This means that consultation functions as a spectrum. Courts have also stipulated that government must approach their consultative duties in good faith, providing adequate funding and timely information to Indigenous rights-holders. In *Mikisew Cree First Nation v. Canada* (2018), the Supreme Court held that the creation (or amendment) of legislation, including environmental legislation, does not necessarily trigger the consultation process.

In other decisions, courts have explained who is responsible for the duty to consult and accommodate—and who it is owed to. Governmental bodies retain ultimate responsibility for consultation, as the honour of the Crown cannot be delegated. However, they may delegate procedural aspects of consultation to project proponents, such as developers or mineral exploration corporations. In *R v Van der Peet* (1996), the Supreme Court set out the test for determining whether an Aboriginal right exists in any given context, while *R v Powley* (2003) modified this test for Métis individuals and communities. *Behn v Moulton Contracting* (2013) further clarified that Aboriginal rights are inherently collective in nature. As such, an Aboriginal rights-holder seeking rights related to the duty to consult must do so on a representative basis (i.e. on behalf of their Indigenous community).

Case law also addresses breaches of treaty rights. A particularly significant decision was released in 2021, *Yahey v. British Columbia*. It considered whether the treaty rights of the Blueberry River First Nations and had been infringed by the cumulative impacts of industrial developments within their territory, including forestry, oil and gas, renewable energy and agriculture. The court concluded that British Columbia had breached Treaty 8 over a period of many years. This breach occurred by allowing extensive industrial development in the First Nation's territory without assessing cumulative impacts and ensuring that the First Nation would be able to continue meaningfully exercising its treaty rights in its territory. This decision was not appealed. Although prior legal decisions have recognized the significance of cumulative effects when it comes to the duty to consult, the *Yahey* case is one of the first holdings to link cumulative effects with treaty rights. This is likely to have an impact on regulatory risks where similar claims may be made.

More recently, we see, for example in Ontario, governments infusing the obligation to consult into land-use planning decisions by ensuring that First Nations are consulted as part of land-use planning decisions, as well as through infrastructure projects under environmental assessment regimes. While the substantive duty rests with the Crown, an Ontario court has held that when the Aboriginal rights claim is toward the light end of the consultive spectrum, the Crown can rely on statutory planning processes to fulfil its duty to consult. Further, under Ontario's *Provincial Policy Statement* and the *Planning Act*,

planning authorities are mandated to engage with Indigenous communities and encouraged to develop co-operative relationships.

WASTE AND RECYCLING

The storage, transfer and disposal of hazardous and non-hazardous waste are primarily regulated at the provincial level, with some federal involvement in certain circumstances, such as controlling transboundary movements of hazardous waste and recyclables. Municipalities are responsible for the collection, recycling, composting and disposal of household waste. Development of new waste facilities, such as landfills, can be controversial and subject to significant review and public consultation. In Ontario, environmental regulation of new waste facilities is largely governed under updated sections of the EAA.

Most provinces and territorial governments are actively encouraging recycling and mandate industry-funded stewardship programs to divert certain waste streams (e.g., tires, paper, cardboard, electronic) from landfills. Several provinces, including Ontario, have adopted a "producer responsibility model" where producers are responsible for the full life-cycle of their products and packaging, including its collection through either a single agency or—uniquely in Ontario—multiple organizations through the private sector. In Ontario, waste diversion is overseen by the Resource Productivity and Recovery Authority ("**RPRA**"). Under the producer responsibility model in Ontario, producers are fully responsible for municipal hazardous waste (e.g., paint, antifreeze and batteries), electrical waste (e.g., computers, televisions and stereos), used tires and beverage containers. Blue Box services are transitioning; producers will be fully responsible for these services by the end of 2025.

The *Resource Recovery and Circular Economy Act, 2016*, along with the Ontario Regulation, provide the RPRA the statutory means of ensuring compliance with its regulatory schemes. Regulated parties that fall under these statutes must follow their regulations. In the event of non-compliance, the RPRA has the authority to impose Administrative Monetary Penalty Provisions as an alternative to court proceedings. While these penalties cannot exceed $C1 million, they may still be substantial, intended to ensure a regulated party cannot gain a competitive market advantage by opting for non-compliance. Examples of contraventions that might attract administrative penalties include failure to meet resource recovery performance targets, failure to respond to information requests, failure to submit reports on time, or submitting incomplete, inaccurate or misleading information.

Several jurisdictions have mandated goals to reduce waste to specified targets providing new opportunities for innovation. The federal government has introduced ambitious plans to reduce food waste and plastic waste, for instance. Within waste diversion processes and regulations, failure to register, file and remit payments can lead to fines. Regulation of recycling and waste diversion is expected to increase.

ENVIRONMENT, SOCIAL AND GOVERNANCE CONCERNS

CORPORATE GOVERNANCE AND SECURITIES REGULATION

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

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

GREENWASHING

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

The *Competition Act* has criminal and civil regimes. Under both sets of provisions, directly or indirectly promoting the supply or use of a product which is false or misleading in a material respect is reviewable and can lead to substantial fines for deceptive marketing. To determine whether a claim is misleading, courts will consider the "general impression" conveyed, as well as the claim's literal meaning. Further, under the civil regime, any "green" marketing claim must be supported by concrete evidence obtained through adequate and proper testing.

Companies should be aware of Canada's guidelines for environmental claims greenwashing, updated in December 2021, addressing the *Competition*

Act, the *Consumer Packaging and Labeling Act*, and the *Textile Labelling Act*, and their associated regulations. The guidelines clarify that the Competition Bureau will take action to combat false, misleading or unsubstantiated environmental claims. They also offer best practices for businesses to avoid greenwashing in their ads, slogans, logos and packaging.

HOUSING

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

In an attempt to address the need for housing, Ontario has sought to introduce changes to the planning framework in Ontario, impacting municipal approval processes, appeal rights from municipal decisions, and permitting functions by conservation authorities.

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

Conservation authority permits are now required in all cases where ministerial zoning order powers are used. Additionally, new regulations have exempted conservation authority permits from formal application requirements when regulatory requirements are met. This change mirrors similar changes in other environmental spheres, such as the management pollution releases and species at risk. Conservation authorities can only make regulations for land actually owned by the authority in question. Furthermore, the conditions attached to conservation authority permits have been further reduced.

Setbacks from provincially significant wetlands have also been reduced through changes to regulations administered by conservation authorities. In addition, Ontario has changed the way wetlands are evaluated and identified, with the likely impact that fewer wetlands will be protected, including by eliminating the concept of "wetland complexes."

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

Contrary to the prevailing provincial trend, the Ontario government recently reversed its prior decision to open a significant parcel of protected lands within the province's Greenbelt for housing development. Developers will not be compensated for lands that will be returned to the Greenbelt through legislation.

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