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Canada: Trends & Development

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Trends and Developments

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National Developments

Courts retain COVID-19 adaptations

As Canada emerged from the pandemic, courts around the country re-opened to in-person hearings. However, a new hybrid model has emerged with a significant number of court appearances continuing to be facilitated by remote technology such as audio and video-conferencing. It appears that the courts are willing to continue to allow the use of this technology having seen the efficiencies this creates, especially in managing busy court dockets.

Mediators and arbitrators have also continued to use virtual tools which, especially in an expansive country such as Canada, has significantly eased the time and cost burden of matters involving participants in different jurisdictions. There seems little doubt that these changes are here to stay.

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.

In May 2022, the federal government's Office of the Superintendent of Financial Institutions (OSFI) issued draft Guideline B-15: Climate Risk Management to set out its expectations on how federally regulated financial institutions handle the governance and management of climate-

related risks as well as disclose financial risks related to climate change. OSFI has completed the consultation period for this guideline and plans to issue the final guideline in early 2023.

The Task Force on Climate-Related Financial Disclosures (TCFD) has continued to gain recognition in Canada. In late 2021, the Canadian Securities Administrators published the Proposed National Instruction 51-107: Disclosure of Climate-Related Matters, which aligns with the core disclosure recommendations of the TCFD. This instrument, alongside an accompanying policy and forms, would introduce disclosure requirements for reporting issuers regarding climate-related matters, including governance, strategy, risk management, metrics and targets, and greenhouse gas emissions. Should this policy become effective on 31 December 2022, public companies (with a financial year-end of 31 December) would be required to start making disclosures in March 2024.

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.

Building on Canada's first-ever climate accountability legislation, the 2021 Canadian Net-Zero Emissions Accountability Act, Canada announced its 2030 Emissions Reduction Plan: Clean Air, Strong Economy, which outlines a sector-by-sector path for Canada to reach its 2030 emissions target. The plan includes CAD9.1 billion in new investments in sectors that include buildings, renewables and electric vehicles, and reduction of greenhouse gas emissions from the oil and gas sectors.

This year saw greater attention devoted to carbon capture and storage (CCUS) technology with the 2022 Federal Budget proposing a tax credit for businesses investing in CCUS. The credit is expected to cost CAD2.6 billion for the next five years and CAD1.5 billion annually after that until 2030.

Continued attention to issues impacting Indigenous peoples

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 former school sites across the country. As of August 2021, more than 1,300 unmarked graves had been found at five former residential school sites; many more sites have not been searched. In June 2022, the federal government appointed an Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools.

The repercussions of these disturbing discoveries continued in 2022 with heightened attention resulting from a visit by Pope Francis in July 2022 that focused on apologising for the

Catholic Church's role in the Canadian residential school system. Greater focus on Indigenous rights will continue to impact the development of environmental laws, policies and private projects.

Traction towards recognition of the right to a healthy environment in Canada

In July 2022, the United Nations General Assembly (UNGA) passed a resolution recognising the right to a clean, healthy and sustainable environment. Canada voted in favour of the UNGA resolution.

In February 2022, the Senate introduced amendments to the Canadian Environmental Protection Act, 1999 (CEPA) which would recognise that every individual in Canada has a right to a healthy environment, mandate the federal government to protect that right, and require the government to develop an implementation framework setting out how to consider the right in administering CEPA. The bill passed through the Senate, and the House of Commons completed its first reading of the bill in September 2022. The passing of this bill would see the entrenchment of the right to a healthy environment in Canada and quite possibly open the door for a new wave of litigation.

British Columbia (BC)

Climate lawsuit launched against the province

In March 2022, the Sierra Club of British Columbia Foundation (the "Sierra Club") filed a petition against the province seeking judicial review of the 2021 Climate Change Accountability Report (the "Climate Report"), which was prepared pursuant to the Climate Change Accountability Act, SBC 2007, c 42 (CCAA).

The Sierra Club's petition seeks to quash and set aside the Climate Report on the basis that it violates the CCAA's requirements to include:

- a plan to continue progress towards achieving the 2025 emissions reduction target;
- a plan to continue progress towards the 2040 and 2050 emissions reduction targets; and
- a plan to continue progress towards the oil and gas sector's emissions reduction target.

In its violation of the CCAA's statutory requirements, the Climate Report is regarded as an unreasonable exercise of the minister's statutory reporting obligations under the CCAA, according to the Sierra Club, which also states that the province's failure to produce detailed plans has enabled it to continue approving new fossil fuel projects without demonstrating how it will achieve its emissions reduction targets.

This case was heard at the BC Supreme Court in October 2022.

DRIPA Action Plan released

Following BC's enactment of the Declaration on the Rights of Indigenous Peoples Act (DRIPA) in 2019, which requires the province to harmonise its laws with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), BC released its first DRIPA Action Plan in May 2022. This plan contains 89 actions which the province intends to undertake over the next five years in the areas of self-determination and self-government; title and Aboriginal rights; ending Indigenous-specific racism and discrimination; and social, cultural, and economic well-being.

Government laws and policies regarding Indigenous involvement with proposed projects will likely continue to evolve as the province imple-

ments the actions, and should be regularly monitored by proponents working in the province.

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. In March 2022, the province established a BC Hydrogen Office to help attract investments and simplify the permitting process. There are already 40 hydrogen projects proposed or underway in the province, which represent CAD4.8 billion in proposed investment. BC has also developed the first cluster of public hydrogen-fuelling stations in Canada as part of its efforts to increase demand for zero-emission vehicles.

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 in order 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 supply nearly half of the total global hydrogen demand by the year 2050.

Alberta

In March, the government of Alberta announced restrictions on coal development on the eastern slopes of the Rockies. The restrictions on new developments will be in place pending the development of updated regional land-use plans. The government also released the final report of the Coal Policy Committee which has documented the change in public and political attitudes towards coal development in Alberta since the original official Coal Policy was published in 1976. The report, which was prepared after

extensive public consultation, noted that “Albertans considered the environmental impacts of potential coal mines to be a ‘top-of-mind issue’” and that “85% of Albertans indicated they were not at all confident that coal exploration and development are properly regulated”.

The consultation process also noted, however, that “Certain communities, including Indigenous communities that would potentially experience economic benefits from new coal mines, understandably expressed support for new potential development projects. However many Albertans were deeply concerned about or opposed to such proposed projects...” This statement succinctly summarises a perennial problem for all Canadian policy makers who continue to struggle with finding a balance between the ongoing, if essentially finite, benefits of an economy based on resource extraction, with the short and long-term environmental impacts of that extraction.

One such effort that is of keen interest to Alberta is the development of working facilities that will bring to reality the promises made by proponents of carbon capture and storage projects. To this effect, Alberta has committed CAD1.24 billion through 2025 to two commercial-scale carbon capture, utilisation and storage projects. The goal is to reduce CO₂ emissions from the oil sands and fertiliser sectors by up to 2.76 million tonnes each year, which is the equivalent of yearly emissions from 600,000 petrol vehicles.

In March of 2022, the Quest Project reported in its 2021 Annual Report to the government of Alberta that “as of December 2021, Quest surpassed 6.8 million tonnes of injected CO₂ since project start-up” and that Quest had combined “strong integrated project reliability performance

with operational availability at 97.8% since start-up.”

The second project, the Alberta Carbon Trunk Line Project’s 2021 “Knowledge Sharing Report”, also published in March 2022, indicated that in 2021, the first full year of commercial operations for the project, the cumulative injection of CO₂ reached two million tonnes “as of November”.

Proponents of these projects see them as a viable solution to address the impact of CO₂ emissions from extractive industries such as the oil and gas sector. Of course, these projects are not without their critics, who point to the large amounts of money and energy required and also express concerns related to the long-term integrity of the storage facilities. In many ways, the public discourse around carbon capture and storage is only just beginning.

In May, the Alberta Court of Appeal ruled that the federal Impact Assessment Act is unconstitutional. The legislation establishes a public process for information gathering and decision making on the impacts of major projects within federal responsibility, such as fisheries, migratory birds and Indigenous peoples. The majority of the court ruled the legislation unconstitutional and claimed it interfered with the provinces’ jurisdiction over their natural resources and other powers granted to the provinces by Canada’s constitution. The majority opinion was highly critical of the legislation saying that it was “a breathtaking pre-emption of provincial authority” and that “Parliament has taken a wrecking ball to the constitutional rights of the Citizens of Alberta and Saskatchewan and other provinces to have their... natural resources developed for their benefit”. The federal government has appealed the decision to the Supreme Court of Canada.

Ontario

Creation of a Clean Energy Credit registry

In January the Ontario government announced its intention to establish a provincial Clean Energy Credit (CEC) registry. The purpose of the registry is to track the trading of credits from “non-emitting facilities” for energy generated and consumed in Ontario.

In an official posting about the CEC in Ontario’s Environmental Registry, the Ontario Ministry of Energy notes that over 90% of electricity generated in Ontario in 2021 was emissions-free. This consisted of 55% from nuclear power, 23% from hydro-electric facilities, 9% from wind, 2.5% from solar and 0.5% from bio-energy.

Several jurisdictions in North America provide electricity consumers with the ability to purchase Clean Energy Credits, also sometimes referred to as Voluntary Energy Credits (VECs) or Renewable Energy Credits (RECs). This is intended to provide consumers with the certainty that the power they consume comes from a known (and presumably, environmentally desirable) source.

The Ontario registry is intended to be a central system for tracking the transfer and retirement of CECs. It is not a market nor is participation mandatory. Yet the Ontario government says the CEC “could help businesses meet their environmental and sustainability goals, support rate-payers by enabling proceeds from CEC sales to flow to the rate base, and help [Ontario’s] efforts to further decarbonise by supporting investment in new clean or renewable generation”.

It will be interesting to see how participation in the registry is influenced by other factors including public perception and acceptance of the concept that the selected generators are indeed environmentally desirable. The fact that 55% of

Ontario’s current generation is nuclear makes the Ontario system particularly vulnerable to criticism by those who would challenge nuclear power’s claim to be emissions free. It is also unclear whether such a system would indeed facilitate investment in new clean or renewable generation given the existence of a supply system that claims to already be over 90% “emissions free”.

Other Ontario developments

In February, Ontario passed a new regulation designed to impose new limits on sulphur dioxide emissions from petroleum facilities. There are only five such facilities in Ontario. Reduced emission limits and greater reporting obligations are to be phased in over a ten-year period (2022–2031).

In May, a significant storm across some of the most heavily populated parts of the province (causing estimated insured damage of CAD875 million) brought increased discussion of extreme weather events and the likelihood of climate change causing more severe and more frequent occurrences. However, there was no indication that this discussion was likely to translate into any significant legislative changes in the near future.

The Law Commission of Ontario (LCO) commenced public consultations on Ontario’s Environmental Bill of Rights Legislation (EBR). Noting that the EBR has been in place for more than 25 years, the LCO wishes to consider the need to reform the EBR’s provisions for public participation in government decisions that impact the environment and to consider how to take into account concepts such as “environmental justice”, the “right to a healthy environment” and Indigenous rights. The final report is expected in early 2023.

In an otherwise generally quiet year in terms of changes to environmental rules in Ontario, several statutes were modified to continue the current administration's efforts to encourage investment in Ontario and streamline the permitting and approvals process for projects with low environmental risks. As in many other jurisdictions, a challenging economic climate is likely to weigh heavily on any political decision that might be a disincentive to economic growth. The challenge for Ontario, as elsewhere, is how to develop policies that continue to allow for a truly sustainable economy at a time when the predicted impacts of climate change are increasingly gaining public attention.

Quebec

Energy transition in Quebec

The 2030 Energy Policy and its implementation

This 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 bio-energy production by 50%.

The first implementation action amended the Act with respect to the *Régie de l'énergie* (Quebec's energy regulator) to introduce the concept of renewable natural gas (RNG). This, 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

This 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 transportation 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 with respect to 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.

Regulation on RNG 2022

On 17 August 2022, the government of Quebec adopted a regulation (the "Regulation") to amend the previous regulation with respect to the quantity of renewable natural gas to be delivered by a distributor. The Regulation comes into force on 1 January 2023.

In accordance with the Regulation, natural gas is regarded as being from a renewable source if it is:

- produced from non-fossil organic matter that is degraded by biological processes, includ-

ing anaerobic digestion, or by thermochemical processes, including gasification; or

- hydrogen produced in accordance with the second paragraph and non-fossil carbon monoxide or carbon dioxide.

The Regulation also provides that another substance added to natural gas is regarded as being from a renewable source if it is hydrogen that is produced:

- from non-fossil organic matter degraded by thermochemical processes, in particular by gasification;
- by electrolysis of water using electricity generated exclusively from renewable energy sources; or
- by an industrial process that has a function other than obtaining hydrogen and that is fuelled by energy derived exclusively from renewable sources.

Under the amended Regulation, the minimum volume of RNG to be delivered must reach a rate of 7% by 2028 and 10% by 2030. This obligation is also accompanied by an additional condition requiring that the minimum annual volume of renewable natural gas to be delivered must be “for final consumption in the territory in which its exclusive distribution rights are held”.

Finally, under the Regulation, where the RNG delivered annually by a distributor is hydrogen produced in accordance with the Regulation, only one third of such hydrogen may be considered in the calculation of the volume of RNG that a distributor must deliver to meet its annual obligation.

Zero-net greenhouse gases (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 last May 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 calls for the adoption of a new regulation by 2023 that will require a zero-emission performance threshold for new building permit applications. As for existing buildings, the city plans to impose gradual GHG reduction performance thresholds so that all buildings can be supplied with 100% renewable energy by 2040.

These new obligations are in addition to By-law 21-042, with respect to GHG emission disclosures and ratings of large buildings, adopted in 2021 and already in force, which requires building owners to disclose each year the level of GHG emissions resulting from energy consumption in their buildings in order to allow the city to implement measures to reduce these GHG levels.

Other cities and municipalities in the province are moving to adopt climate plans and to impose new obligations for building owners with the objective of reducing 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 with respect to the traceability of excavated contaminated soil. It has been gradually enforced since 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 the province, particularly in Ontario.

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 with respect to the regulatory scheme applying to activities on the basis of their environmental impact (REAFIE).

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.

Miller Thomson LLP is comprised of approximately 500 lawyers situated in 12 strategically placed offices across Canada. The firm's environmental law group is a trusted partner to national and multinational businesses that must navigate Canada's environmental laws and regulations, which evolve constantly and vary from province to province. The team at Miller Thomson helps these businesses manage 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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CANADA TRENDS AND DEVELOPMENTS

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