Chapter

Canada

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1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in Canada and which agencies/bodies administer and enforce environmental law?

The Dominion of Canada is a confederation of provinces, with a nationally elected federal government, and locally elected provincial and legislatures. Provinces and territories have similar political and legal powers and structures. In this segment on Canada, the term "provinces" will also include territories.

The federal/provincial division of powers was established at Confederation by the *Constitution Act, 1867*, and the courts have interpreted the constitutional jurisdictions between federal and provincial governments since then. The courts have declared that "environment" is an area of shared jurisdiction. Both levels of government can regulate and enforce, so long as they avoid conflicts, and relate their legislation to one of the heads of power allocated under the constitution.

Federal government powers related to the environment include criminal powers, railways (and now airports), shipping, fisheries and oceans, inter-provincial transportation and international treaties. Relevant provincial powers include "property and civil rights and matters of a purely local nature. Provinces control land resources, including mines, minerals, forestry and most power generation.

Environmental policy is influenced by international reports and conventions and influenced by the courts. For example, the Supreme Court of Canada reiterated Canada's endorsement of the international law "precautionary principle" in its 2005 decision in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, where it upheld a municipal by-law prohibiting cosmetic pesticide use.

Federal

Environmental Canada is the principal federal department concerned with environmental regulation and enforcement of federal laws and regulations. Other significant players on the federal scene include the Department of Fisheries and Oceans (DFO), Natural Resources Canada, the Canadian Environmental Assessment Agency, and the Canadian Nuclear Safety Commission. Health Canada cooperates with Environment Canada on the assessment and determination of "toxic" substances as defined under the *Canadian Environmental Protection Act, 1999* (CEPA).

Federal regulation is relevant for large industries with significant effluent discharges (*Fisheries Act*) or air emissions of listed toxic substances, such as mercury, dioxin and other substances designated as toxic under CEPA. Manufacturers and importers of chemicals are also affected. Transporters of hazardous and dangerous goods and wastes across provincial and national boundaries are subject to significant federal regulation.

The federal government implements regulations giving effect to environmental treaties that Canada has ratified. Federal regulations under CEPA impose regulatory conditions on the import and export of hazardous waste and recyclable materials (Basel, Rotterdam, Canada-US Transboundary Agreement). CEPA regulations prohibit and regulate the use of ozone-depleting substances (Montreal Protocol.)

Under growing public pressure to deal with air pollution and greenhouse gases (GHG), the federal government has proposed a national *Clean Air Act* to regulate and set caps on smog precursors and GHGs.

Provincial

Provincial laws affect every manufacturer and industrial company's day to day operations. Every company that emits contaminants into air or water, or disposes of waste, has to obtain permits from the relevant provincial or department or ministry of the environment. Each province or territory has environment ministries or departments that have primary responsibility for environmental laws, including compliance, approvals and enforcement. Most provinces also have their own ministries or departments for resource exploitation, such as ministries of natural resources, mining, and forestry.

The respective provincial and territorial environment ministries are:

- Alberta Ministry of the Environment.
- British Columbia Ministry of Environment.
- Manitoba Ministry of Conservation.
- New Brunswick Department of Environment.
- Newfoundland Department of Environment and Conservation.
- Northwest Territories Ministry of Environment and Natural Resources.
- Nova Scotia Ministry of Environment and Labour.
- Nunavut Department of Environment.
- Ontario Ministry of the Environment.
- Prince Edward Island Department of Environment, Energy and Forestry.
- Quebec Ministère du Développement durable, de l'Environnement et des Parcs.
- Saskatchewan Department of Environment.
- Yukon Department of Environment.

Municipal

In Canada, municipalities are creatures of provincial statute. They derive their power to make and enforce local environmental by-laws from provincial statutory grants of power. Municipal acts in each province and territory empower municipalities to make by-laws that vary from province to province. Most provinces authorise municipalities to regulate local sewer-use and nuisances such as noise, odour and dust. The Supreme Court of Canada, in the *Hudson* decision cited above, endorsed the right of municipalities to pass by-laws to protect the environment and health and welfare of their citizens.

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

The federal government and many provinces have published compliance and enforcement policies describing voluntary and mandatory actions to secure compliance, abate pollution and enforce environmental laws using tools ranging from administrative orders to prosecution.

Enforcement is usually a last resort for pollution abatement and prevention. Most of the environmental prosecution and enforcement activity is initiated in and by the provinces. The most significant federal prosecutions and penalties are those for water pollution and fish habitat destruction under the federal Fisheries Act. Given the recent public support for the environment, the current federal government shows signs of increasing regulatory and enforcement activities in the future.

Provincial prosecution activities vary according to local conditions and politics. For example, as a result of several chemical spills in Sarnia's Chemical Valley, the Ontario government ramped up inspections of industrial dischargers and introduced more stringent liability reporting and obligations. Penal provisions were stiffened. New Environmental Penalties were introduced - summary administrative fines of a maximum of $100,000 per day, to come into force in 2007. Prosecutions for air emissions and water pollution and have resulted in some significant fines in the last several years - several exceeding $300,000.

Federal

Environmental Canada abatement and enforcement policy for CEPA is set out in **Compliance and Enforcement Policy for the Canadian Environmental Protection Act, 1999.** The general principles set out in this policy are:

- Compliance with the Act and its regulations is mandatory.
- Enforcement officers throughout Canada will apply the Act in a manner that is fair, predictable and consistent. They will use rules, sanctions and processes securely founded in law.
- Enforcement officers will administer the Act with an emphasis on prevention of damage to the environment.
- Enforcement officers will examine every suspected violation of which they have knowledge, and will take action consistent with this Compliance and Enforcement Policy.
- Enforcement officers will encourage the reporting of suspected violations of the Act.

The federal Department of Fisheries and Oceans **Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act*.** The general principles are similar to and consistent with those articulated in the CEPA policy summarised above.

Provincial

Many provinces have published compliance and enforcement policies. For example, Ontario's **Compliance Guideline F-2** and British Columbia's **Compliance and Enforcement Policy and Procedure** set out compliance and enforcement options available to abatement and enforcement staff, and describing the decision-making criteria used by them to determine whether to pursue voluntary or mandatory abatement, or prosecution.

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

Public consultation and transparency are significant features of Canadian government decision-making. Environmental laws and policies are posted on a number of government websites. Generally stakeholders and the public are consulted before federal or provincial statutes or regulations are passed. Environment Canada maintains the CEPA Registry (www.ec.gc.ca/ceparegistry.htm) where statutes, regulations, discussion papers, policies and public consultations are all published. Some provinces also have similar Internet registries under Environmental Bill of Rights legislation. Some federal and provincial statutes require pre-posting or consultation for prescribed approvals for air emissions, water and wastewater discharges and waste management and disposal.

Public consultation is required in provincial and federal environmental assessment processes. Growing importance for industry is the duty to consult with and accommodate First Nations (Aboriginals) over significant environmental approvals. While the primary consultation obligation falls on the Crown (governments), if private proponents fail to ensure that consultation is adequate, approvals may be delayed or denied in court.

In addition, Canada has federal, provincial and municipal "access to information" legislation that compels disclosure of government information to the public. These laws include the federal *Access to Information Act*, and provincial statutes, for example the Nova Scotia *Freedom of Information and Protection of Privacy Act*, and provincial statutes for municipalities, such as Ontario's *Municipal Freedom of Information and Protection of Privacy Act*. Notably, Ontario's Act requires municipal FIA officials to notify the public or affected persons of a grave environmental, health or safety hazard to the public.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

Environmental permits and approvals are required for activities that result in emissions to air, discharges to water or handling or disposal of waste. Large projects or major infrastructure projects (power generation, mining, waste disposal sites, power transmission lines, etc.) may require prior approval under the federal and/or provincial environmental assessment regime, in addition to the regular environmental and land use permits.

Federal approvals include those for export and import of hazardous wastes and recyclables, effluent discharges from specific industries (e.g. pulp and paper mill effluent, metal mining effluent, potato processing and meat and poultry products plant effluents, petroleum refining effluent and chlor-alkali mercury effluent). Some federal approvals are administered by provincial authorities.

Provincial approvals are required to take groundwater, to discharge effluent, and to operate wastewater treatment systems. Air emission approvals (including odour, noise and dust) are required for every

emitter - either for individual sources, or site-wide approval. The handling, transportation and management of waste (waste management systems), and waste treatment and disposal sites all require approvals.

Transfers of these approvals usually require consent of the regulator that issued the permit, additional fees, additional information about the applicant, additional or alternative financial assurance or terms.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

Appeal rights must be specified in the statute authorising the permit. Many statutes only offered these appeal rights to the issuing agency and the applicant. In recent years, third party appeal rights have been authorised by Environmental Bills of Rights. These appeals are usually held before administrative tribunals such as Alberta's Environmental Appeal Board or Ontario's Environmental Review Tribunal.

In addition, most government decisions are subject to review by the courts (judicial review) on issues of jurisdiction, error of law or denial of natural justice. Judicial review can be initiated in federal or provincial courts, depending on the identity of the government official who made the decision that is challenged.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

Federal

The *Canadian Environmental Assessment Act* (CEAA) requires an environmental assessment before a Federal Authority can undertake or approve a project. The requirement is triggered where the Federal Authority is the proponent of the project, provides funding, or provides ownership or access to federal lands to enable the project. A federal EA is also triggered where the Federal Authority proposes to issue a prescribed permit, licence or approval for the project - this trigger is the one most likely to affect private-sector projects. The CEAA process classifies projects for differing levels of assessment according to the nature of the project and its potential environmental impacts. Low impact projects merely require screening, while the highest impacts are subject to a comprehensive assessment, with the possibility of public hearings.

Many of the provinces have agreements with the federal government for participating in federal environmental assessments, or for joint assessments when both federal and provincial assessments are engaged. These agreements are intended to cut down on duplication for all participants.

Provincial

Every province has an environmental assessment statute, however the scope and process varies from province to province. For example, in Ontario the Environmental Assessment Act (EAA) sets out a detailed, complex and lengthy process that must be followed for approval of projects that are included by regulation or designated for full EAA by the Minister of the Environment. To obtain an EA approval of a significant waste disposal site, for example, can take many years and requires extensive public consultation, development of Terms of Reference, the consideration of need and alternatives, the preparation and submission of a wide range of environmental studies, and the potential of protracted public hearings. However, for standard government and municipal infrastructure projects with predictable environmental impacts, the EAA provides for a simple Class EA process. Some provincial EA statutes are environmental impact assessment and approval processes. Ontario's EAA process is an onerous and full EA planning process. Reform is currently underway.

Environmental system audits are not required by statute, but are often required by purchasers, lenders or insurers for large commercial transactions involving companies with potentially significant environmental impact from operations.

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

Federal and provincial statutes provide environmental officers with powers to respond to violation of permits. These powers include rights of inspection, search, seizure and the power to make a wide range of administrative orders to study pollution, to stop or control pollution, to clean up waste or contamination and to restore the natural environment. Where polluters fail to comply with orders, the federal or provincial government may have the work done and make cost recovery orders. In addition, polluters may be prosecuted for the violations, and where the violations are from harmful discharges, significant fines can be levied and judicial orders imposed.

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

Federal waste regulation is focused on transportation of dangerous wastes and export and import of hazardous wastes and hazardous recyclable materials across provincial and national boundaries. The federal government has established a national transportation of dangerous goods regime, harmonised with the provinces, for coordinated regulation of air, rail and highway movement that regime is currently being integrated with environmental regulation under CEPA to provide seamless coverage of all dangerous/hazardous materials, wastes and recyclables.

All shipments of hazardous waste in Canada must be accompanied by a waste manifest, soon to be redefined as a "movement document." In some provinces there are both generator registration fees and manifesting or tonnage fees applicable to the movement of hazardous waste. Special regulations apply to PCB wastes.

All wastes are captured by a combination of federal and provincial waste and dangerous goods laws and must be transported, managed and disposed by licensed waste management haulers, treatment operators and treated or disposed at approved facilities and sites.

Each province has its own definition of waste, usually combining a general definition with prescribed or designated wastes, and definitions of other classes and categories of waste, such as hazardous and liquid industrial wastes.

3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

Waste may only be disposed on a site that is approved as a waste disposal site. Various exemptions apply under provincial regulations for on-site storage. Small quantities are usually defined and exempted. In Ontario a generator may not store its hazardous waste on-site for more than 3 months without notifying the regulator. If this waste is to be stored on-site for more than 2 years, the generator must obtain a certificate of approval.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

Unlike some other jurisdictions like the U.S., Canadian waste "generators" generally do not retain residual statutory liability if waste is lawfully transferred to a party who is authorised to handle, transfer and dispose of the waste. That transfer must be properly documented, and the authorised party must acknowledge that it accepts the waste.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

Until the waste is properly transferred and received at an authorised waste disposal site, the waste "generator" remains responsible for managing the waste. This applies whether the waste is to be disposed within or outside of Canada.

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

Companies, corporate directors and officers, managers and employees can all be charged with environmental offences committed by a company. Persons charged with environmental offences are innocent unless proven guilty beyond a reasonable doubt. On conviction corporation can be fined and be subject to profit-stripping and other court orders. Maximum fines are set as high as $10 million. The highest fine for an environmental offence in Canada to date was in *R. v. Tioxide Canada* (1993) - $1 million plus a mandatory $3 million contribution to local conservation and protection, for violations of the *Fisheries Act*, involving industrial discharges into the St. Lawrence River. An individual can be fined and also be incarcerated.

Where an offence has been proved, the main defence is that of "reasonable care" or "due diligence". A defendant who can prove that s/he or it took all the reasonable care that would be taken by someone with the appropriate knowledge, judgment and skill to prevent the specific violation will not be convicted. Other or related defences include mistake of fact, abuse of process and officially induced error. Mistake of law is not a defence.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

An operator may be liable to prosecution for causing an "adverse effect" on the environment, including plants and animals, or for causing nuisance, loss of enjoyment or harm to human health or safety. In most provinces, operating within permit limits is not a defence to prosecution, unless specifically provided for by statute. However, some court decisions have taken compliance into account.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Both federal and provincial environmental laws specifically impose environmental law duties on corporate directors and officers. Where a failure results in an offence by the corporation, the directors or officers can be charged and convicted. D&O insurance products are available to cover legal defence and civil liability. In some situations fines on conviction may not be indemnified.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

Where assets are purchased, liability will generally be limited to impacts arising from contamination on-site at the time of the transaction, and any new contamination

When shares are purchased, there may be additional liability, both regulatory and civil, for environmental offences, and the impacts of illegal emissions or discharges from operations happening prior to the closing.

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

Lenders who take actions to protect security or take possession of contaminated sites or who take control of businesses or other source of pollution can be liable to regulatory orders and prosecutions. In some provinces, such as Ontario and British Columbia there are statutory exemptions for secured creditors, receivers, trustees in bankruptcy, that prescribe the actions these parties can take to protect or realise on secured property without incurring regulatory liability.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

The contaminated land regime varies from province to province. However, generally the "polluter pays" principle prevails. Some provincial regimes do not limit clean-up liability to polluters, but may include anyone who owns or owned a property or a business, or who has or had charge, management or control.

5.2 How is liability allocated where more than one person is responsible for the contamination?

Canadian statutes provide that polluters are jointly and severally liable. Some jurisdictions have judicial or administrative processes for allocating responsibility among responsible parties. For example, in British Columbia, responsible persons may apply to the courts or appeal a Director's order. In Ontario, responsible persons have successfully appealed to the Environmental Review Tribunal.

5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

Canadian contaminated land law is evolving to provide greater certainty to owners who enter into agreements with regulators. However, 2003 the Supreme Court of Canada decided in *Imperial Oil v. Quebec (Minister of the Environment)* that the "polluter pays" principle permitted the Quebec government to make an order against the original polluter, despite the government's sign-off some

years earlier. Statutory Brownfields regimes in some provinces provide more protection and certainly for owners who clean up and for their successors.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

An owner may succeed in a civil lawsuit against the direct predecessor in title, or an occupant with whom the owner has had a contractual relationship. There are no Canadian cases where a private litigant has successfully sued an owner or occupant further back in the chain of title in nuisance or negligence for polluting the property.

Some provincial legislation includes a private right of action for owners to seek contribution to remediation cost.

Vendors have successfully been able to transfer civil liability to purchasers through the agreement of purchase and sale. However, in most provinces it is difficult to transfer all regulatory liability. As Brownfields legislation evolves (such as in British Columbia and Ontario), vendors who ensure that a certified clean-up is conducted, can gain significant protection from regulatory orders going forward.

5.5 Does the government have authority to obtain from a polluter monetary damages for aesthetic harms to public assets, e.g., rivers?

The Supreme Court of Canada endorsed the principle of monetary compensation to the public for harm to environmental resources in *British Columbia v. Canadian Forest Products Ltd. (2004).*

Many provinces have statutory rights for government to recover costs from polluters for cleaning up and restoring the environment. In Ontario municipalities have a summary right to order spillers to pay costs incurred to respond to a spill.

6 Powers of Regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

Canadian environmental statutes, both federal and provincial, provide broad rights of "inspection" to federal and provincial compliance and abatement staff. Companies and individuals whose operations are subject to these laws and regulations (regulated persons) must accept government intrusions made for the purpose of assessing their compliance, and achieving abatement. Specified statutory inspection powers permit environmental officers to enter and inspect regulated premises, require production and copying of documents, take samples and recordings and conduct interviews.

However, the Charter of Rights and Freedoms protects companies and individuals who are under investigation and jeopardy of criminal or quasi-criminal prosecution.

Companies and individuals have the right to freedom from unlawful search and seizure. Therefore investigations for the purpose of collecting evidence of an offence, including entry, search and seizure, must either be by consent, or conducted under judicial authorisation (search warrant or judicial order).

In addition, individuals have the right to remain silent when detained by the state, and have the right to retain and instruct legal counsel. The rules applying to conduct of environmental investigators are the same as those governing regular police officers.

7 Reporting / Disclosure Obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

Contaminated site reporting obligations depend on the nature of the contamination and whether it is threatening health or safety of humans. Typically they vary from province to province. Contamination caused by a recent spill must be reported under spill reporting legislation. There are few situations where historic contamination must be reported to the government. For example, in Ontario, historic contamination from storage tanks must be reported to the Ministry of the Environment, under the *Technical Standards and Safety Authority Act.* Historic contamination otherwise cause is not required to be reported.

Unless required by an administrative order, reporting to third parties of historic contamination is not required by statute. However, risk assessment based clean-up (whether voluntary or required by order or statute) requires consultation with neighbours and municipalities.

Emerging in Canadian tort law is a "duty to warn" of serious environmental harm. Where off-site migration poses a significant threat, there may be a duty to warn potentially affected parties.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

Investigation (and remediation) may be required by those persons required to respond to a spill. Provincial environmental officials may require investigation (and clean-up) of contaminated sites, where other statutory conditions are met (e.g. adverse effect, contravention of law, off-site migration discovered).

Some provincial Brownfields statutes require environmental site investigations where an owner proposes to change the use of the property from a less sensitive use (such as industrial/commercial) to a more sensitive use (such as residential). Under Ontario provincial law, an owner proposing such a change must conduct an environmental site assessment and where necessary clean up the property and file a Record of Site Condition on a public registry in order to obtain a building permit.

Some municipalities require environmental site assessments as a pre-condition to land use planning and development approvals.

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

Canadian securities laws apply to public companies ("issuers"), who are required to disclose "material" facts or changes. "Material" information is that which would reasonably be expected to have a significant effect on the market price or value of securities. There is no simple answer as to what is "material". Guidance is found in publications of the Canadian Institute of Chartered Accountants.

The principle of *caveat emptor* is in effect in Canada. Buyers carry the risk in transactions, absent fraud or misrepresentation. Vendors

are liable for failure to disclose known latent defects. Purchasers must protect themselves through contractual provisions and transactional due diligence.

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

Payment of an environmental indemnity cannot discharge an individual or company from regulatory liability. There are rare statutory exceptions, such as Ontario's esoteric *Industrial and Mining Lands Act*. Corporations may not indemnify directors, officers or others against criminal penalties. Indemnities in Canada are contractual, and do not affect rights to sue or defend individuals or companies who are not party to the contract.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

Canadian securities regulators have tightened corporate disclosure requirements. A number of provincial securities regulators have pioneered statutory amendments prescribing more stringent requirements for timely disclosure of material facts and changes in a wide range of corporate financial, management and prospectus documentation. Individual civil liability provisions have been introduced for corporate directors, officers and others responsible for "continuous disclosure" violations.

Companies and their shareholders are restricted in the ability to escape liability by dissolving a company. Some provincial corporation statutes provide for the continuing of civil, administrative or criminal actions that were started before the company dissolved. Shareholders receiving distribution of property on dissolution are liable for these claims to the value of the property received. Environmental statutes permit criminal charges against individuals for breach of environmental duties whether or not the company is charged. Administrative orders, for example clean-up orders, apply to those who were in charge, management or control and extend to individuals who controlled a polluting company.

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

Canadian shareholders are immune from regulatory and civil liability for acts of corporations. Courts are unwilling to "pierce the corporate veil" absent fraud or other unlawful acts that would render the corporation as a sham. However, where a shareholder takes an active part in the management of the company so as to have charge, management or control, the shareholder may become subject to regulatory liability.

8.4 Are there any laws to protect "whistle-blowers" who report environmental violations/matters?

Whistle-blower protection is enshrined in both federal and provincial environmental legislation.

8.5 Are group or "class" actions available for pursuing environmental claims, and are penal or exemplary damages available?

Class proceeding legislation is in place in most Canadian provinces. Until recently, successful certification of environmental class proceedings had been rare. In the last two years environmental class proceedings have been certified in several provinces, including Ontario, Alberta and Quebec. So far, most environmental class proceedings in Canada have related to claims for damage to or devaluation of property from contamination, for example from TCE. Environmental class proceedings are currently not seen by the courts as a preferable way to litigate personal injury claims. Punitive or exemplary damages are available in Canada, but are awarded only in exceptional cases, and in amounts significantly lower than in the USA.

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in Canada and how is the emissions trading market developing there?

Before the federal election in January 2006, the Government was poised to introduce a domestic greenhouse gas emissions trading system targeted at "Large Final Emitters" with whom the Government had consulted at length.

This system was dismantled before it took effect by the new Conservative government. In October 2006, the new Government's Bill C-30 *Clean Air Act* received its first reading. That Act proposes a timeframe and a series of emission targets that differ markedly from the requirements of the Kyoto Protocol.

The Government has indicated that it will consider a number of compliance options to minimise the cost of compliance to industry. Among those options are industry led emissions trading systems in which the Government will not participate. At this time it remains unclear whether and in what form a Federal emissions trading system will be introduced."

Some provinces, such as Ontario have set up nitric and nitrous oxide and sulphur dioxide caps and trading systems for large emitters. At this early stage the market is immature and small.

10 Asbestos

10.1 Is Canada likely to follow the experience of the US in terms of asbestos litigation?

Canada is not likely to follow the US experience in asbestos litigation. Canada does not have a comparable volume of asbestos producers, nor a large pool of potential plaintiffs. Worker compensation legislation provides compensation to Canadian workers for occupational health injuries and health claims. This legislation ousts workers' rights to bring civil lawsuits. Canada has a more conservative litigation environment than the US. Canadian civil trials are rarely held before juries. Canadian courts currently maintain a cap of $310,000 for pain and suffering in individual personal injury damage awards.

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

Occupational health and safety legislation regulations the duties of owners/occupiers for worker health and safety, for asbestos audits and inspections, and for requirements to encapsulate or remove asbestos from premises. Environmental laws govern the management, transportation and disposal of asbestos waste.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in Canada?

Canada's market for environmental insurance is expanding slowly. An ever-widening set of insurance products has reached the market, for operations, contaminated land risk and remediation cost-cap, directors and officers liability and professional liability.

11.2 What is the environmental insurance claims experience in Canada?

Canada is currently not experiencing an unexpected number of environmental claims. Court decisions concerning environmental insurance claims are routinely decided on the basis of settled principles of insurance law. As more environmental insurance coverage is underwritten, and more contamination discovered, inevitably claims will increase. No unusual or drastic increase in claims or payouts is expected, however.

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Donna is frequently retained by corporate counsel and by commercial, business and real estate lawyers for her strategic and practical environmental expertise in facilitating the closing of commercial real estate transactions, asset purchases and dispositions.

Donna is an accredited mediator. She is a popular speaker at professional conferences. One of her favourites is her regular annual environmental law speech at the Law Society of Upper Canada's Real Estate Summit. She is legal editor of Canadian Environmental Regulation and Compliance News. She is "Repeatedly Recommended" in the Lexpert Directory, and was peer selected for the 2006 inaugural edition of *Best Lawyers In Canada*.

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John has appeared as counsel before environmental and planning tribunals. John has acted on environmental assessment matters for a range of proponents and interveners. Much of his work involves advising or challenging government officials on administrative decisions, whether regarding approvals or orders.

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