

# Environmental Law 2023



## Environmental Law in Canada: an Introduction

### National Developments

#### Challenges to federal jurisdiction could impact net-zero emissions goals

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

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

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

### British Columbia (BC)

#### Building Code requires newbuilds to be more energy efficient

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

Projects such as single family homes or townhouses will be required to meet a

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

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

### **Court ruling to change province's mineral tenure system**

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

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

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

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

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

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

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

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

## **Alberta**

### **Mandate for Alberta Environment and Protected Areas**

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

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

### **Updated climate change plan**

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

- an Alberta plan based on practical, achievable pathways;
- delivering Alberta energy to the world while reducing emissions;
- affordability and reliability;
- energy security;

- partnership with Indigenous communities and organisations;
- industrial policy and systems approach;
- sustainable finance; and
- conservation, protection and enhancement of nature-based solutions.

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

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

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

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