

**MLT AIKINS**

# PFAS FROM A LEGAL PERSPECTIVE

04.23.2024





# CURRENT REGULATORY FRAMEWORKS

## LAND ACKNOWLEDGEMENT

MLT Aikins acknowledges that our offices are located on the territories of Indigenous peoples who have occupied these lands since time immemorial, including the First Nations of Treaty 1 (Winnipeg), Treaty 4 (Regina), Treaty 6 (Edmonton and Saskatoon), Treaty 7 (Calgary), the Coast Salish peoples (Vancouver), as well as other non-Treaty First Nations and Métis.

## ***CANADIAN ENVIRONMENTAL PROTECTION ACT*** **(“CEPA”): LISTS**

- The Domestic Substances List (DSL) is a list of substances manufactured in or imported into Canada on a commercial scale. The original list included approximately 23 000 substances that were in Canadian commerce between January 1984 and December 1986. The DSL is amended, on average, 12 times per year to add, update or delete substances and now contains more than 28 000 entries.
- The Priority Substances List is a list of substances that require investigation on a priority basis to determine whether they meet any of the criteria set out in section 64 of the Act.
- The List of Toxic Substances is a list of substances that meet at least one of the criteria set out in section 64 of the Act, and that were added to Schedule 1 of the Act by the Governor in Council
- The Export Control List is a list of substances whose export is controlled because their use in Canada is prohibited or severely restricted or because Canada has agreed, through an international agreement, to control their export.
- The Virtual Elimination List is a list of substances designated for virtual elimination.

## CEPA: PROCESS OF REGULATING TOXIC SUBSTANCES

- Assessment of new and existing substances to determine and reduce their potential risk to the environment and human health
- Section 64 – how government determines whether something is toxic

# ***CANADIAN ENVIRONMENTAL PROTECTION ACT :*** **PROCESS OF REGULATING TOXIC SUBSTANCES**

## **Toxic substances**

64 For the purposes of this Part and Part 6, except where the expression “inherently toxic” appears, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that

- (a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity;
- (b) Constitute or may constitute a danger to the environment on which life depends; or
- (c) constitute or may constitute a danger in Canada to human life or health

## ***CANADIAN ENVIRONMENTAL PROTECTION ACT :*** **PROCESS OF REGULATING TOXIC SUBSTANCES**

- Section 68 indicates what the Minister can consider in assessing whether a substance is toxic or capable of becoming toxic, as well as how to control the substance
- Under Section 71, the Minister can also publish certain notices
- Section 70 imposes a duty on people who obtain information about toxic substances

## **CANADIAN ENVIRONMENTAL PROTECTION ACT: PROCESS OF REGULATING TOXIC SUBSTANCES**

- Section 77: Minister must publish their decision in the *Canada Gazette*
  - Indicating the measures they propose to take, or
  - If the substance is already regulated, identifying the act or regulation that the substance is regulated by
- Measures that can be proposed are:
  - Taking no further action
  - Adding substance to the List
  - Recommending that the substance be added to Part 1 of the list of toxic substances in Schedule 1
  - Recommending that the substance be added to Part 2 of the list of toxic substances in Schedule 1
- Part 1 can only be recommended in certain circumstances (highest risk)
- Part 2 pollution prevention actions
- Comments can be submitted, which Minister is to consider



## ***CANADIAN ENVIRONMENTAL PROTECTION ACT :*** **PROCESS OF REGULATING TOXIC SUBSTANCES**

- Section 90 allows the Governor in Council to, if recommended by the Ministers, make an order adding the toxic substance to Part 1 or Part 2 of the list of toxic substances
  - Two-year clock starts
- If a substance is added to the list of toxic substances, regulations can be made imposing various different requirements

## ***CANADIAN ENVIRONMENTAL PROTECTION ACT (“CEPA”): SIGNIFICANT NEW ACTIVITY***

- A different way to regulate toxic substances: Significant New Activity, Part 5, Section sections 80 - 84
- An activity that results in
  - The entry or release of a substance into the environment that is greater than the quantity or concentration previously entered/released into environment; or
  - The entry, release, exposure or potential exposure that is significantly different from how the substance previously entered/was released into the environment or of any previous exposure

## ***CANADIAN ENVIRONMENTAL PROTECTION ACT*** **(“CEPA”): SIGNIFICANT NEW ACTIVITY**

- The SNAc provisions are applied when a substance has been assessed and there is a suspicion that new activities may pose a risk to human health and/or the environment.
- If a person’s proposed activities with a substance are captured by the definition of a significant new activity, that person is required to submit a significant new activity notification (SNAN) to the government
- Once a complete SNAN is submitted to the government, the Minister of Environment and Climate Change Canada and the Minister of Health assess the information provided and other available information to determine whether the substance could pose a risk to the environment or human health, and whether further risk management considerations are required.
- The new activity cannot be undertaken until the assessment period of the SNAN has expired.

## ***CANADIAN ENVIRONMENTAL PROTECTION ACT (“CEPA”): ANCILLARY PROVISIONS***

- Minister is required to conduct certain environmental research under Section 44
- Minister can require certain people to prepare and implement a pollution prevention program under Section 56

## ***CANADIAN ENVIRONMENTAL PROTECTION ACT (“CEPA”): RECENT AND COMING CHANGES***

- Bill S-5, *Strengthening Environmental Protection for a Healthier Canada Act*
  - Recognizes Canadians’ right to a healthy environment
  - Recognizes importance of vulnerable populations
  - Use of precautionary principle
  - Plan of Chemicals Management Priorities
  - Reduce Animal Testing
  - Requests to assess
  - Splits Schedule 1 into Part 1 and Part 2
- Draft State of PFAS Report

## ***CANADIAN ENVIRONMENTAL PROTECTION ACT (“CEPA”): RECENT AND COMING CHANGES***

Draft State of PFAS Report and Risk Management Scope for PFAS Report

- Most Canadians have some level of PFAS in their blood
- Harmful impacts of PFAS on environment and human health will only increase without further regulation due to bioaccumulation
- Presumed that the PFAS that have not been studied will have similar impacts as those that have been studied
- Government is proposing to conclude that the entire class of PFAS has potential to cause harm and should be considered toxic under sections 64(a) and (c) of CEPA and added to Schedule 1 -Toxic Substances List
  - This may lead to additional labelling and warning requirements – Environment and Climate Change Canada and Health Canada published proposal to introduce more labelling for cosmetics and cleaning products as well as other consumer products that contain toxic substances
  - Canadian Food Inspection Agency plans to implement an interim standard for PFAS in biosolids used as fertilizers

## DEFINITION

- Perfluoroalkyl and Polyfluoroalkyl Substances
- The class of PFAS encompasses a broad range of structures (for example, ethers, polymers), including those with varying degrees of fluorination and chain length (Buck et al. 2011; ITRC 2020a; OECD 2021; Wang et al. 2017a).
- While certain chemical definitions have been proposed for PFAS, such as those found in reports by the Interstate Technology and Regulatory Council (ITRC 2020a), the Toxics Use Reduction Institute (TURI 2021), and the US EPA (2021a), the term has not benefited from a community-accepted definition.
- Under the auspices of the OECD/UNEP Global PFC Group, a document has been published to address PFAS terminology. This document uses the OECD (2021) definition for PFAS, defined as “fluorinated substances that contain at least one fully fluorinated methyl or methylene carbon atom (without any H/Cl/Br/I atom attached to it), that is, with a few noted exceptions, any chemical with at least a perfluorinated methyl group ( $-CF_3$ ) or a perfluorinated methylene group ( $-CF_2-$ ) is a PFAS.”

## PFAS

- Per - and polyfluoroalkyl substances (PFAS) are a group of over 4,700 human-made substances that are used in a wide range of products such as lubricants, cosmetics, surfactants, firefighting foams, non-stick cookware, food packaging materials, repellents (for dirt, water, and grease), and textiles (carpets, furniture, and clothing). New PFAS are continually being developed and notified to the Government of Canada.
- Adverse environmental and health effects have been observed for well-studied PFAS [perfluorooctane sulfonate (PFOS), perfluorooctanoic acid (PFOA), long-chain perfluorocarboxylic acids (LC-PFCAs), and their salts and precursors] and they have been shown to pose a risk to the Canadian environment. In Canada, PFOS, PFOA, and LC-PFCAs (and their salts and precursors) are prohibited through regulations; however, scientific evidence to date indicates that the PFAS used to replace regulated PFOS, PFOA, and LC-PFCAs may also be associated with environmental and human health effects.



## ***CANADIAN ENVIRONMENTAL PROTECTION ACT (“CEPA”)***

- Currently only PFOS (and its salts), PFOA and long-chain perfluorocarboxylic acids (LC-PFCAs) are regulated under CEPA,
- Regulated under the *Prohibition of Certain Toxic Substances Regulations, 2012*

## ***CANADIAN ENVIRONMENTAL PROTECTION ACT*** **(“CEPA”)**

- Listed as toxic substances under Schedule 1 (Toxic Substances List)
- Gives the federal government authority to adopt measures to prevent or control the use and release of the substances
- Government has in place the *Prohibition of Certain Toxic Substances Regulations, 2012*
  - Prohibits manufacture, use, sale and import of PFOS, PFOA and LC-PFCAs and products containing these substances
    - Certain limited exemptions, such as certain AFFF fire-fighting foams and photographic film

## PROVINCIAL REGULATORY FRAMEWORKS

- BC
  - Regulates PFAS under Contaminated Sites Regulation
  - Included in water standards
- AB
  - January 2023, released updated Soil and Remediation Guidelines which includes PFOS and PFOA
- ON
  - May 2023, published a bulletin on PFAS related risks in drinking water
- Municipalities are testing for PFAS, including Winnipeg which have not detected PFAS or endocrine disruptors

## U.S. ENVIRONMENTAL PROTECTION AGENCY

- New regulation mandating that water providers reduce PFAS to near-zero levels
- EPA has mandated that water providers reduce PFAS to near zero levels
- This regulation has been described as the most significant action the US federal government has ever taken to reduce PFAS exposure in drinking water
- EPA estimated it would cost water utilities about \$1.5 billion annually to comply with regulation, though utilities maintain the cost could be twice that amount
- Under new regulation, water utilities must monitor supplies for PFAS chemical and would be required to notify public and reduce contamination if levels exceed the new standard 4 parts per trillion for PFAS (previously, drinking water was to contain no more than 70 parts per trillion)
- Public water systems have three years to complete monitoring
- If the samples show that levels of PFAS exceed the new standards, the utilities would have another two years to purchase and install equipment designed to filter out PFAS



# **COURT CASES INVOLVING PFAS**

# **EGAN ET AL V. NATIONAL RESEARCH COUNCIL OF CANADA ET AL**

- Action was certified as a class action
- Allegation that the National Research Council of Canada allowed contaminants, PFAS, to enter the surface water and groundwater at its National Fire Laboratory facility site, which migrated onto adjoining properties
- 69 owners of adjacent properties are the class, damages for loss in value of their properties

**GROUPE  
MARCELLE INC.  
AND DAVID CAPE  
V. CANADA  
(ENVIRONMENT  
AND CLIMATE  
CHANGE CANADA)**

- Review of an Environmental Protection Compliance Order issued by Environment and Climate Change Canada under CEPA
- Order directed Marcelle to carry out six measures, including to immediately stop marketing products containing Perfluorononyl Dimethicone
- Perfluorononyl Dimethicone is subject to a Significant New Activity Notice published in accordance with Section 85(1) of CEPA

# **RESPONSIBLE PLASTIC USE COALITION V. CANADA (ENVIRONMENTAL AND CLIMATE CHANGE)**

- Federal government made Order under CEPA to add “plastic manufactured items” (PMI) to the Toxic Substances List
- Court declared the Order to be invalid and unlawful
- Plastics industry argued Order was unreasonable because listing for PMI was too broad, federal government did not have proper evidence to demonstrate that PMI are toxic for the purposes of CEPA
- Court said that while the report concluded that all PMIs have the potential to become plastic pollution, it did not give evidence to bridge the gap between that statement and the decision to list all PMI on the toxic substances list
- Implications for PFAS– government is proposing to treat over 10,000 substances as a single class of toxic substances





# THANK YOU

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