

## Legal update

### Auditor general provides insight into inspection and enforcement of toxic substances regulations

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**October 2018**

**Energy**

**Environmental law**

The Office of the Auditor General of Canada has released an audit report by the Canadian Commissioner of the Environment and Sustainable Development on the enforcement by Environment and Climate Change Canada (ECCC) of regulations to control toxic substances under the *Canadian Environmental Protection Act, 1999 (CEPA)*. The report provides insight into the scope of ECCC's enforcement activities and should be of interest to businesses that use, manufacture, sell and dispose of toxic substances in Canadian commerce.

The Canadian Commissioner of the Environment and Sustainable Development is appointed by the Auditor General of Canada to provide parliamentarians with objective, independent analysis and recommendations on the federal government's efforts to protect the environment and foster sustainable development.

*CEPA* requires the Government of Canada to control and prevent the risks posed by toxic substances. Under *CEPA*, a substance is considered toxic if it can enter the environment in a way that endangers human health, the environment, or both. As of July 2018, there were 141 substances considered toxic under *CEPA*.

ECCC and Health Canada have responsibilities for controlling and reducing toxic substance releases and exposure, with ECCC taking the lead on enforcing the 39 regulations under *CEPA* that generally require businesses that handle any of the 141 listed substances to:

- limit the quantity of toxic substances released into the environment;
- restrict where toxic substances may be released;
- adhere to certain manufacturing processes;
- regulate imports and sales; and
- report toxic substances released.

#### Over 10,000 inspections

The audit report notes that during the last three fiscal years ECCC's 201 enforcement officers in five regions of the country carried out 10,180 inspections, which resulted in 95 tickets, 4,285 written warnings, 612 environmental protection compliance orders and 48 prosecutions, which resulted in 24 convictions. Interestingly, over half of the inspection and enforcement measures occurred under only three of the 39 regulations: the *Tetrachloroethylene (Use in*

Dry Cleaning and Reporting Requirements) Regulations, the PCB Regulations and the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations.

### Little enforcement of many regulations

Twenty-three other regulations collectively were related to less than 1% of all reported inspections and enforcement measures. These included regulations managing asbestos, mercury, gasoline, hazardous waste, lead, sulfur, volatile organic compounds, degreasing solvents and other toxic substances. Surprisingly, one regulation that prohibits 26 toxic substances from being manufactured, used, sold or imported into Canada (the *Prohibition of Certain Toxic Substances Regulations, 2012*) had no inspections over the three-year period.

Dry cleaners and entities with PCBs were far more likely to be subject to inspections and enforcement. During the last three years, nearly 70% of all convictions under *CEPA* were related to a single toxic substance regulated by the dry cleaning regulation. The audit found no documentation indicating that this substance, tetrachloroethylene, posed a higher risk to human health and the environment than any of the other toxic substances.

### Enforcement not based on risk

The audit report was critical of ECCC's enforcement priorities, as it found that ECCC did not base most of its enforcement efforts on risks to human health or the environment. Instead, ECCC prioritized enforcement activities merely on the basis of businesses' potential for non-compliance instead of on those businesses and activities that posed the greatest risk to human health and the environment. In response to the audit, ECCC has agreed to develop a risk framework that assesses the risks associated with non-compliance of regulatory requirements and said it will develop a new policy about how environmental and human health risks are taken into account in setting inspection and enforcement priorities.

The audit report also followed up on previous audits. One issue examined was whether ECCC and Health Canada undertook any evaluations of their programs in meeting the objective of reducing risks to human health and the environment posed by toxic substances.

It found that the departments did not evaluate the effectiveness of the regulations or their actions in actually reducing risks to Canadians and the environment except for four of the 141 toxic substances.

The audit concludes that ECCC and Health Canada have significant work to do in selective areas to effectively control the risks posed by toxic substances.

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