Legal update

10 tips to manage environmental risk during uncertain times

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During the current pandemic there are many competing priorities, including environmental legal obligations that remain in force. At the same time, the pandemic will create new challenges in fulfilling these duties. Below are practical suggestions on how to integrate environmental compliance information that can be used to assist companies to check their compliance status.

COVID-19 teams

Many companies have established COVID-19 teams. Ensure environmental issues are on the team’s radar and include someone (and an alternate) knowledgeable about environmental matters. Keep in contact with outside experts and contractors to understand their availability. Many contractors have already given force majeure notices pursuant to pre-existing contracts that they may not be able to provide their regular services. Read our update about force majeure here.

Review environmental approvals, licences and permits (approvals) to confirm operational limits

Many companies find themselves operating at one end of the spectrum, either at minimal levels / ceasing operations, or operating at capacity or being asked to identify potential maximum capacity. Ensure you consult your internal teams to understand the obligations for ceasing or expanding operations, including notification to regulators if changes occur.

In Quebec, companies that temporarily increase their production to supply essential products related to efforts to combat COVID-19 could benefit from an exemption; read our update.

Emergency amendments to approvals

Many companies require amendments to their approvals to change their operational requirements. If you find your company is in such position then communicate with your regulator the need for a change. Ministries are setting up response teams to deal with emergency amendments. Your local ministry contact is the best place to start.
In Quebec, companies that temporarily modify their production to supply a new product related to efforts to combat COVID-19 could benefit from an exemption; read our update.

**Reporting and compliance deadlines**

It is important to confirm deadlines for all approvals and regulatory requirements. Many annual reports are due on March 31 for the prior year. Administrative orders may also have timelines and reporting obligations set out in them. Missing a deadline in an approval or an order is an offence. Official guidance at this time is only available for Alberta and Quebec, who have each modified certain reporting obligations. We continue to monitor the provinces, territories and federally for any changes. Companies should assess their ability to meet any regulatory or compliance deadlines. If there’s a concern that a deadline will not be met due to COVID-19 impacts, an immediate written request should be made for an extension from the local district office and authorized officers.

While Alberta and British Columbia have deemed engineers an essential service, Ontario has deemed businesses that deliver or support the delivery of certain “community services,” and Quebec has deemed “enterprises involved in environmental emergencies” and enterprises performing “maintenance and operation of strategic infrastructures” to be priority services, many engineering offices are only working remotely. This may hinder access to necessary supports to complete reports and make filing deadlines that require a physical stamp of an engineer.

**Designation as an essential service**

If your company has been designated an essential service and will continue to operate, then it’s important to understand what other services are also essential. (See our update on essential services across Canada.) Ontario and Quebec have designated essential services restrictions that came into force on March 24 at 11:59 p.m. in Ontario (revised on April 3, including a significantly reduced number of essential services from 74 down to 44) and March 25 at 12:01 a.m. in Quebec (changes are made regularly to the list). Alberta’s order and list was released on March 27 and was effective immediately. British Columbia also announced what it considered to be essential services. We note that generally, the environmental industry sector should largely be available to help companies continue their operations.

**Due diligence**

It is important during this time to consider communicating proactively with your regulator on potential compliance concerns. While many government employees are working remotely, there are still regulatory inspections and investigations taking place.

Ensure you have a protocol in place for regulatory inspections and investigations but to also add a new question about COVID-19 self-assessments (i.e., similar questions for all visitors: Have they recently travelled? Do they meet any of the assessment criteria for COVID-19 testing?). It’s important this policy is enforced. If the answer is yes, then ask for another officer to conduct the inspection/investigation. Proactive communication is a way to inform your local officer about current operations and precautions being taken during this challenging time. It may also be useful in a subsequent due diligence defense should the need arise.

**Emergency and spill response reporting**

Review your emergency and spill reporting protocols. Confirm that the people who will respond and report any spill or emergency are still available. Consider adding alternate contact information. Confirm that on-site emergency response supplies are adequately stocked. Check with your emergency response contactors to ensure they are still operational and can respond. If not, then seek alternative contractors. With constantly changing staffing levels at some companies and workforces reduced due to self-isolation and self-quarantine, ensure clear communication exits to ensure how environmental compliance and emergency response are managed.
Civil litigation, provincial offences and regulatory proceedings

In Ontario, pursuant to an order under s. 7.1 of the *Emergency Management and Civil Protection Act* (the Suspension Order), all provincial limitation periods for civil lawsuits have been temporarily suspended for the duration of Ontario’s declared state of emergency, retroactive to March 16, 2020. Likewise, subject to the discretion of the applicable court, tribunal or decision-maker, all deadlines in pending civil, *Provincial Offences Act*, and regulatory proceedings have been temporarily suspended.

Notwithstanding the Suspension Order, the Ontario Superior Court of Justice and Ontario Court of Appeal continue to hear urgent civil matters. The Ontario Court of Justice, however, has suspended all *Provincial Offences Act* matters scheduled until May 29, 2020. Finally, the Environmental Review Tribunal (the ERT) has stated it is postponing and rescheduling in-person hearings. The ERT is using alternative hearing options such as written and telephone hearings where feasible and is using its discretion under the Suspension Order to suspend procedural time periods for matters before it in an effort to continue delivering services and minimizing disruption.

In Quebec, under Order No. 2020-004 of the minister of health and social services issued on March 15 (the First Health and Social Services Order), any hearing scheduled before a court of justice, administrative tribunal or other administrative body must be held behind closed doors unless the decision-making authority decides otherwise. Pursuant to a subsequent order issued on March 23, Order No. 2020-009 of the minister of health and social services (the Second Health and Social Services Order), certain time limits provided for in the *Code of Penal Procedure* are suspended except for cases deemed urgent by the courts. Furthermore, the Second Health and Social Services Order provided that despite articles 96 and 103 of the *Code of Penal Procedure*, any search may be authorized by telephone warrant.

In British Columbia, the Court of Appeal for British Columbia and Supreme Court of British Columbia have generally adjourned all hearings scheduled to occur before May 1. The Supreme Court will hear matters that, upon a party’s request, are determined to be essential and urgent. The Court of Appeal will only be hearing appeals the court deems as matters that must proceed. On March 26, the minister of public safety and solicitor general issued ministerial order No. M086, pursuant to the *Emergency Program Act*. This order suspends every mandatory limitation period within which a civil action, proceeding, claim or appeal must be commenced in the Provincial Court, Supreme Court or Court of Appeal, effective March 26 until the current state of emergency declaration expires or is cancelled.

In Alberta, the Court of Queen’s Bench has adjourned all civil matters scheduled for hearings up to May 1. All filing deadlines under the Alberta Rules of Court are suspended until that time. At this time, the court will only hear emergency matters.

**Review environmental health and safety policies and procedures**

While there are competing interests to keep companies functional and operational, now is a good time to have policies and procedures reviewed to determine if any temporary changes are required as a result of COVID-19 operational realities. In some companies, employees are now working remotely. Consider delegating this review to someone who is now working remotely as opposed to at a facility. Policies and procedures are an important part of operational concerns and are also important to potential due diligence defences.

**What comes next?**

Companies should continue to consider the implications of changes to their operations if further government-ordered shutdowns are implemented and workforces and supply chains are further affected. Review operational temporary closure plans to ensure critical operations are managed appropriately and key contractors who may be required to assist in any closure continue to be available.

Some regulators have taken to conducting consultations on-line instead of in person. Be aware of this change in communications with your regulator if you are an involved stakeholder. On April 3, the Ontario government announced
a temporary exemption for Ontario ministries from a regular 30-day public consultation period so it can expedite decision-making and implementation of measures to respond to the COVID-19 emergency.

Many government agencies have stated they will be posting a “frequently asked questions” for the regulated community; however we have not yet seen any at this time.

As the current situation continues to rapidly change, our team is available to assist you across Canada for any of your environmental legal needs.

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