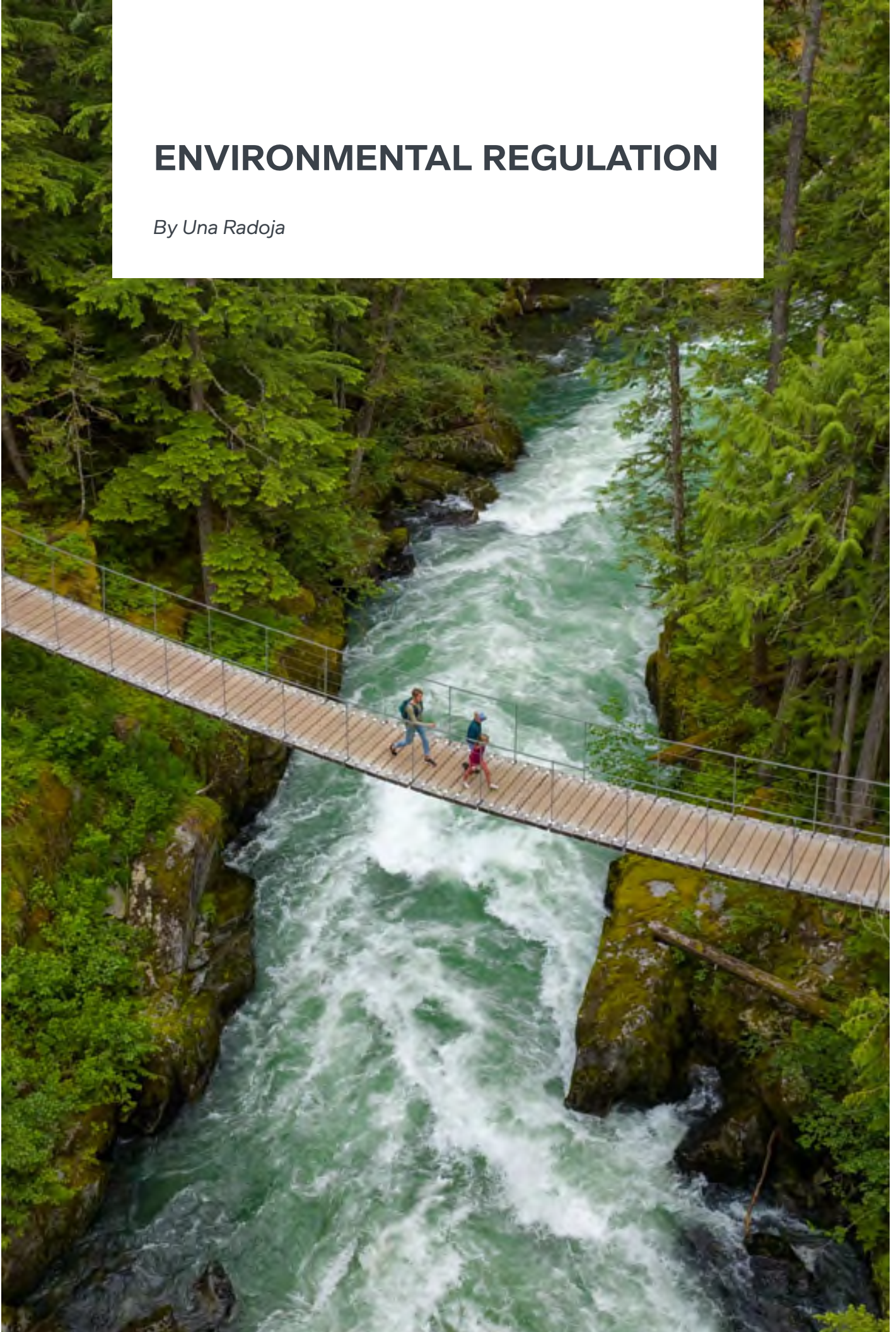


# ENVIRONMENTAL REGULATION

*By Una Radoja*



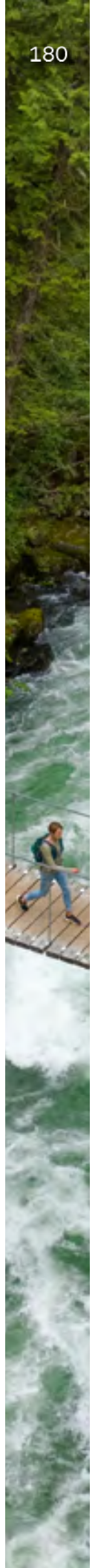
## ENVIRONMENTAL REGULATION

Environmental regulation in Canada is an area of shared responsibility between the federal government and the provincial governments, which, in turn, have delegated certain matters to municipal governments.

Both the federal and provincial governments have enacted legislation, regulations, policies and guidelines that affect industry on environmental matters such as pollution or contamination of the air, land and water, toxic substances, hazardous wastes, greenhouse gas emissions, spills, and transportation of dangerous goods. In addition, there are requirements for approvals and environmental impact assessments in many areas affecting both the public and private sectors.

Environmental regulators have broad monitoring and inspection powers and use a wide range of enforcement mechanisms. These powers and mechanisms extend not only to the businesses involved, but also to corporate directors, officers, employees and agents if they authorize or acquiesce in an unlawful act or fail to take reasonable measures to ensure compliance, even if the corporation has not been prosecuted. For example, the federal *Canadian Environmental Protection Act* (CEPA) and the federal *Fisheries Act* includes provisions for warnings, significant fines, imprisonment, injunctions and compliance orders. Canadian courts are also now holding companies, as well as their officers, directors and certain employees liable for environmental offences.

Liability for contaminated sites is an important issue in Canada. The law in this area places liability on those persons who cause the pollution (the “polluter pays” principle) and, depending on the particular situation and province, on those persons who own, occupy, manage or control contaminated sites, or who owned, occupied or controlled such sites in the past. Consequently, a “buyer-beware” philosophy prevails, making it critical in business and real estate transactions that either the buyer or the lender knows about all past and potential environmental problems associated with a particular business or property and, in some cases, formerly owned businesses and properties. In certain Canadian provinces, current and former owners and operators of contaminated land, as well as their directors and officers, can face civil actions by future owners of the land or impacted neighbouring property owners, for recovery of remediation costs incurred. Such persons may also face



pollution prevention, investigation and remediation orders issued by the provincial regulator. If the contamination affects waters frequented by fish, a charge under the federal *Fisheries Act* may ensue.

Canada has enacted legislation to prevent future contaminated sites and protect water resources, including the CEPA, the *Fisheries Act* and the *Canada Water Act*. Operating in conjunction with provincial regulation, this legislative framework helps Canadian businesses determine if the substances that they are using are deleterious substances and if so the amount that is permitted to be released without penalty. Officers and directors in most Canadian jurisdictions have a positive obligation to take reasonable steps to ensure compliance and to report the release of certain substances. Any business that releases substances that may enter waterways must be in compliance with the laws and accompanying regulations or the business risks potentially significant penalties.

Air pollution is another important issue in Canada. The CEPA creates duties for businesses if there is a release or a likelihood of release into the environment of a listed toxic substance that may threaten the health, safety, and welfare of humans. These duties include reporting, notifying the relevant authorities and members of the public, and deploying preventive measures to reduce the damage to the environment. These obligations also apply to pollution that may have international effects.

As a result of stringent environmental legislation and the regulatory bodies' vigorous approach to investigating and prosecuting environmental concerns, it is prudent for businesses to seek proper advice concerning environmental due diligence.

Federal and provincial governments have developed and started to implement legislation aimed at reducing greenhouse gas emissions. The federal government has begun implementing a federal carbon pricing system in provinces and territories that do not have their own qualified systems in place. The federal system consists of an output-based pricing system that applies to various industries, and a fuel tax that applies to fossil fuels consumed with the province or territory. Climate change law is a developing area across Canada and businesses should ensure they are up to date on current and developing requirements in the provinces where they operate.

Canada enacted the *Impact Assessment Act* (formerly the *Canadian Environmental Assessment Act*) in 2019 in an effort to decrease the environmental, economic, health, and social effects of major projects in Canada as well as the impacts on Indigenous groups and the rights of Indigenous Peoples in Canada. The *Impact Assessment Act* applies to major projects described in the associated project list or those projects designated by the Minister. Once a project is designated, the Act provides tools to support co-operation and co-ordination with other jurisdictions.

Projects that meet the thresholds set out in the project list or that are designated by the Minister undergo a planning phase to determine if an impact assessment is required. Projects that require an impact assessment are reviewed by either the agency or a review panel and a decision is rendered regarding the impacts of the project and any amendments or modifications required. Any business seeking approval of a major project that may require an impact assessment should be aware of the requirements and the timelines associated with approval.

Canada is working to streamline the project approval process through the “one project, one assessment” principle where major projects would only have to undergo either a federal impact assessment or a provincial impact assessment. Streamlining the project approval process will help to attract investment into major Canadian projects by allowing these projects to be completed faster while still in alignment with Canada’s sustainability objectives.

**FOR MORE INFORMATION, PLEASE CONTACT:**

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