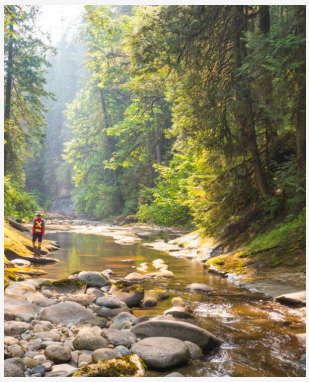
OSLER

# Regulation of 'forever chemicals' (PFAS) in Canada

**JANUARY 5, 2024 10 MIN READ**



## Related Expertise

- Commercial Real Estate
- Corporate and Commercial Disputes
- Disputes
- Environmental
- Environmental Disputes and Enforcement
- Product Liability
- Regulatory
- Regulatory, Indigenous and Environmental

Authors: Richard J. King, Jennifer Fairfax, Evan Barz, Shelby Empey

Per-and polyfluoroalkyl substances (PFAS) are increasingly of interest to environmental regulators — in Canada, and abroad. Recently, the federal government announced its intention to designate PFAS as a class of toxic substances under the *Canadian Environmental Protection Act* (CEPA), opening the door to further regulatory restrictions (and potential prohibitions) on the manufacture, use, sale and import of products containing PFAS.

In this Osler Update, we provide an overview of PFAS regulation in Canada (both current and proposed), discuss how Canada's approach to PFAS compares to the United States (including litigation trends), and consider the potential implications of increased regulation of PFAS for businesses operating in Canada.

## What are PFAS?

PFAS are comprised of more than 4,700 human-made synthetic chemicals. They have many beneficial properties, including high physical, chemical and thermal resistance, repellency to oil and water, and low surface tension. These traits make PFAS widely used in consumer products and in industrial applications. Products containing PFAS include non-stick cookware, cosmetics, textiles, personal care products, paints, sealants, varnishes, and aqueous film-forming foam (AFFF) for fire fighting. They are also commonly used in the production of electronics, plastics and metals.

While PFAS have desirable traits, they are also considered to be bioaccumulative and environmentally persistent — meaning that they do not readily degrade under normal conditions (and for that reason, have been labelled "forever chemicals"). PFAS are also mobile within the environment and have the potential to transform from precursors to stable, toxic end products, which further increases concentrations in the environment. Some PFAS are subject to long-range transport through the atmosphere and oceans. PFAS have been detected in wildlife, environmental media and humans.

Environmental and health regulators have been concerned about the effects of exposure to PFAS on human health and the environment — in particular, effects on the liver and kidneys, potential harm to reproductive and endocrine systems, and developmental and immunological effects. Some PFAS, including perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA), can cause cancer in animals exposed to high doses.

# Current regulation of PFAS

## Regulation of PFAS in Canada

PFOS (and its salts), PFOA, and long-chain perfluorocarboxylic acids (LC-PFCAs), are currently listed as toxic substances in Schedule 1 of CEPA (the Toxic Substances List). Adding a substance to the Toxic Substances List provides the Canadian government with the authority to adopt measures to prevent or control the use and/or release of these substances, such as the adoption of regulations, guidelines and codes of practice.

Under that authority, the Canadian government currently regulates PFOS, PFOA and LC-PFCAs under the *Prohibition of Certain Toxic Substances Regulations, 2012* (the Prohibition Regulations). The Prohibition Regulations prohibit the manufacture, use, sale and import of PFOS, PFOA and LC-PFCAs and products containing these substances, subject to certain limited exceptions and permitted activities, including for use in certain AFFF fire-fighting foams and photolithography and photographic film.

Provincially, British Columbia and Alberta regulate PFAS under contaminated sites frameworks. In B.C., PFAS are regulated under the *Contaminated Sites Regulation* adopted under the *Environmental Management Act*. In January 2023, Alberta released updated versions of the *Tier 1 Soil and Remediation Guidelines* [PDF], which provide numerical risk-based guidelines for the remediation of PFOS and PFOA at contaminated sites.

Federally, Health Canada has also developed a maximum acceptable concentration guideline for PFOA (200 ng/L) and PFOS (600 ng/L) in drinking water and screening values for other PFAS. In May 2023, Public Health Ontario published a "Focus On" bulletin on PFAS, which provides an overview of exposure risks and human health effects with a focus on drinking water. B.C. has also listed PFAS as emerging contaminants of concern in its *Design Guidelines for Drinking Water Systems in British Columbia*, which are used in the approvals process for changes to waterworks.

## U.S. regulation of PFAS

California, Vermont, Colorado, Maine, Maryland, Michigan, New York and Wisconsin are some of the states currently regulating PFAS in products. For instance, California prohibited the sale and distribution of plant-fiber based food packaging containing PFAS at levels exceeding 100 parts per million, prohibited PFAS in products for children under the age of 12, and has a planned prohibition of all PFAS from cosmetics by 2025. Some states, such as Minnesota, are phasing in broad reporting requirements and prohibitions on consumer products containing PFAS, while Maine, Vermont and Maryland are each introducing restrictions and prohibitions on PFAS in certain products over the next several years.

Federally, the U.S. Environmental Protection Agency (EPA) is proposing to designate PFOA and PFOS as hazardous substances under the *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA), also commonly referred to as "Superfund". Among other things, these designations would require facilities across the country to report on PFOA and PFOS releases that meet or exceed reportable quantities, allow the EPA to respond to releases or threats or releases of PFOA and PFOS without making a determination of imminent and substantial danger, and require responsible parties to pay for the cost of remediation. The EPA sought public comment in mid-2023 on a proposal to expand the designation to include an additional seven PFAS under CERCLA. Under the *Clean Water Act*, the EPA is in the development stages of a test for about 40 PFAS in water.

## Proposed further regulation of PFAS in Canada

In 2021, the Canadian government released a Notice of intent to move forward with activities to address PFAS as a class, since substance-specific information was lacking for most PFAS that are used in Canada, including those that are commonly used by industry to replace those PFAS currently restricted for use in Canada (as above, PFOS, PFOA and LC-PFCAs). In the Notice, the government announced its intention to invest in research and monitoring of PFAS, collect and examine information on PFAS to inform the class-based approach, review PFAS-related policy development in other jurisdictions, and publish a "State of PFAS Report" summarizing relevant information on the class of substances within two years.

In May 2023, the federal government released a Draft State of Per- and Polyfluoroalkyl Substances (PFAS) Report (the Draft Report) and a complimentary Risk Management Scope for PFAS Report (the Risk Management Report). The Draft Report indicates that it is impractical to manage PFAS as individual substances, because doing so does not address the potential environmental and health concerns that the broad class of PFAS pose. From the government's perspective, these potential harms will only increase absent federal regulation of PFAS as a class.

In the Draft Report and the Risk Management Report, the federal government proposes to recommend that PFAS, as a class of substances, be added to the Toxic Substances List. If that step is taken, the Risk Management Report outlines additional regulatory measures that the government is considering taking, including:

- introducing regulations and/or other instruments (i.e., guidelines, codes of practice) to minimize environmental and human exposure to the class of PFAS from firefighting foams
- gathering information (including through mandatory reporting) needed to identify and prioritize options for minimizing environmental and human exposure to PFAS from other sources and products
- aligning with actions in other jurisdictions, where appropriate

The Risk Management Report is clear that these risk management options are preliminary and could be subject to change based on additional information obtained by the government. It is expected that additional regulatory proposals would be forthcoming once additional information is gathered.

The commenting period on the Draft Report and the Risk Management Report closed on July 19, 2023. Publication of the comments received on the reports has yet to occur, but is anticipated to take place concurrently with the publication of a "Final State of PFAS Report" and the government's proposed risk management approach.

The Risk Management Report also indicates that the government intends to implement the following actions in accordance with the timelines noted (timelines are potentially subject to change):

| Action | Timeline |
|---|---|
| *Mandatory Information Gathering*: Publication of a mandatory information gathering notice under section 71 of CEPA, which provides the government with authority to collect information from any person regarding their activities with substances (section 71 notices typically target users, sellers, importers, and manufacturers). | Planned for Fall 2023 (now passed). |

| Action | Timeline |
|---|---|
| *Responses to Public Comments*: Publication of responses to public comments on the government's proposed risk management approach and, if required, publication of a proposed regulatory instrument. | At the latest, 24 months from the date on which a recommendation is published that PFAS, as a class, be added to the Toxic Substances List. |
| *Regulatory Instrument Proposal*: Consultation on a proposed regulatory instrument, if required (including potential regulations). | A period of 60 days, starting upon publication of the proposed instrument. |
| *Final Regulatory Instrument:* Publication of a final regulatory instrument, if required. | At the latest, 18 months from the publication of a proposed instrument. |

In addition to the above-noted measures under CEPA, on May 19, 2023, the Canadian Food Inspection Agency issued a notice to industry of its Intent to engage on implementing an interim standard for per- and polyfluoroalkyl substances (PFAS) in biosolids. This proposed standard is designed to mitigate human health and environmental risks posed by PFAS-containing biosolids used as commercial fertilizer and, as proposed, would require that biosolids contain less than 50 ppb of PFOS before they can be imported into or sold in Canada.

## PFAS-related litigation in Canada and the U.S.

PFAS-related litigation has been commenced in both Canada and the U.S., although the amount and scale of U.S. litigation is considerably more significant.

In Canada, a class action was certified in 2021 against the National Research Council of Canada (NRC) relating to PFAS that entered the surface water and ground water at the NRC's National Laboratory Facility in Mississippi Mills, Ontario. Between 1981 and 2016, NRC used the site to conduct research and development of fire safety matters, including the testing of firefighting foams containing PFAS. The plaintiffs are adjacent landowners seeking damages for the loss in value of their properties, caused by the contamination of groundwater of some of the class members' properties and the stigma attached to all of the class members' properties. In the employment context, fire fighters also have been able to advance claims related to PFAS exposure in the workplace.

The U.S. has had monumental cases settled relating to PFAS contamination. In 2018, a class action was brought against 3M by American public water utilities that 3M's PFAS-containing firefighting foams contaminated drinking water. In June 2023, just before the trial was due to commence, 3M settled with the water utilities for $12.5 billion to be paid over 13 years; this is one of the largest settlements to date relating to drinking water in U.S. history. 3M also announced in December 2022 that they will stop making products that contain PFAS by the end of 2025.

A similar claim was settled just weeks earlier against Chemours, DuPont, and Corteva by American water utilities for $1.185 billion in June. In this case, the chemical manufacturing companies agreed to settle the claims alleging the chemicals they manufactured polluted public drinking water.

These large cases are just the tip of the iceberg of U.S. PFAS-related litigation, with tens of thousands of other PFAS claims being commenced in the U.S.,including claims related to contamination, consumer products, packaging and insurance-related claims. Businesses in Canada should be cognizant of these trends, as Canadian claims often "piggy-back" on successful American suits, with similar actions being commenced in this country.

## Implications for Canadian business

For businesses operating in Canada with potential exposure to PFAS, it is important to stay abreast of potential regulatory developments, as consultations on the regulation of PFAS continue and regulatory proposals are announced. When additional opportunities are provided to comment on potential regulatory instruments, impacted businesses would be wise to make their views known, to optimize the chance that the government will take their concerns into account.

For importers, manufacturers and retailers, it will be essential to determine whether their products contain PFAS and, if so, how to mitigate regulatory compliance and potential litigation risks. Depending on the content of potential forthcoming regulations, these businesses may also need to identify alternatives to PFAS in their products, particularly if prohibitions on the use of further PFAS in certain products are introduced. For businesses which use PFAS in their operations, consideration should be given to minimizing exposure to PFAS in the workplace to reduce health risks. In the context of transactions involving real estate, sellers and purchasers need to give consideration with respect to the potential for, and allocation of, PFAS-related liability, particularly since we are increasingly seeing representation and warranty insurance in transactions exclude PFAS from the scope of coverage.