

Forever chemicals and Canadian businesses: What you need to know about PFAS

September 19, 2023

Global awareness of the risks and liabilities associated with the use and persistence of per- and polyfluoroalkyl substances (PFAS) has been growing over the past two decades. In response, governments in Canada and elsewhere have been grappling with how to regulate these “forever chemicals.”

As discussed in our prior article, [Understanding PFAS in Canada: An emerging risk](#), PFAS are a group of over 4,700 synthetic chemicals characterized by a fluorinated carbon chain. The strength of the carbon-fluorine bonds makes PFAS capable of repelling water, oils, and heat. These repellent properties have led to the wide use of PFAS in a variety of applications, including in stain and water repellent textiles, food packaging, consumer products, waxes, paints and cosmetics.

To date, the federal regulation of PFAS in Canada has been restricted to regulations under the [Canadian Environmental Protection Act, 1999](#) (CEPA), which target only the mostly widely known and studied PFAS substances: Perfluorooctane sulfonate (PFOS), Perfluorooctanoic acid (PFOA), and Long-chain perfluorocarboxylic acids (LC-PFCAs). However, on May 20, 2023, the federal government took the next step towards regulating the broad class of PFAS as a whole, publishing a [Draft State of Per- and Polyfluoroalkyl Substances \(PFAS\) Report](#) (the draft state of PFAS Report) and a report summarizing proposed risk management measures for PFAS, entitled [Risk Management Scope for Per- and Polyfluoroalkyl Substances](#) (PFAS).

Significantly, the federal government is proposing to take the rare step of concluding that the entire class of PFAS has the potential to cause harm to the environment and human health, and therefore should be considered “toxic substances” pursuant to sections 64(a) and (c) of CEPA. The proposed designation of the entire class of PFAS as toxic is significant, as it will result in greater restrictions (and prohibitions) on the manufacture, use, sale and import of a wide range of products containing PFAS. Proposed changes mean that industry will not be able to turn to using presently unregulated types of PFAS, thus creating the need to find non-PFAS alternatives.

What you need to know

- Governments around the globe continue to introduce new regulations on the manufacture, import, sale and use of products containing PFAS. [Learn more about current federal regulation of PFAS below.](#)
- In recent years the federal government has made several announcements aimed at expanding the scope of PFAS regulation in Canada, including its stated intent to address the broad class of PFAS and invest in additional PFAS-related research. [Learn more about the proposed measures to address PFAS below.](#)
- Most notably, the federal government is proposing, through the draft state of PFAS report, to conclude that all PFAS are toxic, which will likely result in tighter restrictions, such as new labelling and warning requirements for products containing PFAS. [Learn more about the draft state of PFAS report below.](#)
- The federal government is inviting feedback from industry stakeholders on the draft state of PFAS report and its proposed risk management measures and plans to issue a mandatory information notice in fall 2023 to collect more information on products containing PFAS. [Learn more about stakeholder input below.](#)
- Following the release of the draft state of PFAS report, the federal government also announced its intention to implement an interim standard for PFAS in biosolids imported and sold for use as fertilizer. [Learn more about standards for biosolids below.](#)
- The draft state of PFAS report coincides with additional [attention being placed on PFAS at the provincial level](#), the adoption of [stricter regulations south of the border](#), and the [recent emergence of some of the first PFAS-related litigation in Canada](#).

Sector impact

The legal risks associated with PFAS are here to stay and will only continue to grow as awareness of the environmental and health-related effects of these forever chemicals increases. PFAS-related risks are of particular relevance to the following:

- Employers – with respect to the risk of possible exposures to PFAS in the workplace and related health complication.
- Retailers – with respect to the need to determine whether their products contain PFAS (which may require contacting suppliers and manufacturers), and, if they do, how to minimize the associated regulatory compliance and litigation risks.
- Vendors and purchasers in real estate or commercial transactions – with respect to how to allocate the risk of PFAS-related regulatory or environmental liabilities.

Regardless of sector, it is clear that PFAS are quickly becoming contaminants of concern that all businesses ought to be aware of. Companies operating in Canada should consider conducting a thorough audit of PFAS-related risks and may wish to consider obtaining the assistance of legal counsel in this regard. All businesses should also carefully review their insurance policies for any PFAS-related exclusions, which are becoming more and more frequent as awareness of PFAS-related risks grows.

PFAS effects on human health and the environment

Potential impact:

- Liver
- Kidney
- Immune system
- Reproduction
- Development
- Endocrine function (thyroid)
- Nervous system
- Metabolism and body weight
- Carcinogenicity

Ecotoxicity:

- Potential bioaccumulation in wildlife and plants including aquatic life



Proposed changes to the regulation of PFAS in Canada

A. Current federal regulations

In July 2006, the [federal government concluded](#) that a specific type of PFAS – PFOS and its salts and precursors – posed a potential threat to the environment. In response, Canada enacted the [Perfluorooctane Sulfonate and its Salts and Certain Other Compounds Regulations in 2008](#) (the 2008 Regulations), which restricted the manufacture, use, sale and import of PFOS and products containing PFOS, unless the substance was only incidentally present. The 2008 Regulations also provided several exceptions for “permitted activities,” including use in firefighting foams and photographic films.

PFOS was later added to both the [List of Toxic Substances](#) and the [Virtual Elimination List](#) established under CEPA in 2009. Two other types of PFAS, PFOA and LC-PFCAs, were also added to the [List of Toxic Substances](#) in 2013.

In December 2016, the 2008 Regulations were repealed and replaced through amendments to the [Prohibition of Certain Toxic Substances Regulations, 2012](#), which remain in force today. The 2016 amendments expanded the regulation of PFAS to other PFAS substances, including PFOA and LC-PFCAs (in addition to PFOS), such that the manufacture, use, sale and import of PFOS, PFOA and LC-PFCAs (and products containing these substances) are all prohibited, subject to certain exceptions and “permitted activities.”

Relevant to the regulation of PFOS specifically, Bill S-5, *Strengthening Environmental Protection for a Healthier Canada Act*, received Royal Assent and came into force on June 13, 2023. In addition to modernizing CEPA, Bill S-5- repeals the Virtual Elimination List and the [Perfluorooctane Sulfonate Virtual](#)

[Elimination Act](#) in favour of a more risk-based approach that emphasizes prohibition over elimination. Read more about [Bill S-5 and its modernization of CEPA here](#).

B. What's next: Expanding the scope of PFAS regulations

The federal government issued a [Notice of Intent](#) to address the broad class of PFAS substances in April 2021 (the PFAS Notice of Intent). The PFAS Notice of Intent outlined the federal government's intention to invest in additional PFAS-related research and monitoring; collect and examine information on PFAS to inform a class-based approach; review policy developments in other jurisdictions; and publish a non-draft state of PFAS report within two years time.

In May 2022, the federal government published the [proposed Prohibition of Certain Toxic Substances Regulations, 2022](#). Significantly, the proposed regulations would repeal several of the current exemptions for permitted activities, either immediately or at a specified date in the future. PFOA and LC-PFCAs would also be added to the [Export Control List](#) established under CEPA in conjunction with the proposed changes.

Earlier this year, the federal government also released a [draft technical document](#) on its proposed objective for updating drinking water guidelines to reduce the potential exposure of Canadians to PFAS through drinking water, to be implemented in conjunction with the provinces.

C. The draft state of PFAS report and proposed risk management scope

As noted above, the federal government took a significant step towards regulating the broad class of PFAS on May 20, 2023, with the release of the draft state of PFAS report and companion risk management report.

In the draft state of PFAS report, the federal government notes that the regulation of PFAS is made difficult by the large number of substances implicated and their wide application. Given the complexity and magnitude of the class of PFAS, the current approach, which attempts to manage risks for only certain types or groups of PFAS, is said to be impractical and insufficient to address the broader concern posed by these substances. The federal government is therefore proposing to take the rare step of concluding that the entire class of PFAS have the potential to cause harm to the environment and human health, and therefore should be considered "toxic substances" pursuant to sections 64(a) and (c) of CEPA.

According to the federal government, the harmful impacts of PFAS on the environment and human health are only expected to increase without further regulation preventing their use in products and the environment. While not all types of PFAS have been widely studied, it is presumed that those that have not been studied will have similar impacts to the more widely known PFAS substances, such as PFOS and PFOA.

Based on the findings and proposed conclusions in the draft state of PFAS report, the risk management report recommends that the entire class of PFAS be added to the List of Toxic Substances under CEPA. The proposed addition of the entire class of PFAS to the List of Toxic Substances is significant, as it would result in greater restrictions on the manufacture, use, sale and import of a wide range of products that contain PFAS. It also means that industry will not be able to turn to using presently unregulated types of PFAS to avoid the regulations, thus creating the need to find non-PFAS alternatives.

The designation of all PFAS as toxic may also lead to additional labelling and warning requirements. To this end, Environment and Climate Change Canada and Health Canada published a [Notice of Intent](#) in October 2022 outlining their proposal to introduce additional labelling and warning requirements for certain consumer products, such as cosmetics and cleaning products, that contain toxic substances. If the proposed conclusion in the draft state of PFAS report is adopted, these proposed warning requirements would likewise apply to products containing PFAS. For more information, please see our [article on the labelling notice of intent](#).

In addition to recommending that all PFAS be added to the List of Toxic Substances, the federal government is considering different risk management options to help achieve the lowest possible levels of environmental and

human exposure over time, subject to economic and realistic limits. The risk management report identifies the following risk management options:

- Regulatory and/or non-regulatory controls to minimize environmental and human exposure to PFAS from firefighting foams.
- Gathering information to identify and prioritize options for minimizing environmental and human exposure from the class of PFAS from other sources and products.
- Aligning with actions in other jurisdictions.

D. Stakeholder input on PFAS report

To further consider these options, stakeholders were invited to provide input on the draft state of PFAS report, as well as additional information to address the following perceived information gaps:

- The availability of alternatives to PFAS, including in firefighting foams.
- The socio-economic impacts of replacing PFAS, including associated costs and the feasibility of elimination or replacement.
- The types, quantities and concentrations of PFAS in products manufactured, imported into and sold in Canada.

Various data collection initiatives are planned to address these gaps, including the issuance of a mandatory information gathering notice pursuant to section 71 of CEPA in fall 2023. The proposed timing of the data collection initiatives and other proposed regulatory activity arising from the draft state of PFAS report and the risk management report is as follows:

- Publication of mandatory information gathering notice under section 71 of CEPA: Fall 2023.
- Publication of responses to public comments on the draft state of PFAS report and the risk management report: Concurrent with the publication of the final state of PFAS report and, if required, the risk management approach.
- Publication of responses to public comments on the risk management approach, if applicable and required, a proposed legal instrument: At the latest, 24 months from the date on which the ministers publish a recommendation that the class of PFAS be added to the List of Toxic Substances.
- Consultation on a proposed instrument, if required: 60-day public comment period starting upon publication of a proposed instrument.
- Publication of a final instrument, if required: At the latest, 18 months from the publication of a proposed instrument.

E. Interim standard for PFAS in biosolids

Following the release of the draft state of PFAS report, the Canadian Food Inspection Agency (CFIA) announced plans to engage with other levels of government and industry stakeholders to implement an [interim standard for PFAS in biosolids used as fertilizers](#), set at 50 parts per billion, to mitigate the potential risks to human health through landfarming. Biosolids are the solid phase of municipal wastewater treatment, beneficially reused as a nutrient. While the proper management of biosolids allows for diversion from landfills, reduction of greenhouse gas emissions and other benefits, the application of biosolids is associated with the uptake of PFAS into the food chain. CFIA plans to work with the provinces, industry and other stakeholders over the coming months to develop, refine and implement the interim protocol.

F. Recent developments at the provincial level

Regulation of PFAS at the provincial level has been limited to date. Until recently, British Columbia was the only province to formally regulate PFAS under its [Contaminated Sites Regulation](#). However, in January 2023, Alberta released updated versions of its [Tier 1 and Tier 2 Soil and Remediation Guidelines](#), which

introduced numerical risk-based guidelines for the remediation of sites contaminated with PFOS and PFOA (two of the more widely studied types of PFAS).

Apart from contaminated sites regimes, provincial governments appear to be alive to the need for drinking water standards for PFAS. To this end, British Columbia recently identified PFAS as emerging contaminants of concern in its [Design Guidelines for Drinking Water Systems in British Columbia, 2023](#). Similarly, on May 1, 2023, Public Health Ontario published a [bulletin on PFAS-related risks](#), with a focus on drinking water.

G. Increasing regulation of PFAS south of the border

South of the border, the United States Environmental Protection Agency (EPA) recently proposed to designate certain types of PFOS and PFOA as hazardous substances under the [Comprehensive Environmental Response, Compensation, and Liability Act](#) due to significant evidence that they pose a “[substantial danger to public health or welfare or the environment](#).” The proposal seeks to impose various requirements relating to, among other things, spill-reporting, transporting PFOS and PFOA in accordance with the *Hazardous Materials Transportation Act*, and identifying and remediating contaminated sites. The EPA has also recently issued advanced notice of its intention to expand the hazardous substance designation to include seven additional types of PFAS, [suggesting that even further regulation is on the horizon](#).

On Jan. 20, 2023, the EPA released its *Effluent Guidelines Program Plan 15*, which sets out the EPA’s plan for wastewater regulations and studies, with a particular focus on PFAS. According to the EPA’s press release, the plan is meant to reflect and advance the EPA’s determination that revised effluent guidelines and pre-treatment standards are required to [address PFAS contained in leachate discharges from landfills](#).

Broader measures are also being taken at the state level, with certain states moving to prohibit the use of PFAS in various types of consumer products. For example, California, Maine, Vermont and Maryland have recently introduced or plan to introduce prohibitions on the use of all PFAS in a wide range of products, including in food packaging and cosmetics. As is often the case, California is leading the charge, [prohibiting PFAS in products designed for infants or children](#) under 12 years of age as of July 1, 2023. The sale and distribution of plant-fiber based food packaging containing PFAS at levels [exceeding 100 parts per million](#) is also prohibited in California as of Jan. 1, 2023.



Expansion of PFAS-related litigation risks

A. United States

PFAS-related litigation has been a widespread phenomenon in the United States over the past decade. Historically, most lawsuits were aimed at the producers and/or manufacturers of PFAS, including DuPont and 3M (named in an average of more than [three-PFAS related lawsuits per day in 2021](#)). However, PFAS litigation in the U.S. has recently spread to target distributors and retailers of products containing PFAS (for example, cosmetics and food packaging) for, among other things, [alleged misrepresentations of the risks or presence of PFAS](#). As a result of the litigation risk posed by PFAS, several major retailers in the U.S.

have [adopted policies to phase out the use of PFAS](#) in food packaging, textiles and other products. 3M has also recently announced its [intention to end PFAS production by 2025](#).

More recently, the ever-expanding litigation risk created by PFAS has led to an increasing number of insurance coverage disputes between insurers and policyholders, with insurers seeking to invoke pollution or related exclusions to avoid coverage. According to Bloomberg Law, there is a real fear amongst those in the insurance industry that PFAS could impact the industry in a similar manner to asbestos, with [insurers potentially facing significant exposure and years of litigation](#).

B. Canada

The past two years have seen some of first reported decisions in cases involving PFAS in Canada, including various labour and workplace-related disputes arising from illnesses linked to exposure to PFAS; the [review of an environmental protection compliance order](#) issued under section 235(1) of CEPA regarding the marketing of cosmetics containing perfluorononyl dimethicone (a specific type of PFAS); and, most notably, [the certification of a class proceeding against the National Research Council](#) regarding the alleged contamination of groundwater with PFAS from its National Fire Laboratory.

Given its lack of PFAS production, Canada is unlikely to see PFAS-related litigation reach anywhere near the levels seen in the U.S. Notwithstanding, as awareness of the negative implications of these chemicals by both governments and consumers increases, readers can expect to continue to see a corresponding increase in litigation pertaining to the environmental and human health-related impacts of PFAS. Insurers and policyholders alike should also recognize these risks and carefully review all relevant insurance policies.

How BLG can help

As noted above, it is clear PFAS are quickly becoming contaminants of concern for all Canadian businesses. If you have any questions about the proposed changes to the regulation of PFAS in Canada or the steps your business can take to assess and minimize PFAS-related risks, please reach out to any of the authors or key contacts listed below.

By

[Rick Williams](#), [Gabrielle K. Kramer](#), [Braeden Stang](#)

Expertise

[Environmental](#), [Environmental Disputes](#), [Products Law](#)

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2023 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.