Can you dig it? Recent changes to regulating excess soils in British Columbia, Ontario and Québec

April 05, 2022

Governments in Canada and around the world are taking steps to reduce the trucking of excess soils for disposal to reduce greenhouse gas emissions, reduce wear and tear on existing infrastructure, manage the costs of necessary projects and combat climate change. Environment ministries are looking to reduce the environmental costs associated with the extraction of new materials from the subsurface, while moving towards models of managed reuse of materials and reducing opportunities for the illegal movement of excess soils.

Excess soil is a fact of life for all new projects that must be managed by all stakeholders, including project owners, both public and private and the construction and consulting industries. Millions of cubic meters of excess soil are generated by Canadian provinces every year. With new developments in rapidly growing urban centers and the increased redevelopment of brownfields sites, the proper treatment of generated excess soil becomes even more critical.

This article examines this evolving regulatory landscape, with discussion of recent amendments or regulations introduced in British Columbia, Ontario and Québec for the removal and reuse of soils. Regulations for soil relocation and reuse are detailed and complex and vary in each province and within local municipalities and First Nations' lands.

British Columbia

The Ministry of Environment and Climate Change Strategy in British Columbia (the "BC Ministry") is set to bring in new requirements for relocation of soil through amendments to the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "EMA") and the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "CSR").

Under the current framework, persons relocating soil from a source site that exceeds the CSR land use standards of a receiving site ("contaminated soil") must enter into a Contaminated Soil Relocation Agreement ("CRSA") with the owner or operator of a receiving site and the Director of Waste Management. The authorizations process under

the *Waste Discharge Regulation*, B.C. Reg. 320/2004 and Part 2 of EMA regulates the movement of soil in which concentrations of substances exceed industrial land use standards. Currently, there is no oversight by the BC Ministry of the relocation of uncontaminated soil.

New notification requirements

On March 4, 2020, the British Columbia Legislative Assembly passed Bill 3 – the *Environmental Management Amendment Act* ("Bill 3"). Bill 3 includes amendments to the EMA that remove the requirement for a person to enter into a CSRA when relocating contaminated soil from a property. Instead, a person removing soil – not just contaminated soil – must analyze the soil and provide notice of the relocation. Bill 3 is anticipated to come into force through amendments to the CSR on November 1, 2022. The amendments to the CSR will prescribe details for the new analysis and notice requirements with respect to relocated soil. The proposed regulatory changes will also include administrative penalties (up to $75,000) for non-compliance.

The proposed changes to the CSR are outlined in the Ministry's Regulating Soil Final Direction Policy Paper – January 2022. Subject to some exceptions, a person relocating soil must submit a Soil Relocation Notification Form ("SRNF") to the BC Ministry at least one week prior to soil relocation. The SRNF must include the site from which soil will be relocated, the site at which it will be deposited, the maximum amount of soil to be deposited, a summary of the soil quality analysis and any other information prescribed in the CSR. Information from the SRNF will be posted to a public database that is accessible by the public, municipalities and Indigenous peoples.

Possible exemptions

Soil relocation is proposed to be exempt from notification requirements under the following circumstances:

1. uncontaminated soil that is to be relocated outside of the province;
2. when the volume of uncontaminated soil is less than 30 m^3 per job and involves relocations to a single receiving site during a project for a period of up to two years;
3. preload that originates from a site without an activity or use set out in Schedule 2 to the CSR (specified industrial or commercial uses);
4. sand and related materials applied to roadways for winter maintenance; and
5. quarried material (including both sand/gravel excavated from gravel pits and bedrock that is crushed and/or screened for use as construction aggregate).

However, there will be no volume exemption if the source site is a high-risk site (as defined in Protocol 12). Soil that exceeds the applicable land use standards of the receiving site will not be regulated under the new soil relocation process, but rather under other existing Ministry requirements. These regulatory tools include requiring an authorization under Part 2 of EMA and the *Waste Discharge Regulation*, B.C. Reg. 320/2004; stipulation of independent remediation requirements; and issuance of Certificates of Compliance and Approvals in Principle.

High Volume Receiving Sites

There will also be additional requirements on “High Volume Receiving Sites”, which are defined as sites that receive more than 20,000 m^3 of soil (with exemptions for certain types of infrastructure projects). The regulatory changes will include additional reporting and monitoring requirements on High Volume Receiving Sites and a minimum distance from aquatic receptors, as specified in the *Riparian Areas Protection Regulation*, B.C. Reg. 178/2019 and other applicable regulations. The new requirements are proposed to not apply retroactively to sites that exceed the high volume threshold, but will apply when new soil deposits reach the high volume threshold calculated from the time that EMA and CSR amendments come into force.

Ontario

Ontario recently published a proposal to delay the implementation of the second phase of its excess soil regime. Ontario adopted an excess soil regime in 2019, when its Ministry of the Environment, Conservation and Parks (the "MECP") enacted O. Reg. 406/19: On-Site and Excess Soil Management (the "Regulation") under Ontario’s *Environmental Protection Act* (the "EPA"). The Regulation targets local reuse as well as proper management and tracking of excess soil. Excess soil refers to crushed rock or soil mixed with rock or crushed rock that has been excavated as part of a project (typically construction) and must be moved off-site because it cannot or will not be reused at the site where it is generated.

The Regulation was scheduled to take full effect in three phases, with the first phase taking effect January 1, 2021 and the second scheduled for January 1, 2022. On March 11, 2022, the MECP published a proposal to pause the implementation of the second phase of the Regulation until January 1, 2023. While the first phase created criteria to determine whether excess soil is a resource for reuse, the second phase created obligations for projects including registration, tracking and notice filing. With the pause on implementation, the MECP hopes to allow municipalities, infrastructure developers and industry more time to understand and implement the new phase requirements.

Rules for reuse

The first phase of Ontario’s excess soil regime, which took effect on January 1, 2021, created the rules for reuse, including risk-based standards, waste designation and approvals. On waste designation, the Regulation exempts certain types of excess soil from being considered waste that is eventually deposited in landfill, thus allowing that soil to be reused. To not be considered waste, excess soil must be:

1. directly transported to a reuse site from a project area where it will be reused for a “beneficial purpose”;
2. accepted in writing by the owner or operator of the reuse site (unless the owner or operator is also the Project Leader for the project from which the excess soil was delivered);
3. of a quality and quantity for which there is a beneficial use at the site it is being taken to that site is consistent with the beneficial use; and
4. dry soil and remains dry soil until it is finally placed at the reuse site, or, if it is liquid soil, a site-specific instrument (for example, permits under municipal site alteration by-laws) authorizes the excess soil to be deposited at the reuse site.

Additionally, the Regulation indicates that if instruments such as permits under municipal site alteration by-laws or permits or licenses under the Aggregate Resources Act, R.S.O 1990, c. A.8 (the “ARA”) govern the site, then conditions at s. 4 and 5 of the Regulation must be met for the soil not to be considered waste. Otherwise, if the reuse site is not governed by such instruments, conditions set out in s. 5 of the Regulation must be satisfied. Essentially, the relocation of excess soil is required to comply with all applicable legal requirements such as site alteration or fill by-laws that municipalities may use to also regulate the use of excess soils on reuse sites or temporary storage sites.

Soil that fails to meet any of the above criteria will be considered waste that must be managed according to Ontario’s waste management legislative requirements. The Regulation also does not apply to certain kinds of soil such as soil that is hazardous waste or asbestos waste, or to the operation of a pit or quarry from which aggregate (as defined in the ARA) or topsoil is excavated.

To be deposited at a reuse site, excess soil must comply with the generic quality standards outlined in the *Rules for Soil Management and Excess Soil Quality Standards* (the "Soil Rules"). The reuse sites are also governed by the same, or less strict, generic standards.

Using the definition of a qualified person ("QP") from Ontario’s Record of Site Condition ("RSC") regulation, the Regulation requires that QPs assess the quality of the excess soil from a project site for determining potential reuse. The Regulation also introduces the Beneficial Reuse Assessment Tool, which allows a QP to develop site-specific standards for allowable concentrations of contaminants at a reuse site. This may allow for the deposit of excess soil with concentrations of contaminants that meet the site-specific standards but not the applicable generic standards at a reuse site. Soils may also be brought to an RSC property if the QP has determined that the soil meets the applicable soil quality standards for the RSC property under the Soil Rules.

Registration and reporting requirements

The second phase of the Regulation, currently proposed to be paused after taking effect on January 1, 2022, sets planning requirements for soil reuse including testing, tracking and filing notices related to excess soil. These requirements are primarily the responsibility of the Project Leaders (*i.e.*, the generator of excess soil responsible to lead projects that involve the removal of soil from a site). Before soil can be removed from the project area, the Project Leader must submit specific project information to the Excess Soil Registry (the “Registry”) operated by the Resource Productivity and Recovery Authority.

This phase requires Project Leaders to file notices on the Registry for sites that generate 100 m^3 or more of excess soil, while site owners or operators of soil reuse sites must file notices when receiving 10,000 m^3 or more of soil. There are currently several exemptions from all or some of the soil reuse planning requirements reflecting instances where the relocation of soil is of a lower risk or where the responsibility for the soil is not changing. They include instances where less than 100 m^3 of excess soil is being removed from the project area and directly transported to a waste disposal site, such as a landfill, or if the removal is as a response to an emergency.

However, the MECP is proposing to pause the implementation of this phase until January 1, 2023. The MECP wishes to consult on refinements to the provisions of the Regulation that are proposed to be paused to ensure they are clear, effective, practical and focused to circumstances most necessary to support sustainable soil management. The comment period on the proposed pause and changes to the Regulation closes on April 10, 2022.

This pause period may result in certain refinements to the requirements while allowing organizations more time to understand the requirements, implement appropriate soil management processes and coordinate with other parties involved to ensure a common understanding of responsibilities and best practices. The implementation pause will not affect provisions of the Regulation in effect as of January 1, 2021 such as criteria defining excess soil as a resource for reuse, or the related excess soil reuse standards and rules.

Prohibition on landfilling of soil

The third phase and last phase of the Ontario Regulation, to be implemented January 1, 2025, will focus on restricting the landfilling of cleaner quality excess soil. More specifically, if excess soil meets Table 2.1 (full depth potable) of the generic excess soil quality standards for residential, parkland or institutional uses it may not be deposited at a landfill or dump. Exemptions will apply to excess soil of this quality, however, required by a landfill or dump for its operation including daily or final cover, or the construction of roads or berms.

Québec

The Québec regime for contaminated soils has been in place for over 15 years, empowered by the *Environmental Quality Act*, QCLR c. Q-2, with recent refinements related to traceability being enacted in November 2021. By way of background, *The Land Protection and Rehabilitation Regulation*, CQLR c. Q-2, r. 37 sets out applicable contamination limit values for land, by category of activity. It sets out the applicable limits, monitoring requirements and rehabilitation measures. If soils exceed the applicable regulatory limits, any relocation must be made to an authorized site. The *Regulation respecting contaminated soil storage and contaminated soil transfer stations*, CQLR, c. Q-2, r. 46, deals with the establishment, operation and closure of contained soil storage and transfer stations, including setting out limits, penalties and liabilities. The final destination of the soils must respect the conditions or prohibitions surrounding the operation of sites that are used in part or in whole for the burial of contaminated soils, as set out in the *Regulation respecting the burial of contaminated soils*, CQLR c. Q-2, r. 18.

The Minister of the Environment and the Fight against Climate Change (the "MEFCC") is responsible for applying this framework. The MEFCC has also published a number of guides and policy documents that provide guidance on the application of the regulatory framework and set out objectives to reduce further contamination.There is no regulatory oversight by the MEFCC of the relocation of uncontaminated soil or excess soils.

Current regulations for Excavated Contaminated Soil

In November 2021, the *Regulation respecting the traceability of Excavated Contaminated Soil* came into effect. Concurrently, the *Regulation respecting fees payable in respect of the traceability of excavated contaminated soil* was enacted, and sets a fee of $2 per metric tonne of contaminated soil subject to the traceability requirements.

The purpose of this new regulation is to track contaminated soil from its original location to its final destination, using the electronic platform TracesQuebec developed by the MEFCC, in order to prevent potential further contamination. A number of individuals have the obligation to register, make inscriptions and, in certain cases, to attest or confirm that tracking was made, including the person responsible for the receptor site, the owner of excavated contaminated soil, project managers, polluters and any other person mandated, as applicable in each situation.

The regulation came into application gradually, first starting from January 1, 2021, when it was applicable only for the transportation of more than 5,000 metric tonnes from the source site. Since January 2022, the regulation applies to the transportation of 1,000 metric tonnes or more of contaminated soil (i) from the source site, in the course of work undertaken under a contract concluded after June 23, 2021 and (ii) from a receptor site in the course of work commencing on or after January 1, 2022.

Future application to all Excavated Contaminated Soil

As of January 2023, the regulation will apply to all transportation of excavated contaminated soil, regardless of when excavation of the soil began. Registration with the electronic platform is optional for the transportation of less than 200 metric tonnes of contaminated soil for a same project.

The MEFCC is taking the implementation of the Regulation respecting *the traceability of Excavated Contaminated Soil* seriously and we expect to see inspections by the MEFCC to verify the compliance of sites and of obligated persons. Administrative penalties of up to $10,000 and penal sanctions of up to $6 million can be imposed for non-compliance.

Conclusion and impacts on organizations operating in Canada

The regulatory framework for soil relocation is shifting in British Columbia, Ontario, Québec, as well as other jurisdictions in Canada, and internationally. Upcoming changes to regulations for soil relocation will broaden the scope of analysis and reporting requirements for relocating soil from one site to another. Both public and private organizations working on construction sites, soil management facilities or lands being remediated will need to consider how the new regulations will affect their operations. Complying with current and future regulations will likely require additional time and costs.

The regulation of excess and contaminated soils may, nonetheless, present opportunities for Canadian businesses and communities. Sustainable stewardship of excess soils can help mitigate adverse environmental impacts from contaminated soils. Efficient reuse of soils can also help lower costs and greenhouse gas emissions by

avoiding the unnecessary transportation of soils. Local reuse of soils can also help reduce the need for landfill space, freeing it up for a more productive use. To unearth these potential benefits, however, organizations should have systems in place to comply with the soil relocation regulations in their jurisdictions.

Organizations should proactively assess whether their processes align with the applicable soil management regimes. For guidance on navigating the evolving soil management regulations in Canada, please contact the any of the contacts below or anyone else in BLG's Environmental team.

By

Gabrielle K. Kramer, Rick Williams, F.F. (Rick) Coburn, Roark Lewis, Julie Belley Perron, Morgane L. Besner

Expertise

Environmental, Climate Change, Municipal 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