BLG
Borden Ladner Gervais

Environmental Law

Review of Case Law and Legislative Developments

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A. Introduction

Since our last update in October 2019, there have been many interesting developments in the area of environmental law. The COVID-19 pandemic, reconciliation with Indigenous peoples, and climate change were key topics that shaped judicial, legislative, and policy changes in British Columbia and across Canada.

With respect to judicial developments, disputes over natural resource projects, contaminated sites, environmental prosecutions, as well as judicial review or appeal decisions arising from environmental regulatory bodies, brought many changes to the landscape of environmental law.

With respect to legislative developments, the federal legislative process was slowed by the COVID-19 pandemic, but several significant amendments have been proposed and introduced for first reading, including statutes related to achieving net-zero greenhouse gas emissions by the year 2050. At the provincial level, the British Columbia government introduced and implemented various new regulations under the *Environmental Assessment Act*.

With respect to policy developments, the Government of Canada confirmed that it would be finalizing regulations with respect to the previously announced ban of single-use plastics by the end of 2021.

B. Contaminated Sites

1. Legislation

(i) Amendments to the B.C. Contaminated Sites Regime

On Feb. 1, 2021, the Province of British Columbia introduced new obligations for identifying and addressing contaminated sites through amendments to the *Environmental Management Act*, S.B.C. 2003, c. 53 ("EMA") and the associated *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "Regulation") into force.

The amended legislation establishes the process for identifying potentially contaminated sites and ensuring that such sites are investigated and remediated as needed after they have been decommissioned, where operations have ceased, or before re-use or redevelopment. B.C. has stated that the amendments to the EMA and Regulation are needed to address weaknesses and gaps in this process. The amendments also impose a number of additional burdens and costs on the owners and operators of commercial and industrial properties in B.C.

As of Feb. 1, 2021, owners and operators of lands that have been used for a specified commercial or industrial use (as set out in the revised Schedule 2 of the Regulation) are subject to additional reporting requirements under the EMA. Notably, contamination migrating, or likely to migrate, from an industrial or commercial site is a specified industrial or commercial use for the purposes of the legislation.

A number of activities trigger the requirement that the owner or operator submit a Site Disclosure Statement (which replaces the previous Site Profile), including:

a. Decommissioning a site or ceasing operations;

b. Applying for development or building permits;

c. Applying for subdivision or rezoning approvals; and

d. Applying for creditor or bankruptcy protection.

In addition, a vendor of real property must submit a Site Disclosure Statement to a prospective purchaser of the property.

Significantly, municipalities can no longer opt out of the Site Disclosure process. This means that owners or operators of lands in municipalities that had previously opted out of the former Site Profile process will now be subject to the requirements of the EMA and the Regulation.

Where a Site Disclosure Statement is required, a Preliminary Site Investigation is now mandatory and automatic in almost all circumstances, with the exception of a vendor of real property who provides a Site Disclosure Statement to a prospective purchaser. If contamination is identified at the site, a Detailed Site Investigation is also required. Previously, the need for any site investigation was at the discretion of the Director.

There are exemptions from the requirements to submit a Site Disclosure Statement and to conduct investigations, including where:

a. Another process applies under the EMA and the Director has issued some type of determination (e.g., Certificate of Compliance, Approval in Principle, or determination that the site is not contaminated). This exemption only applies in circumstances where, after making reasonable inquiries, there is no reason to believe that there has been further contamination at the site since that determination was made.

b. A prospective purchaser of real property waives the entitlement to be provided with a Site Disclosure Statement by the vendor.

c. A person is applying to a municipality for approval of zoning, but the land is already being used for a specified industrial or commercial use that would continue to be authorized on the land if the zoning were approved.

d. A person is applying to a municipality for a development or building permit only for certain purposes (i.e., demolition, installing or replacing underground utilities, installing or replacing fencing or signage, paving, or landscaping).

e. More than one owner or operator is required to submit Site Disclosure Statement when ceasing operations on land. In this situation, only one person must provide the Site Disclosure Statement.

Finally, there is a specific carve-out for oil and gas sites in the new legislation, which recognizes that the B.C. Oil and Gas Commission is responsible for the management of oil and gas activities, including the remediation of those sites. Consequential amendments to the *Oil and Gas Activities Act* have removed the requirement that the provisions of the EMA must be met prior to the issuance of a Certificate of Restoration. Instead, an oil and gas permit holder is subject to *Oil and Gas Activities Act* and *Dormancy and Shutdown Regulation*.

(ii). Amendments to the *EMA* Soil Removal and Relocation Requirements

Bill 3, the *Environmental Management Amendment Act, 2020*, passed third reading on March 4, 2020 and will come into force by regulation.

Section 55 of the *EMA* will be amended to stipulate that a person must not remove soil from a site that has been used for a specified industrial or commercial use unless the person has analyzed the quality of the soil in accordance with the regulations and provided notice of the removal to the prescribed persons, in accordance with subsection (1.2). This varies the requirements set out in the current provision, which stipulates that a person must not relocate contaminated soil from a contaminated site unless they enter into a contaminated soil relocation agreement and comply with the terms and conditions of the contaminated soil relocation agreement.

Bill 3 will also add section 55.1 to the *EMA*, which will define "relocated industrial or commercial site soil" as "soil that has been relocated from a site that has been used for a specified industrial or commercial use." This provision will also state that the owner of the site must take certain steps if the total amount of relocated industrial or commercial site soil present at a site is greater than the prescribed amount.

The former provisions continue to apply in respect of the relocation of contaminated soil if a person entered into a contaminated soil relocation agreement before the coming into force of this section.

(iii). Proposed Stage 14 *Contaminated Sites Regulation* Amendments Related to Soil Relocation

In January 2021, the Ministry of Environment and Climate Change Strategy released an intentions paper setting out the proposed changes to the CSR and other associated regulations.

The Ministry intends that the requirements to complete soil analysis and submit the notification form will apply to those relocating soil that:

a. originates on lands that have been used for commercial or industrial uses (prescribed CSR Schedule 2 activities); and

b. is ten or more cubic meters in volume (about one truck load).

Under the proposed amendments, Contaminated Soil Relocation Agreements will be replaced, and the system will transition to other processes such as authorizations and approvals in principle. The exemption for federal reserve lands would also be removed from the soil relocation requirements, but others will remain.

The Ministry has also proposed that "high volume" receiving sites (*i.e.*, sites that receive more than 20,000 cubic metres of soil over the lifetime of the receiving site) will face additional requirements.

Submissions for comments on the proposed changes were due on March 15, 2021.

2. Case Law

(i) *Jedd Ent. Ltd. v. Actton Petroleum Sales Ltd*., 2020 BCSC 131

Jedd Ent. Ltd. (the "Plaintiff") and Actton Petroleum Sales Ltd. (the "Defendant") owned neighbouring commercial properties in Vernon, B.C. In June 2006, the Plaintiff brought a contaminated sites claim under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*EMA*") against the Defendant, claiming that the Defendant's gas station had leached gasoline and other hydrocarbons through the soil and contaminated its land. The Defendant applied to add Chevron Canada Limited, Shell Canada Products and Husky Energy International Corporation (the "Oil Companies"), all of which operated or supplied product to gas stations in the vicinity of the Plaintiff's property, as third parties.

The matter had been set for a five-day trial starting June 1, 2020. The application for leave to file the third party claim was filed shortly after the notice of trial in June 2019. The Defendant argued that it was just and convenient to determine all matters at a single trial. It argued that, although the action was 14 years old, it was still at the preliminary stages of litigation, since there had been no examinations for discovery and document disclosure was incomplete. The trial date was not in jeopardy because, in any event, the parties were not prepared to proceed.

The Plaintiff and the Oil Companies opposed the application. The Plaintiff argued it would suffer significant prejudice because the trial would necessarily become longer and more complex, which would result in delay. The Oil Companies also argued prejudice and pointed out that the Defendant had been aware of its claim for contribution and indemnity from the outset, and that their ability to investigate and prepare for trial had been compromised by the Defendant's delay.

The Court balanced the overarching objective of avoiding an unnecessary multiplicity of proceedings with the potential prejudice to the affected parties. The Court accepted that, if the trial was delayed to allow the Oil Companies time to prepare, the Plaintiff would suffer significant prejudice. The Court observed that where an application, if successful, would result in adjournment of the trial or substantial delay, the applicant must provide an explanation for the delay, including evidence as to when the applicant knew that a claim for contribution or indemnity could be advanced.

The Defendant suggested that the delay was due to recent document disclosure and the contents of the Plaintiff's expert report. The Court rejected this explanation, noting that the new documents and the expert report could only have supplemented or amplified what the Defendant already knew.

In dismissing the application, the Court inferred that the application was tactical, intended to either adjourn or delay, or to render the Plaintiffs relatively modest claim uneconomical. It was therefore neither just nor convenient to add the Oil Companies as third parties.

(ii) *Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd.*, 2021 BCCA 129

In *Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd.*, 2021 BCCA 129, the B.C. Court of Appeal suggested, for the first time, that legal costs reasonably incurred in connection with the remediation of a contaminated site may be fully recoverable as remediation costs under section 47 of the *Environmental Management Act* (the "*EMA*"). The case involved the migration of contaminants from a long-time gas station site owned by Victory Motors (Abbotsford) Ltd. ("Victory Motors") and operated at various times by Super-Save, Shell, and Chevron over the course of several decades, to a commercial property across the street owned by Jansen Industries 2010 Ltd ("Jansen"). Jansen commenced an action against Victory Motors, Super-Save, Shell, and Chevron. Victory Motors also commenced an action against Super-Save, Shell, and Chevron. Shell and Chevron settled the claims against them prior to trial. At trial, Jansen and Victory Motors advanced a claim for $150,000 in legal fees that they allegedly incurred in connection with the remediation of the site. However, they did not adduce any evidence in support of their claim, and instead sought a reference to the registrar for an assessment of such costs. The trial judge held that it was not appropriate to refer the matter to the registrar and dismissed the claim based on a lack of evidence. The plaintiffs appealed this aspect of the decision.

On appeal, the Court upheld the decision of the trial judge to dismiss the claim on evidentiary grounds. In doing so, however, the Court also raised the possibility of a party recovering certain types of legal costs as "remediation costs" under the *EMA*. Specifically, the Court distinguished between legal costs incurred in effecting the remediation of a contaminated site (which it characterized as "remediation legal costs") and legal costs incurred in litigation seeking to recover the costs of remediation (which it referred to as "litigation legal costs"). Importantly, the Court held that, notwithstanding prior judicial decisions to the contrary, there was nothing that precluded the phrase "all remediation costs" in subsection 47(3) of the *EMA*, from including "full indemnification for reasonable remediation legal costs." The Court went on to hold that examples of such legal costs may include: "advising the remediating client, negotiating with governmental authorities, and navigating the client through the creation of an acceptable remediation plan, its execution, and obtaining final regulatory approval." On the question of how the reasonableness of legal costs would be determined, the Court held that this would depend upon the circumstances of each case, and would ultimately be subject to the discretion of the trial judge. In arriving at its decision, the Court held that prior judicial decisions that suggested that legal costs were not recoverable as remediation costs were incorrectly decided. The Court confirmed that the recovery of "litigation legal costs" in the British Columbia Supreme Court would still be subject to the *Supreme Court Civil Rules* tariff, which only awards a successful party legal costs at fixed amounts, and only for certain steps taken in connection with the litigation process. Legal costs are generally not recoverable in British Columbia Provincial Court.

As the claim for legal costs was ultimately dismissed on evidentiary grounds, the Court's interpretation of the *EMA* is arguably not binding in future cases. However, given that the reasons for judgment were rendered by the Chief Justice of British Columbia (the Honourable Mr. Justice Bauman), it is likely that the reasoning will nonetheless be adopted in future court decisions. If so, this decision could considerably widen the scope of potential costs recoverable by a claimant in a statutory cost recovery action brought under the *EMA*.

Another ground of appeal concerned the allocation of responsibility for remediation costs as between Super Save and Victory Motors, owing to the alleged benefit of the latter having obtained a Certificate of Compliance in respect of its site. On this point, the Court held that it was not proper for the trial judge to have considered this factor when determining the degree of responsibility for remediation costs attributable to Victory Motors, as such an approach would discourage an owner who is also a "responsible person" from remediating its property in a timely way. As a result, it remitted this issue back to the trial judge to determine the proper allocation of responsibility for remediation costs as between Super Save and Victory Motors.

C. Regulatory Compliance and Statutory Authorizations

1. Legislation

(i) B.C. *Mines Amendment Act, 2020*

The *Mines Amendment Act, 2020* received Royal Assent on August 14, 2020, amending certain provisions of the *Mines Act,* R.S.B.C. 1996, c. 293 (the "*Act*"). The amendments strengthened compliance and enforcement over mining projects in the province.

Section 2.1 is introduced which creates the position of the "chief auditor" who is appointed by the minister. The authority of the chief auditor is set out in section 2.2 of the *Act*, which states that the chief auditor may conduct audits for the purpose of evaluating the effectiveness of any of the following:

a. the regulatory framework for mining in British Columbia; and

b. policies, programs, practices and actions to fulfil the objectives of that framework.

Section 8.2 of the *Act* creates the position of the "chief permitting officer," who assumes some of the responsibilities, duties and powers of the chief inspector. The new and separate position of the chief permitting officer is intended to ensure that the mine permitting process is efficient and effective, while the chief inspector retains responsibility for health, safety and enforcement.

The amendments also extend the limitation period for offences under the *Act* and the *Environmental Management Act,* S.B.C. 2003, c. 53 (the "*Environmental Management Act*"), from 3 years to 5 years. Under the *Act,* the limitation period begins on the date that the chief inspector learned of the facts on which the offence is based. In the case of the *Environmental Management Act*, the limitation period generally begins on the date that the facts "arose."

2. Case Law

(i) *Cobble Hill Holdings Ltd. v. British Columbia*, 2020 BCCA 91

Cobble Hill Holdings Ltd. ("Cobble Hill"), owned a mine quarry near Shawnigan Lake, B.C. Cobble Hill brought a negligence claim against the provincial Crown (the "Province") and the former Minister of Environment (the "Minister") after the cancellation of a permit that allowed it to accept contaminated soils at its quarry site and discharge waste into the environment. The permit was issued and cancelled pursuant to the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*EMA*"). Cobble Hill also brought a claim of misfeasance in public office, alleging that the Minister had a collateral political purpose in cancelling its permit.

On an application to strike the claim for lack of reasonable grounds, the chambers judge found that Cobble Hill was not owed a duty of care and dismissed the negligence claim. However, the chambers judge granted Cobble Hill leave to amend its pleadings to meet the requirements of the tort of misfeasance in public office.

The Court of Appeal upheld the chambers judge's decision. The chambers judge was not satisfied that this was a case where a duty of care had previously been found in an analogous situation, and that there were residual policy concerns that prevented finding a new duty of care pursuant to the *Anns/Cooper* test. The Court of Appeal went further, and held that there was insufficient proximity between the parties to create a private law duty of care. The duties imposed on the Minister arose solely within the statutory scheme of the *EMA*, and the relationship between the parties did not extend beyond the legislative framework. The chambers judge held that establishing a private duty of care between the Minister and a regulated entity would create a conflict of interest and render the Minister unable to properly perform his or her duties.

The Court of Appeal affirmed the chambers judge's reasoning with regards to residual policy concerns and held that the scheme of the *EMA* is irreconcilable with a private law duty to assist in the promotion of a permit holder's financial or business interest. The Court of Appeal held that the overarching aim of the *EMA* is directed to the interests of the public and to ensure that, if contaminated waste is to be discharged into the environment, the process occurs in a manner that will not be harmful to the environment and human health. The Supreme Court of Canada dismissed the application for leave to appeal this decision

(ii) *British Columbia (Assistant Water Manager) v. Chisholm,* 2020 BCSC 545

The Assistant Water Manager (the "Manager") sought judicial review of a decision of the Environmental Appeal Board (the "Board") allowing an appeal by Linda and Jackie Chisholm. The Chisholms had appealed to the Board after the Manager dismissed the Chisholm's request to amend their water licence under the *Water Sustainability Act*, S.B.C 2014, c. 15 (the "*WSA*").

The Chisholms owned a ranch in Cranbrook, B.C. since 2001. On May 5, 2015, the Chisholms submitted a Water Licence Amendment and Change of Works application (the "Application"), maintaining that historical mapping errors and renaming of streams had led to their water rights being usurped. The Manager dismissed the Application, and the Chisholms appealed.

The Board found that the Manager had the authority to grant the Chisholms' requests, and that the requests were reasonable and ought to have been granted. The Court noted that the Board owed no deference to the Manager's decision, as the appeal before the Board was conducted as a hearing *de novo*.

The Manager sought judicial review of the Board's decision and argued that the Board erred in two ways: (i) by misapprehending the evidence regarding the historical evolution of the water licences, the Board unreasonably interpreted the scope of the Manager's authority under s. 26 of the *WSA*; and (ii) by ordering the Manager to amend the licence without considering environmental flow needs, as it was statutorily required to do.

The parties and the Board all agreed that the applicable standard of review was reasonableness. However, the Court was not persuaded by the Manager's arguments.

Firstly, in reading the Board's reasons wholly and contextually, the Court found that the Board's interpretation of s. 26(1) of the *WSA* was reasonable and did not rest on a misapprehension of the evidence. Secondly, the Manager acknowledged that, if the Chisholms were correct, and the appropriate remedy was a correction to the maps, there would be no need to conduct an environmental flow analysis. The Court found that the Board was entitled to rely on the Manager's concession. In the alternative, the Court held that the environmental flow analysis was not required, so the Board's failure to conduct this analysis was reasonable. As the Board determined that there were mapping errors, the Board restored the registration of a water licence to reflect the accurate locations. An environmental flow analysis was not necessary. The petition was dismissed.

D. Regulatory Enforcement and Environmental Prosecutions

1. *R. v. University of British Columbia*, 2020 BCSC 1126

The University of British Columbia ("UBC") appealed its conviction for violating certain provisions of the *Fisheries Act,* R.S.C. 1985, c. F-14 (the "*Fisheries Act*"). UBC also appealed the sentence imposed and the dismissal of its application to stay the charges based on delay. CIMCO Refrigeration and UBC were charged with offences under the *Fisheries Act* after ammonia was discharged into a storm water sewer system flowing from Thunderbird Arena to Booming Grounds Creek (the "Creek"). UBC was convicted of two counts and sentenced to a combined fine of $1.155 million.

UBC applied for a stay of proceedings based on an alleged breach of the right to be tried within a reasonable time under s. 11(b) of the *Charter of Rights and Freedoms.* The trial judge dismissed the application and found that the Crown had established exceptional circumstances bringing the delay against UBC below the 18-month ceiling, and that the delay was not unreasonable.

On appeal, the Court reviewed the principles established in *R. v. Jordan,* 2016 SCC 27, and noted that that the ceiling beyond which delay is presumptively unreasonable is a period of 18 months. The trial judge concluded that the total delay (after subtracting delay attributable to UBC) was approximately 20.5 months, meaning the Crown bore the burden of establishing exceptional circumstances to rebut the presumption. After deducting the delay caused by various discrete events that were outside the control of the Crown, the trial judge concluded that the resulting delay against UBC was approximately 15 months. The Court agreed that some specific delays were unavoidable and could not have been reasonably remedied by the Crown. Therefore, UBC's appeal of the trial judge's stay decision was denied.

With respect to its appeal from conviction, UBC argued that the trial judge erred by finding that a deleterious substance was deposited into the Creek, and by finding that UBC did not establish due diligence. UBC admitted that ammonia in a concentration that was deleterious to fish had been found in the ditch, and that it came from it a release into an outdoor drain near UBC's Thunderbird Arena. However, UBC challenged the trial judge's inference that ammonia actually entered the Creek.

On appeal, the Court agreed with the trial judge, noting that UBC had mischaracterized the legal test for finding that a deleterious substance had been deposited into waters frequented by fish under the *Fisheries Act.* There is no requirement to prove the presence of a substance in a concentration that is deleterious to fish. Once it is determined that a deleterious substance has been deposited into waters frequented by fish, the offence is complete. The Court dismissed UBC's challenge to the conviction on this basis.

If the Crown has proved the *actus reus* of the offence, the burden shifts to the accused to establish a due diligence defense on a balance of probabilities. UBC argued that the trial judge misinterpreted the expert evidence of a refrigeration industry expert and that the trial judge focused on the wrong risk when considering foreseeability. The Court found that neither position had merit, determining that the trial judge did not err with respect to the due diligence defense.

Finally, the Court reviewed the trial judge's sentencing decision, which, it held, was owed "great deference" on appeal. In deciding whether it should decrease UBC's fine, the Court noted that UBC had not cited cases that provided a helpful comparison to the events at hand. Further, the Court did not find the sentence imposed to be unfit, given that ammonia is a well-known noxious substance and a significant quantity had been discharged into the storm sewer. UBC knew of the importance of pollution prevention and failed to explain why it had not extended its own policies to Thunderbird Arena. UBC's appeal of its sentence was dismissed.

2. *R. v. Volkswagen AG*, 2020 ONCJ 398

In January 2020, Volkswagen Aktiengesellschaft ("VW AG") pled guilty to 58 counts of contravening s. 154 of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 ("*CEPA 1999*") by unlawfully importing into Canada vehicles that did not conform to prescribed vehicle emissions standards and to two counts of providing misleading information.

On January 1, 2004, the On-Road Vehicle and Engine Emission Regulations (the "Regulations") came into effect. The Regulations harmonized vehicle emissions standards in Canada with those of the U.S. Environmental Protection Agency (the "EPA"). The EPA established standards and test procedures for new light-duty motor vehicles imported and sold in the U.S., including federal emissions standards that were implemented by the EPA in separate steps or "Tiers." The Tier II program included emissions standards for nitrogen oxide ("NOx") emissions for diesel vehicles (the "Prescribed EPA NOx Standards"). These standards and procedures applied by extension in Canada due to its adoption of the EPA standards in the Regulations.

CEPA 1999 prohibited companies from importing into Canada new light-duty vehicles from the 2009-2016 model years for the purposes of sale unless such vehicles conformed to the Prescribed EPA NOx Standards, and evidence of such conformity was obtained.

VW AG imported a number of diesel vehicles from the 2009-2016 model years (the "Subject Vehicles") into Canada for the purposes of sale. Equivalent vehicles of the same model year as the Subject Vehicles were sold in the U.S. and applications were made for certificates of conformity to the EPA. These applications included a statement that the emission of pollutants conformed with the prescribed standards and did not cause unreasonable risk to public safety. On the basis of these representations, the EPA issued certificates of conformity for the equivalent Subject Vehicles, allowing them to be sold in the U.S. When the Subject Vehicles were imported into Canada for the purpose of sale, the EPA certificates of conformity were relied upon as valid evidence of their compliance with the Prescribed EPA NOx Standards.

The Court held that VW AG deceived the EPA, which had the effect of also deceiving ECCC due to the U.S.-Canada regulatory harmonization. It had been demonstrated that, from 2008 to 2015, certain VW employees knew that: (i) the Subject Vehicles did not meet the Prescribed EPA NOx Standards; and (ii) VW was using software to cheat the U.S. testing process by making it appear as if the Subject Vehicles met the Prescribed EPA NOx Standards when, in fact, they satisfied the U.S. testing only by using a defeat device. The Court also held that these VW employees attempted to and did conceal these facts from U.S. regulators and, therefore, ECCC.

The Crown and VW AG had jointly submitted that a fine totaling $196,500,000 be imposed. The Court held that the proposed fine demonstrated legitimacy to Canada's role in fulfilling its international obligation in respect of the environment. The Court stated that the proposed fine "signals a new era of substantial fines for environmental infractions and is sufficient in achieving the required deterrence and denunciation."

3. *Gray v. Canada (Attorney General)*, 2019 FC 1553

In September 2015, Environmental and Climate Change Canada ("ECCC") opened investigations into potential violations of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 (the "*Act*") from the importation of certain diesel vehicles equipped with prohibited defeat devices.

Environmental groups grew dissatisfied with the time ECCC was taking to conduct its investigation. Consequently, some individuals from these groups decided to initiate private complaints under the *Act*. In June 2017, Tim Gray and Muhannad Malas (together, the "Applicants") applied for an investigation under section 17 of the *Act*, alleging that Volkswagen and its subsidiaries' diesel vehicles were noncompliant with the *Act*. In response, the Minister of the Environment and Climate Change (the "Minister") refused to investigate the first three allegations made, as ECCC had already engaged in an investigation and the allegations were covered by said investigation.

The Applicants applied for judicial review of the Minister's decision to refuse to investigate. Specifically, they argued that upon receipt of an application under section 17 of the *Act*, the Minister was required by section 18 to open an investigation. The Applicants submitted that the Minister had no discretion regarding whether she would investigate, and that by refusing to investigate, she made a decision beyond her jurisdiction and authority.

The decision turned on the interpretation of section 18 of the *Act,* which had not previously received judicial consideration. The court found that the Minister had to first interpret section 18 of the *Act* in making the decision not to open an investigation into the Applicants' allegations. The court noted that the *Act* was the Minister's home statute and therefore her interpretation was entitled to deference and was reviewable on a reasonableness standard.

The court held that its task was not to dictate the "correct" interpretation of the *Act*, but to decide if the interpretation of the Minister was reasonable. The court found that the Applicants' interpretation of section 18 disallowed the Minister from acting as a gatekeeper of applications received, since she would have to investigate every application, no matter how frivolous or meritless. Moreover, the Applicants' interpretation would create a significant burden on Ministerial resources and was not consistent with the purpose and scheme of the *Act* as a whole.

The court found that the Minister's interpretation of the *Act* was not the only interpretation, but was nonetheless a reasonable one. With respect to the Minister's decision not to open an investigation, the court found that such decision fell into a range of possible, justifiable outcomes and could not be disturbed. The Minister was already investigating three of the Applicants' allegations. As the subject was already under investigation, it was reasonable to conclude that repetition would waste government resources without assisting in protecting the environment.

4. *R. v. Banks Island Gold Inc*., 2020 BCSC 167

The appeals arose from alleged offences at a gold mining site operated by Banks Island Gold Ltd. ("BIG"). Benjamin Mossman appealed his conviction of failing to report a spill under s. 79(5) of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*EMA*") and failing to report the deposit of a deleterious substance under s. 38(5) of the *Fisheries Act*, R.S.C. 1985, c. F-14 (the "*Fisheries Act*"). The Crown appealed Mr. Mossman's acquittal on 11 counts and Dirk Meckert's acquittal on 14 counts under the *EMA*, *Fisheries Act*, and *Water Act*, R.S.B.C. 1996, c. 483.

At trial, the Crown sought to rely on observational evidence of compliance officers obtained at the BIG site on July 9, 2015, statements of Mr. Mossman and Mr. Meckert (the "Defendants") made on July 9 and 15, 2015, and a report on the spills (the "Report"). The trial judge conducted a *voir dire* on the Defendants' application to exclude this evidence based on breaches of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The trial judge admitted the observational evidence, portions of the joint July 9 statement, and the subsequent Spill Report. The Defendants appealed. The Crown appealed the ruling excluding portions of the joint July 9 statement and the Defendants' individual July 15 statements.

The Court noted that the Defendants were subject to inspection within a regulatory context that always carried the risk of penal liability for non-compliance. Therefore, the proper contextual analysis was "whether the officers' regulatory inspection powers were exercised reasonably in the totality of the circumstances."

The Court reviewed the Defendants' ss. 7, 8 and 10 *Charter* arguments with respect to the observational evidence and concluded that there were no errors in the trial judge's admission of the evidence.

The trial judge excluded part of the July 9 joint statement and both July 15 individual statements. The trial judge broke down the July 9 interview into discrete lines of questioning and excluded the portion of the statement that addressed non-regulatory concerns. The Court found the trial judge's focus on the purpose of the questions was too narrow, concluding that the trial judge ought to have performed a "concrete and contextual analysis" of the totality of the circumstances of the interview (including but not limited to the purpose of the questions).

The Court found that the July 9 statement commenced as an investigative interview, not a regulatory matter. However, the interview shifted to regulatory matters without the Defendants being advised that the investigatory questions were concluded. The Court held that, while parallel regulatory and criminal inquiries may co-exist, once the inquiry involves the investigation of penal liability, the process for evidence-gathering must be *Charter* compliant. The Defendants were interviewed in the presence of four investigating officers. They knew that they were obligated to provide certain information under the regulatory framework, but also that they were being investigated for potential offences. There was no clear delineation.

The Court was not satisfied the officers exercised their regulatory powers reasonably in conducting the interview, so the July 9 statement should have been excluded in its entirety.

The trial judge excluded the July 15 statements in their entirety, finding they were a continuation of the earlier interview. On appeal, the Court held that the July 15 interviews were different from the July 9 interviews. The statements were focused on the lack of compliance and the alleged events relevant to proof of the offences. Two fisheries officers, rather than a mix of officers from different agencies conducted the interviews. The interviews were clearly investigatory. Unlike the July 9 interview, there was no preceding search of the mining site or discussion with the officers earlier in the day. Coupled with the clear warnings given at the outset, it was unlikely that the Defendants were confused about their right to silence or misled as to their regulatory obligations. As a result, the Court held that the July 15 statements should not have been excluded.

The Report was made following an order directing BIG to submit a written report on the discharge to the Director. The Defendants submitted that Mr. Mossman did not have to create and deliver the Report independently of the order. The Court concluded that the permits required reporting at the time of the spill, so the obligation to submit the necessary reports existed before the investigation occurred and independent of the officer's direction. There was no error in the trial judge's reasoning and conclusion that the Report was admissible.

Both the Defendants' and the Crown's appeals were allowed in part, and the acquittals and appeals were vacated and a new trial was ordered.

The Defendants then sought leave to further appeal this decision to the B.C. Court of Appeal on three grounds, arguing the B.C. Supreme Court judge erred by: (i) using the contextual framework for assessing *Charter* breaches in a regulatory context rather than the point in time framework; (ii) overturning the trial judge's exclusion of the July 15 statement without identifying an error in fact or law; and (iii) finding that the reasons of the trial judge for excluding the July 15 statements were insufficient for appellate review.

The Court saw no evidence of confusion in the lower courts about the proper framework to be used when assessing *Charter* compliance in a regulatory setting. The jurisprudence recognizes the importance of context in assessing *Charter* compliance. The point at which an inspection becomes an investigation is but one of many contextual factors that must be considered in determining whether an officer exercised their regulatory inspection powers reasonably. The Court held that the applicable framework is settled law and was correctly identified by both lower courts.

Further, the Court did not agree that the appeal judge set aside findings of fact and held that it was apparent from the reasons that the appeal judge reviewed the evidentiary record to understand why the trial judge excluded the July 15 statements, quoting his reasons at some length.

The Court concluded the proposed grounds of appeal did not raise issues of importance and did not have sufficient merit to warrant granting leave to appeal.

5. *R. v. Fraser River Pile and Dredge (GP) Inc*., 2020 BCPC 169

This matter involved a prosecution under the *Canadian Environmental Protection* Act, 1999, S.C. 1999, c. 33 (the "*CEPA, 1999*"). The federal Crown alleged that Stewart Bulk Terminals ("SBT"), the operator of a bulk loading facility, had contracted Fraser River Pile and Dredge (GP) Inc. ("FRPD") to carry out unlawful dredging activities in northwest B.C. In preparation for trial, both SBT and FRPD sought to exclude evidence pursuant to ss. 24(1) and/or 24(2) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") due to alleged violations of their ss. 8 and 11(d) *Charter* rights.

After learning of possible *CEPA, 1999* infractions, investigators with Environment and Climate Change Canada ("ECCC") attended upon SBT's premises to obtain information from SBT's owners and operators (the "Owners"). The ECCC investigators identified themselves as "enforcement officers" and advised that they were investigating the recent dredging. Interviews were conducted during which the investigators did not, among other things, advise the Owners of their right to refuse to provide information. The Owners were told that they were being interviewed as "witnesses." The Owners alleged that they believed that they were legally required to provide assistance to the ECCC investigators.

The federal Crown opposed the *Charter* voir dire, prompting SBT and FRPD to apply for a so-called "*Vukelich* Hearing" to determine whether a voir dire would be necessary to determine the admissibility of the evidence.

The Court agreed with SBT and FRPD that valid, informed consent requires an understanding and appreciation of the rights being waived and the consequences flowing from such waiver. Therefore, the Court agreed that there was a question to be answered regarding the validity of the consent that had been given by the various witnesses. With respect to the s. 8 *Charter* issue, when considering and assessing the totality of the circumstances for the purposes of the *Vukelich* Hearing, the Court found that the applicants met the low threshold for standing to move on to a voir dire.

SBT and FRPD also argued that they were entitled to have a s. 11(d) *Charter* voir dire because the manner that ECCC conducted the investigation was so egregious that it would offend society's sense of fair play and decency, such that the ECCC's conduct amounted to an abuse of process or would undermine the fairness of the trial. In making this argument, SBT and FRPD submitted that while abuse of process has been subsumed under s. 7 of the *Charter*, which does not apply to corporations, that either a stay of proceedings or the exclusion of evidence can occur under s. 11(d) of the *Charter*.

The Court observed that while it was a novel approach to s. 11(d) of the *Charter*, *Vukelich* Hearings should not be used to stifle novel, but unsettled and important points of law. The Court allowed SBT and FRPD to enter into a s. 11(d) *Charter* voir dire alleging violations of their right to a fair trial and abuse of process.

6. *R. v. Prince Rupert Port Authority*, 2019 BCPC 298

In late June 2017, the defendant Prince Rupert Port Authority (the "PRPA") conducted an open burn on Ridley Island. Several residents of nearby Port Edward reported that they experienced adverse effects from the fire, and multiple witnesses testified that they detected a chemical odour from the burn, with several identifying the odour as creosote. The PRPA extinguished the burn after six days. The burn pile did contain creosote-treated material, as well as numerous items not lawfully permitted to be incinerated in an open burn. The PRPA operated its burns in accordance with its internal Ridley Island Open Burning Protocol (the "Protocol").

The Crown charged the PRPA with three offences under provincial environmental legislation. The PRPA's properties include Ridley Island, which is federal property for the purposes of section 91(1A) of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3. The PRPA submitted that its federal status granted it immunity from the operation of provincial environmental legislation purporting to regulate what it burns, when it burns, or how long it burns port-related material.

First, the Crown charged the PRPA with having unlawfully caused air contaminants to be introduced into the environment by the open burning of prohibited materials, contrary to the *Environmental Management Act*, S.B.C. 2003 c. 53 (the "*EMA*"). The court held that the Crown did not prove the *actus reus* on the part of the PRPA. To be found guilty, the court needed to be satisfied that the PRPA introduced "air contaminants" (in the meaning of the *EMA*) into the environment. The court found that there was no doubt that the PRPA burned prohibited material. However, the court was unable to find, beyond a reasonable doubt, that the discomfort reported by residents and smoke-related limited visibility were caused by the burning of prohibited material. The PRPA was acquitted of this charge.

Secondly, the Crown charged the PRPA with having burned prohibited material contrary to the *Open Burning Smoke Control Regulation* 145/93 ("*OBSCR*"). The PRPA argued that, as an agent of the federal Crown, it was immune from complying with the *OBSCR*. The provincial Crown submitted that the PRPA was acting well outside of its authority under the *Canada Marine Act*, S.C. 1998, c. 10 ("*CMA*") and the *Port Authority Operations Regulation*, S.O.R./200-55 (the "*PAOR*"), which prohibit the PRPA from doing anything in a port that has or is likely to cause a nuisance. The court held

that the PRPA did not take any appropriate measures to mitigate or prevent a nuisance or adverse effect on air quality because of the burn. Accordingly, the court held that PRPA had not complied with the *PAOR* and breached the *CMA*, and that the PRPA was not entitled to rely on Crown immunity as a defence since it had been acting outside its authority granted to it as a Crown agent in conducting an open burn of prohibited materials. The court then considered the PRPA's division of powers argument. The doctrine of interjurisdictional immunity did not bar the application of the provisions of the *OBSCR*, as nothing from the *OBSCR* limited the core federal power to legislate regarding federal public lands. Further, as the Protocol is not a valid federal law, the doctrine of paramountcy could not apply to remove the requirement for the PRPA to act in accordance with the *OBSCR*. Nothing in the *OBSCR* could be said to frustrate the PRPA's federal purpose, which is to manage port lands and waste disposal in relation to port lands. The *OBSCR* simply prohibits the burning of prohibited materials and the release of smoke near urban areas for more than 72 hours. The PRPA was found guilty on the second charge.

Finally, the Crown charged the PRPA with having allowed smoke to release from the open burn for more than 72 hours in a Category 'A' area contrary to the *OBSCR*. The court held that although smoke was released for over 72 hours in Prince Rupert (a Category 'A' area), Port Edward (a Category 'B' area) was most affected. In a Category 'B' area, smoke may lawfully exceed 72 hours in certain conditions. The court accepted PRPA's argument that, in burning the pile until the fuel was gone, the PRPA was acting in compliance with the *PAOR*. The PRPA was acting in its role as an agent of the Crown and the provisions of the *OBSCR* did not apply. The PRPA was acquitted of this charge.

7. Sentencing of Teck Coal under the *Fisheries Act*

On March 26, 2021, Teck Coal ("Teck"), a subsidiary of Teck Resources, plead guilty to charges under the *Fisheries Act*, R.S.C., 1985, c. F-14 (the "*Fisheries Act*") relating to the 2012 discharge of selenium and calcite from its steelmaking coal operations in the Elk Valley region of British Columbia.

In 2012, Environment Canada investigators had found that selenium concentrations in the mine's settling ponds and the Fording River far exceeded the regulated levels.

After conducting research in 2020, Teck found that the fish populations in the Fording River and surrounding streams had almost collapsed. In October of 2020, federal investigators found that Teck had not remedied the problem, and issued charges under the *Fisheries Act*.

The agreed statement of facts presented by Teck and the Crown stated that, prior to 2009, Teck was aware that selenium and calcite could be environmentally harmful, but did not have a comprehensive plan to address the deposit of coal mine waste. The agreed statement of facts also stated that Teck did not exercise the necessary due diligence to prevent the deposit of coal mine waste rock from leaching into the Fording River from its settling ponds.

Teck informed the Court that it had spent nearly $1 billion since 2011 to bring the selenium levels under control, and planned to spend a further $655 million over the next four years. It also reported that it had upgraded its water treatment facilities to remove 95 percent of the selenium.

Teck plead guilty to two offences under subsection 36(3) of the *Fisheries Act*, and was ordered to pay a fine of $30 million per offence. The total fine, $60 million, is the highest fine that has been imposed under the *Fisheries Act* to date, and was presented to the Provincial Court of British Columbia by the Crown and Teck in a joint sentencing submission. The majority of the fine, $58 million, will go to the federal Environmental Damages Fund, while the remaining $2 million will go to general revenues.

E. Jurisdiction over the Environment

1. *Vancouver Fraser Port Authority v Mountain Premier Contracting & Demolition Ltd.*, 2021 BCSC 207

The plaintiff, Vancouver Fraser Port Authority ("VFPA") is the port authority created by letters patent issued under the Canada Marine Act, S.C. 1998, c. 10 [CMA]. It is responsible for the stewardship of the lands and waters comprising the Port of Vancouver (the "Port").

One of the defendants, Valley Towing Limited ("Valley"), leased a water lot in the Fraser River from VFPA (the "Lease"). The other defendants, Mountain Premier Contracting & Demolition Ltd. ("Mountain"), whose CEO is Jordan Michael Andrew Rowand ("Rowand") (collectively the "Mountain"), entered into a sublease for the water lot, contrary to the terms of the head lease. Mountain began dismantling and deconstructing old ships on the water lot.

VFPA had not authorized the ship breaking operation, and it terminated the head lease in April 2019. VFPA's concerns were that a ship breaking operation in water was too dangerous from an environmental standpoint and should only be permitted in a dry dock or upland location. One of the major concerns was in respect of a submerged gas and oil pipeline running through the premises. The consequences of a wreck sinking on top of that pipeline could have been catastrophic. As the parties were unsuccessful in arranging for the orderly vacating of the water lot, VFPA brought an action against the defendants seeking the costs of remediating the water lot, damages for trespass, and injunctive relief. VFPA sought an interlocutory injunction restraining Mountain from occupying the water lot and from interfering with VFPA accessing the water lot for the purposes of moving property and conducting remediation work.

Valley leased the water lot from VFPA in 2014 for the sole purpose of "log storage". The Lease was later amended and the permitted use was changed to "Boat Moorage". A further term of the Lease was that Valley was not permitted to assign or sublease any part of the Water Lot to any person.

Valley subleased the water lot in 2017 to Mountain. Mountain then commenced a ship breaking and demolition operation within the water lot. It brought several barges and ships, including a former Alaskan State ferry, into the water lot. This was done without the approval or permission of VFPA and in breach of the Lease. Mountain did not apply for or receive authorization from VFPA to conduct a ship breaking operation.

Upon becoming aware of the ship breaking operation in 2018, VFPA wrote a letter to Valley advising that the ship breaking operation was in breach of the permitted use of the water lot under the Lease and that all ship breaking activities had to cease within 30 days. In December 2018, VFPA gave Valley permission to conduct certain emergency works. While some work was carried out, no salvage plan was approved and a sunken vessel remained submerged in the water lot.

On February 19, 2019, VFPA informed Mountain that they could submit a preliminary review application for a Category C permit without needing a tenancy agreement. An application for a Category A or B project required a tenancy agreement and differed from a Category C project. On the same day, Mountain submitted an application for a permit for a Category A and B project. VFPA cancelled the application as a result of there being no lease, license, access agreement, or landlord consent being in place. After unsuccessful attempts at having Mountain cooperate in vacating the water lot, VFPA sent a notice to vacate and a notice restricting access to the site. After this point in time, there was evidence that the notices sent to Mountain were ignored and that Mountain was still accessing the site.

In a letter dated November 17, 2020, Mountain advised that one of the vessels located in the water lot was in danger of sinking. Mountain requested approximately 120 days in order to vacate the area. Mountain's lawyers also took the position that the notice to vacate was a nullity as it imposed conditions on the removal of the property that were impossible to comply with. On November 26, 2020, Rowan advised VFPA contractors that they were trespassing and that he would only allow them aboard the vessels for the purposes of pumping the vessels to prevent sinking. On November 30, 2020, Rowand moved into one of the vessels.

The Court recognized that VFPA had authority over the water lot as an agent of the Federal Crown. Under such authority, VFPA is authorized to take appropriate measures for the safety and security of persons or property in the Port. VFPA sought an interim injunction on two bases (1) that Mountain was committing a trespass at common law which should be restrained, and (2) that Mountain was in breach of the Port Authorities Operations Regulations, SOR/2000-55 [Regulations] and should be restrained.

The Court determined that Mountain was a trespasser in the water lot. At no time did the defendants have authorization from VFPA to set up a ship breaking business in the water lot. Mountain required that approval under the Regulations. Mountain claimed they had a sublease from Valley that allowed them to occupy the premises. However, Valley did not have the authority to sublease the premises to anyone without the prior written consent of VFPA, which it did not seek.

The Court also found that Mountain had engaged in activities that violated the Regulations by carrying on ship breaking and dismantling operations in the water lot without authorization. Based on the trespass and statutory breach, the Court was satisfied that injunctive relief was warranted. There were no exceptional circumstances on the facts that would change this finding. Finally, the Court determined that an injunction should also be issued on the basis of the RJR-Macdonald test, which Mountain argued was the appropriate test to apply.

2. *Canadian National Railway and British Columbia (Delegate of the Director, Environmental Management Act), Re*, 2018-EMA-043(c); 2018-EMA-044(c); 2018-EMA-045(c)

Canadian National Railway Company ("CN"), Canadian Pacific Railway Company ("CP") and Burlington Northern Santa Fe LLC ("BNSF") (collectively, the "Appellants") brought three appeals in relation to orders (the "Orders") issued by the Director of the Environmental Emergency Program (the "Director") and the Ministry of Environment and Climate Change Strategy (the "Ministry"). The Orders required the Appellants to provide certain information regarding shipments of crude oil and diluted bitumen (together "Crude Oil") being transported through B.C. by rail, including railway route and volume information. Additionally, the Orders stated that the Ministry planned to publish reports on Crude Oil transport in B.C. The Orders were made pursuant to s. 91.11(5)(b) of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*EMA*") and s. 2(1)(b)(i) of the *Spill Response, Preparedness and Recovery Regulation*, B.C. Reg. 186/2017 (the "Regulation").

The Appellants argued that s. 91.11 of the *EMA* and s. 2(1)(b)(i) of the Regulation (together the "Impugned Legislation") were not within the Province's constitutional jurisdiction, and therefore the Director had no jurisdiction to make the Orders. The Appellants asserted that the Impugned Legislation and the Orders regulated interprovincial railways, which fall exclusively under federal jurisdiction. Alternatively, the Appellants submitted that the doctrines of interjurisdictional immunity ("IJI") or paramountcy applied such that the Impugned Legislation and the Orders could not operate or apply to the Appellants. In the further alternative, the Appellants submitted that the Orders were unreasonable because public disclosure of the Route and Volume Information constituted a security risk to shipments of Crude Oil.

The Director and the Attorney General of British Columbia (together the "Respondents") submitted that the Orders would allow the Director to better understand the movement of Crude Oil by rail through B.C., and allow him to assess the Appellants' spill response preparedness plans. Additionally, the Respondents maintained that the pith and substance of the Impugned Legislation and the Orders is environmental protection, which is a matter of shared federal-provincial jurisdiction.

In the result, the Board found that the legislative purpose of imposing spill preparedness requirements on railways falling within s. 2(1)(b)(i) of the Regulation, and the intended effect of the information requirements in the Orders, was to regulate the spill preparedness of interprovincial railways carrying large quantities of listed substances such as Crude Oil. It was readily apparent that permitting a provincial decision-maker to impose potentially unique requirements on the Appellants' spill response planning would constitute more than an incidental effect on the Appellants' operation. Consequently, the Board found that the Impugned Legislation was invalid based on a pith and substance analysis, and that the Director therefore lacked statutory authority to issue the Orders.

Even if the Impugned Legislation was validly enacted provincial environmental legislation, the Board held that IJI would prevent the Impugned Legislation and the Orders from applying to the Appellants. The Board recognized that interprovincial railway safety and associated operational management was a core power of a federal undertaking, and that such an undertaking must have the ability to plan its operations and its spill preparedness, allocate its resources, and manage its security and safety, free from provincial interference.

Based on the pith and substance analysis, and in the alternative, the IJI analysis, the Board allowed the appeals.

3. *OK Industries Ltd v District of Highlands*, 2021 BCSC 81

OK Industries Ltd. (the "Petitioner") was engaged in the quarrying of mining aggregates. In January 2015, it purchased a 6.5 acre vacant and unimproved property (the "Property") from the Province, which is located within the respondent District of Highlands (the "Respondent"). The Respondent is a municipal corporation created pursuant to the *Community Charter,* SBC 2003, c 26 ("*Community Chater*").

On March 24, 2017, the Petitioner submitted a Notice of Work application to the Ministry of Energy, Mines and Petroleum Resources, seeking a permit to operate a quarry on the Property. The Respondent opposed the application, but on March 18, 2020, a quarry permit was granted to the Petitioner pursuant to the *Mines Act,* RSBC 1996, c 293 ("*Mines Act*") (the "Permit"). The Permit was subject to detailed authorizations and conditions, including the advice that the Permit might be subject to other laws and regulations, such as local government bylaws.

In preparation for its quarry operation, the petitioner began cutting down some trees on the Property. The Petitioner did not apply for any permits from the Respondent. On October 3, 2020, the Respondent's bylaw compliance officer issued a "cease work order" on the basis that the Petitioner's tree cutting activities were taking place without a valid tree cutting permit having been issued by the Respondent, contrary to a municipal bylaw. The Respondent had previously indicated to the Petitioner that there were a number of other municipal bylaws that could be triggered by the Petitioner's operations, and had indicated that the Petitioner would require permits under those bylaws in order to proceed. The Petitioner's position was that the bylaws did not apply to its intended use of the Property as a quarrying operation.

The Petitioner filed a petition seeking interim and permanent orders declaring that its quarry operation was not subject to the Respondent's bylaw scheme. The Petitioner also sought an order in the nature of *certiorari* staying the cease work order.

The court reviewed the legislative scheme, which included three main pieces of provincial legislation: the *Mines Act,* the *Community Charter* and the *Local Government Act,* RSBC 2015, c 1 ("*LGA*"). The Court further reviewed the statutory scheme for relief under the *Judicial Review Procedure Act,* RSBC 1996, c 241 ("*JRPA*"). The court determined that there were a number of compelling factors in the case that led to the conclusion that the court should hear the petition and that declaratory relief as sought was available to the Petitioner.

The first central question was whether the Province had exclusive jurisdiction over quarries and mines, such that the respondent's municipal bylaws were inapplicable to the petitioner's mining activities authorized by the Permit. The Respondent contended that it was incorrect to say that the Province had exclusive jurisdiction over quarries and mines because of the mere existence of the definitions of "mine" and "mining activity" in the *Mines Act.* It pointed to the jurisprudence establishing that the "impossibility of dual compliance" test applied when considering potentially conflicting provincial and municipal legislation.

The court observed that the mere existence of provincial legislation in a given field did not oust municipal prerogatives to regulate the subject matter. The case law recognized that local governments may pass bylaws that have the effect of regulating in an area regulated by the Province provided that the two regimes do not conflict.

The court stated that the main question was whether the Respondent's decision that the municipal bylaws were applicable to the petitioner's activities to be conducted pursuant to the Permit was correct and/or reasonable, in light of the statutory scheme and judicial precedents, in particular *Cowichan Valley (Regional District) v Cobble Hill Holdings Ltd,* 2016 BCCA 432 ("*Cobble Hill*"). In that case, the Court of Appeal held:

a. The Province has exclusive jurisdiction over activities that are captured by the definitions of "mine" and "mining activity" in the *Mines Act*;

b. The operation of a quarry is captured by the definitions of "mine" and "mining activity"; and

c. The reclamation of a site, insofar as the actions are integral to restoring the affected landform, is captured by the definitions of "mine" and "mining activity".

The court noted that while the third point was not at issue in the case at hand, the other two points were key to the petitioner's arguments. The court concluded that for all the bylaws at issue, the Respondent's decision was both unreasonable and incorrect. As in *Cobble Hill,* the Respondent's jurisdiction to regulate the use of the Property through its bylaws would only be re-engaged when the quarrying activities were complete.

The court granted the Petitioner the order in the nature of *certiorari* staying the cease work order. The court also granted the Petitioner a declaration that the Respondent's bylaws were inapplicable in respect of the Petitioner's activities authorized by the Permit, to the extent that those activities fell within the definition of a "mine" or "mining activity" under the *Mines Act.*

F. Environmental Assessments

1. Legislation

(i) B.C. *Environmental Assessment Act*

As discussed in BLG's last Environmental Law Seminar, the *Environmental Assessment Act,* S.B.C. 2018, c. 51 (the "*EAA*") received Royal Assent on November 27, 2018. The *EAA* repeals and replaces the former *Environmental Assessment Act*, S.B.C. 2002, c. 43. Importantly, the *EAA* introduces changes to the environmental assessment process in B.C. In particular, the *EAA* creates an early engagement process, increases opportunities for public participation, and prescribes measures to meet the B.C. government's commitment to reconciliation and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

The *EAA* came into force on December 16, 2019.

Section 13 of the *EAA* allows for the proponent of a reviewable project to submit to the Officer an initial description of the project and an engagement plan which includes a proposal respecting the engagement with Indigenous nations, municipalities, government agencies, and the public. After receiving this plan, the Officer must either approve the plan or require the proponent to make changes. If the plan is approved, the Officer must publish the plan for at least 30 days and invite comment from the public on the plan. Further, after approving the plan, the Officer must provide notice to the proponent of the project setting out a summary of the comments received by the public and the Indigenous nations that are participating Indigenous Nations.

Section 15 of the *EAA* sets out that a proponent who receives approval under section 13 of the *EAA* may submit to the Officer a detailed project description. The Officer may then make any requirements for the project that apply generally or specifically to that project.

(ii) Regulations to the B.C. *Environmental Assessment Act*

a. Reviewable Projects

By Order in Council No. 607, dated November 29, 2019, the Lieutenant Governor ordered that:

a. effective December 16, 2019, the *Reviewable Projects Regulation*, B.C. Reg. 370/2002 was repealed; and

b. effective December 16, 2019, the *Reviewable Projects Regulation*, B.C. Reg. 243/2019 (the "current *RPR*") was enacted, except for section 5, which came into force on April 1, 2020.

The current *RPR* replaced the previous regulation of the same name, and sets out the criteria for determining which projects should be reviewable and required to undergo an environmental assessment pursuant to the *EAA*. A broad range of major projects are now automatically reviewable if they fall within certain categories and meet certain triggers and thresholds under the current *RPR*. Section 5(1) outlines other prescribed projects that will now require a notification to the Environmental Assessment Office (the "EAO") (*i.e.,* projects that are not reviewable based on other criteria and thresholds, but are designated as such).

Specifically, the current *RPR* incorporates the following changes:

a. with respect to design thresholds, a new threshold of 345 kV for electric transmission lines so as to align with the federal reviewability threshold; an alignment of linear project category thresholds (*e.g.*, electric transmission lines, transmission pipelines, public highways, and railways) with the federal definition of "new right of way"; and changes to resort modification thresholds as set out in the Environmental Assessment Office's Intentions Paper on the *RPR*;

b. effects thresholds are as set out in the Intentions Paper, providing a "backstop" that ensures that projects with a small design remain reviewable if they have disproportionately larger effects;

c. notification requirements for new projects are at lower thresholds for greenhouse gases, area of disturbance, and linear disturbance, and a notification requirement is added for electric transmission lines at a lower kV threshold;

d. a single notification requirement is now applicable the first time a project modification results in the exceedance of the greenhouse gas emissions notification threshold;

e. greenhouse gas emissions are calculated in accordance with the *Greenhouse Gas Emission Reporting Regulation*, consistent with existing large industrial emitter reporting; and

f. timber clearance in compliance with the *Resort Timber Administration Act* is not included in the area of disturbance and linear disturbance effects and notification requirements, for the reason that it is base area development that has the highest potential for significant adverse effects for tourist resort developments.

The current *RPR* was later amended by BC Reg 67/2020, effective March 26, 2020, which addressed some drafting errors and clarified the newly in force section 5(1).

b. Transition

The *Environmental Assessment Transition Regulation* (the "Regulation") came into force on December 16, 2019. The Regulation limits the circumstances in which the Chief Executive Assessment Officer (the "Officer") may order project assessments.

Specifically, if under the repealed *Environmental Assessment Act*, S.B.C. 2002, c. 43 (the "Former *Act*"), an order was issued to either:

a. refer a reviewable project for determination as to the scope of the assessment, or the methods and procedures of the assessment under section 10(a) of the Former *Act*; or

b. require an assessment or an assessment certificate for a project where the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect under section 10(c) of the Former *Act*

but, an order under section 11 of the Former *Act* regarding the scope and the procedures and methods for conducting the review has not been issued by December 16, 2019, then the Officer may not make a decision on the type of review required for the project unless the project proponent has complied with sections 13 and 15 of the *EAA*.

c. Fees

The *Environmental Assessment Fees Regulation*, B.C. Reg. 246/2019 (the "*Fees Regulation*") became effective on December 16, 2019. This regulation outlines the various fees applicable under the *EAA*. The *Fees Regulation* was later amended by BC Reg 66/2020, part effective March 26, 2020, and part effective April 1, 2020. These amendments clarified that the fees payable were not required to be paid until after April 1, 2020.

d. Administrative Penalties

The *Administrative Penalties Regulation*, B.C. Reg. 64/2020 (the "*Penalties Regulation*") became effective as of March 26, 2020.

The *EAA* grants authority to issue tickets and administrative monetary penalties if the EAO is satisfied on a balance of probabilities that a person has:

a. contravened the *EAA* and its regulations;

b. failed to comply with an order or an EA certificate; or

c. made a statement or omission that is false or misleading.

The *Penalties Regulation* outlines the various factors that are to be considered when determining the amount of an administrative penalty in a given case. The factors include, among others, (i) the nature of contravention or failure, (ii) the previous conduct of the contravening person, (iii) whether the conduct was repeated or continuous, (iv) whether the conduct was deliberate, (v) whether the contravening person secured an economic benefit, and (vi) any efforts to correct and prevent recurrence of the contravention or failure.

e. Protected Areas

The *Protected Areas (Environmental Assessment Act) Regulation,* B.C. Reg. 248/2019 (the "*Protected Areas Regulation*"), which became effective on December 16, 2019, prescribes certain protected areas to be taken into account by the Chief Executive Assessment Officer when deciding whether to proceed with an assessment under section 16 of the *EAA*.

Under section 16, if the Chief Executive Assessment Officer considers that the project in question will have extraordinarily adverse effects on a prescribed protected area, the Officer should recommend that the Minister issue a termination order in respect of the proposed project. The prescribed protected areas under the *Protected Areas Regulation* include ecological reserves, provincial heritage sites, and various classes of parks as designated by the *Park Act,* R.S.B.C. 1996, c. 344.

(iii) B.C. *Declaration on the Rights of Indigenous Peoples Act*

On October 24, 2019, the provincial government introduced the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 (the "*Act*"). The *Act* came into force upon receiving Royal Assent on November 28, 2019, making B.C. the first province in Canada to align itself with the United Nations Declaration on the Rights of Indigenous People ("UNDRIP").

The *Act* does not give UNDRIP legal force and effect in B.C. *per se*, but instructs the provincial government to implement UNDRIP over time, requiring that the government take all necessary steps to ensure that the province's laws are consistent with UNDRIP. This includes preparing and implementing an action plan for achieving alignment, and producing and delivering annual progress reports to the legislature.

With respect to the environmental assessment process, the provincial government has not indicated that the passing of the *Act* will result in immediate changes. However, the *Act* does detail the process by which the government and Indigenous groups can enter into agreements that include Indigenous consent requirements, including the mandating process, public consultation obligations, and administrative structures required to come to decisions. Under this new framework, if the government enters into an agreement that includes an Indigenous consent requirement regarding a project requiring environmental assessment, the *Environmental Assessment Act*, S.B.C. 2018, c. 51 (the "*EAA"*) offers an enacting legal mechanism. Section 7 of the *EAA* requires Indigenous consent with respect to projects under environmental assessment where the province and the Indigenous group in question have established such a consent requirement.

2. Case Law

(i) *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 319

A gold and copper mine near Williams Lake (the "Project"), proposed by Taseko Mines Limited ("Taseko"), was subject to an environmental assessment by a federal review panel (the "Panel"). This assessment culminated in the Panel releasing its Final Report (the "Report") on October 31, 2013, which found that the Project was likely to cause significant adverse environmental effects with respect to a nearby lake.

Taseko applied to the Federal Court of Appeal for judicial review of the Report, claiming that the Panel had failed to observe principles of procedural fairness by relying on a Natural Resources Canada study without giving Taseko the opportunity to respond. Taseko further claimed that the Panel came to a substantively unreasonable determination regarding the Project's environmental impact.

The court rejected both of Taseko's arguments. The court found that Taseko did not object to the study when it was first submitted during the assessment and was afforded an opportunity to respond. The court concluded that the Panel's findings with respect to environmental impact, including expected seepage from the Project and effects on water quality, were reasonable.

The court first considered whether the Report was justiciable. On the basis that the Report was merely a recommendation to the Governor in Council, and therefore lacking in independent legal or practical effect, the court determined the Report to be unamenable to judicial review.

Despite this determination, the court reviewed Taseko's submissions as to the substantive and procedural fairness of the Report in the context of the final decision made by the Minister of the Environment. In doing so, the court found that the Panel's reasoning with respect to estimates of seepage and water quality impact caused by the Project fell within a range of possible, acceptable outcomes. Further, Taseko was found to have been given ample opportunity to know its case and been offered sufficient notice to respond.

(ii) *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320

In the companion decision to *Taseko Mines Limited v. Canada (Environment),* 2019 FCA 319, Taseko Mines Limited ("Taseko") sought judicial review of the decisions of both the Minister of the Environment (the "Minister") and the Governor-in-Council (the "GIC"). Specifically, Taseko sought review of the decision not to approve its gold and copper project (the "Project"), claiming that the decision should be quashed, primarily for breaches of procedural fairness. Taseko made reference to meetings between the Minister and the Tsilhqot'in National Government (the "TNG") at which Taseko was not present. Having received the Final Report from the Federal Review Panel, the Minister released her decision on February 26, 2014, concluding that the Project was likely to cause significant adverse environmental effects. The GIC decided that those effects were not justified in the circumstances.

The court determined that the Minister owed Taseko only a "minimal" degree of procedural fairness and that the requirement was met in this case. With respect to the decision of the GIC, the court rejected the very notion that Taseko was owed any duty of fairness at all and, even if it did, that this duty's content would be minimal and satisfied in this case.

On appeal, the court first dealt with the degree of procedural fairness owed to Taseko in this matter. While Taseko argued that something greater than a "minimal" degree of fairness was owed with respect to the Minister's decision, the court found otherwise. On consideration of the factors from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the court was unwilling to displace the Federal Court's finding that "the Panel process is the venue through which the parties are to be afforded a high degree of procedural fairness," not the Minister's decision. Similarly, the court adopted the reasons of the lower court in finding that no duty of procedural fairness attached to the GIC decision-making process, dismissing the appeal to quash the GIC's decision.

Having determined that only a minimal degree of fairness was owed, the court turned to the question of whether the Minister breached that standard. Much like in the companion decision, the court highlighted that Taseko was not timely in raising a complaint. It also found that Taseko failed to show that there was significant and relevant information presented to the Minister during the meetings with the TNG of which Taseko lacked prior knowledge, and that such information was both "fresh" and prejudicial to its position and had the potential to "change the case it had to meet." The court rejected Taseko's argument that it was not given full opportunity to respond, noting that Taseko's submissions were put before the Minister and that Taseko had also retained a former TNG Chief to advocate for its position.

(iii) *Sierra Club of BC Foundation v. British Columbia (Environmental Assessment Office)*, 2020 BCSC 596

The petitioner, Sierra Club of BC Foundation ("Sierra"), a non-profit environmental organization, brought a petition for judicial review of a July 2018 decision of the Executive Director (the "Executive Director") of the Environmental Assessment Office (the "EAO"). The impugned decision, made pursuant to s. 10(1)(b) of the former *Environmental Assessment Act,* S.B.C. 2002, c. 43 (the "*EAA*"), exempted the respondent, Progress Energy Canada Ltd. ("Progress") from the requirement to obtain an environmental assessment certificate in relation to its Town and Lily Dams (the "Dams") in northeastern B.C.

Sierra sought orders quashing and setting aside the decision or, in the alternative, orders in the nature of *certiorari* remitting the question of whether Progress should receive exemptions to the Executive Director to be determined in accordance with directions. Progress opposed the petition. The Executive Director took no position.

The former *EAA* applies only to "reviewable projects." Per the former *Reviewable Projects Regulation*, B.C. Reg. 370/2002 (the "Regulation"), new dams greater than or equal to 15 metres high are "reviewable projects."

Under the former *EAA*, the EAO does not vet development projects and instead relies on proponents to bring "reviewable projects" to its attention. Per s. 10 of the former *EAA*, the Executive Director has the authority to decide whether a reviewable project requires an environmental assessment or whether an exemption can be issued.

In 2016, Progress discovered that both the Dams exceeded the 15 metre height threshold stipulated in the Regulation and that it had inadvertently failed to obtain an Environmental Assessment Certificate or exemption. In July 2017, Progress made a formal request for an exemption. The Executive Director issued exemptions for both dams, subject to stringent project design restrictions and conditions.

The first issue before the Court was whether the Executive Director's interpretation that he had authority under s. 10(1)(b) of the *EAA* to exempt a project that was built and operated in violation of the *EAA* was unreasonable. Sierra argued that s. 10(1)(b) could not be applied to a project that had already been built in violation of the *EAA*, and maintained that the *EAA*'s purpose would be undermined if proponents could build and operate a project in violation of the *EAA* and then benefit from an exemption. In response, Progress argued that s. 10 applied to all reviewable projects, not just new ones, and that there was no prohibition against granting an exemption for an existing reviewable project.

The Court found that the Executive Director's interpretation that the *EAA* provided him with the authority under s. 10(1)(b) to exempt a project that was built and operated in violation of the *EAA* was reasonable.

The second issue before the Court was whether the Executive Director's decision to issue the exemption was unreasonable. Sierra argued that the decision to grant the exemption lacked justification, transparency and intelligibility and was, therefore, unreasonable. Sierra alleged that granting an exemption awarded Progress for its non-compliance and failed to address the principle of deterrence. The Court rejected this argument, finding that the fact that the Dams were already built was not a bar to the Executive Director ordering an exemption. The Court further found that compliance history (including that the Dams had already been built at the time of the exemption application) was not a factor to be considered under s. 10(1)(b). The Court was satisfied that the Executive Director's decisions to exempt the Dams from the Environmental Assessment Certificate was not unreasonable. Rather, the reasoning process was coherent, rational, logical, justifiable and transparent.

The Court dismissed Sierra's petition.

(iv) *Compliance Coal Corporation v. British Columbia (Environmental Assessment Office)*, 2020 BCSC 621

The plaintiffs, Compliance Coal Corporation and Compliance Holdings Ltd. (together, "Compliance"), claimed damages from the federal and provincial governments for alleged misconduct in performing environmental assessments of a proposed underground coal mine (the "Raven Project").

In 2005, Compliance acquired rights to extract coal on land located south of Courtenay, B.C., and proposed the development of the Raven Project. The Raven Project was subject to environmental assessment pursuant to the former *Environmental Assessment Act*, S.B.C. 2002, c. 43 (the "*EAA*") and the *Canadian Environmental Assessment Act*, S.C. 2012, c. 1. The Province and Canada administer their respective statutes via the B.C. Environmental Assessment Office (the "EAO") and the Canadian Environmental Assessment Agency (the "Agency").

In August 2009, the EAO issued an order pursuant to the former *EAA* requiring that the Raven Project obtain an Environmental Assessment Certificate (the "Certificate"). In January 2010, support for the Raven Project from local governments and communities began to erode. From 2010 to 2016, Compliance went back and forth with the EAO and Agency regarding the Certificate. On April 4, 2016, the BCEAO advised Compliance that it was terminating the environmental assessment.

Compliance alleged five causes of action: (i) misfeasance in public office; (ii) negligence; (iii) *de facto* expropriation; (iv) breach of contract; and (v) conspiracy, and sought damages. British Columbia, Canada, and the Canadian Environmental Assessment Agency ("CEAA") (together, the "Defendants") argued that the amended notice of civil claim ("NOCC") failed to state reasonable causes of action and applied to strike the NOCC. Compliance sought leave to amend their pleadings and argued the further amended NOCC should stand. The central issue was whether it was plain and obvious that the NOCC failed to state reasonable causes of action.

With respect to the tort of misfeasance in public office, the Court found the NOCC was deficient in several ways. To the extent that the details of the Defendants' misconduct were known to Compliance, those details should have been pled as particulars. Further, Compliance failed to name the Crown office holders known to Compliance and to provide details of the federal environmental assessment process and connect it to the administration of a federal statute. Despite these deficiencies, the Court refused to strike the claim for misfeasance in public office.

With respect to the negligence claim, at issue was whether it was arguable that the Defendants owed a duty of care to Compliance. Compliance argued a duty of care arose, not from statutory duties, but from "direct interactions." The Court concluded that *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 was binding: provided the NOCC was revised to correct various deficiencies, Compliance's claim in negligence could proceed.

Compliance alleged the Defendants created burdens in respect of its property by imposing the environmental assessment requirements, which deprived Compliance of its interest in the property and amounted to *de facto* expropriation. For a *de facto* taking requiring compensation at common law, two requirements must be met: (i) an acquisition of a beneficial interest in the property or flowing from it, and (ii) removal of all reasonable uses of the property (see *Canadian Pacific Railway v. Vancouver (City)*, 2006 SCC 5 at para. 30). While Compliance argued that the Province and Canada benefitted "in that they no longer had to face criticism from constituents and other individuals who were opposed to the development of coal mines on Vancouver Island," the Court held that this did not satisfy the first requirement. However, the Court held that the removal of the possibility of mining enhanced the value of surface lots owned by the Province, which satisfied the first requirement. On the second stage of the test, the Court held that, while B.C.'s actions made it impossible for the Raven Project to succeed, it did not follow that all prospects for the exploitation of the subsurface rights were lost. On this basis, the Court concluded that Compliance failed to plead a reasonably arguable claim of *de facto* expropriation.

With respect to the claim for breach of contract, Compliance maintained that it had rights as a successor in title under contracts made at the time of the original Crown grants. However, the contracts upon which the claims were founded were not clearly plead (parties, dates, and manner in which the contracts were concluded were not specified). As a result, the Court held that it was plain and obvious that Compliance's pleadings failed to plead a reasonably arguable claim for breach of contract.

While Compliance further argued the Defendants "agreed or acted in concert to commit and promote the acts…with the predominant purpose of causing injury to Compliance," Compliance failed to include these allegations in Part 1 of the NOCC. The Court concluded that, while Compliance must provide further particulars, it would have been wrong to strike the conspiracy claims.

Rather than dismissing the action, the Court provided Compliance with an opportunity to correct the deficiencies and stayed the action. The stay would be lifted upon the filing of a further amended NOCC with leave of the court.

G. Greenhouse Gas Emissions & Climate Change

1. Legislation

(i) Federal *Order Declaring that the Provisions of the Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector) Do Not Apply in British Columbia*, S.O.R./2020-60

On April 4, 2018, the *Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector),* SOR 2018-66 (the "Federal Regulations") were enacted. The Federal Regulations introduced control measures to reduce emissions of methane and volatile organic compounds from the upstream oil and gas sector.

On December 17, 2018, the British Columbia Oil and Gas Commission approved a final amendment to the existing *Drilling and Production Regulation*, B.C. Reg. 286/2018 (the "Provincial Regulations"), which contains requirements for methane emissions reductions. The Provincial Regulations require control measures to reduce methane emissions from the upstream oil and gas sector, and contain regulatory standards for the same sources as the federal regulations.

The federal Minister of the Environment recommended that an Order in Council be made that would declare that the provisions of the federal regulations do not apply in British Columbia, on the basis that the provincial regulations meet the requirements for an equivalency agreement as set out in *Canadian Environmental Protection Act,* S.C. 1999, c. 33 (the "*CEPA*").

The Governor General in Council made an Order declaring that the provisions of the Federal Regulations respecting reduction in the release of methane and certain volatile organic compounds do not apply in British Columbia. The Order was registered on March 25, 2020, which generally represents the coming into force date of its provisions, with some provisions coming into force later on January 1, 2023. The Order will cease to have effect upon the termination of the equivalency agreement.

(ii) B.C. *Climate Change Accountability Amendment Act, 2019*

The *Climate Change Accountability Amendment Act, 2019*, S.B.C. 2019, c. 43 (the "*Act*") received Royal Assent on November 28, 2019. This Act will amend the *Climate Change Accountability Act*, S.B.C. 2007, c. 42 (the "*CAA*"). Sections 8 and 10 of the *Act* will come into force on December 31, 2020, while the remainder of the *Act* came into force on the date of Royal Assent.

The *Act* introduces amendments directed towards better accountability and transparency as well as more detailed targets for climate action. Specifically, the *Act* addresses emissions targets for the province, reporting requirements, the appointment of an advisory committee, and an expansion of the regulation-making authority.

Under the *Act*, the B.C. government will be required to establish a greenhouse gas emissions target for a specified year that is earlier than 2030. These targets will be established by ministerial order no later than December 31, 2020. Additionally, the government will now be required to establish separate greenhouses gas emissions targets for individual sectors. These targets must be established no later than March 31, 2021. The sector-specific targets must be reviewed before the end of 2025 and at least once every five years after the first review.

The *Act* also repeals the requirement to publicly report on progress toward meeting the emissions targets biannually, as well as the requirement to prepare a report on climate change risks, progress made toward reducing those risks, actions taken to achieve that progress, and plans to continue that progress. These provisions are replaced with a requirement for the Minister to prepare an annual report, that:

a. determines B.C.'s greenhouse gas emissions for the most recent calendar year;

b. estimates B.C.'s greenhouse gas emissions in the year the report is prepared as well as the subsequent two years;

c. describes the actions taken and expenditures to reduce greenhouse gas emissions and manage climate change risks;

d. describes the actions and expenditures proposed to reduce greenhouse gas emissions and manage climate change risks; and

e. describes the expected outcomes of the actions proposed.

Further, in 2020, and in every fifth calendar year after that, the annual report must include a determination of climate change risks. The *Act* introduces new requirements for public sector organizations to provide annual "climate change accountability reports." The reports must include actions taken to minimize greenhouse gas emissions, the places to continue minimizing those emissions, a determination of the greenhouse gas emissions for the year, and actions taken to comply with prescribed requirements and achieve prescribed targets.

The *Act* also requires the government to establish an independent advisory committee to advise the Minister on matters respecting climate change. The new independent advisory committee must consist of no more than 20 members, be composed at least half by women, and include at least one representative from each of the following groups: (a) Indigenous peoples; (b) local governments; (c) environmental organizations; (d) academics; (e) unions; (f) persons living in rural and remote communities; and (g) the business community.

Lastly, the *Act* increases the power of the government to prescribe targets and requirements for public sector buildings and fleets, including: (1) buildings owned or leased by a public sector organization; (2) motor vehicles and other mobile combustion sources owned or leased by a public sector organization; and (3) the fuels used in or by the buildings, motor vehicles and other mobile combustion sources that are owned or leased by the public sector organization, and the infrastructure used to dispense those fuels.

(iii) B.C. *Carbon Tax Regulation*, B.C. Reg. 125/2008

The *Carbon Tax Regulation,* B.C. Reg. 125/2008, (the "*Carbon Tax Regulation*") was amended on November 7, 2019, pursuant to Order in Council 580/2019. The changes added the "Regulated Operation Refund" scheme under Part 5.1 of the *Carbon Tax Regulation*. These provisions allow "regulated operations" (liquefied natural gas operations as defined above by the *Reporting Regulation*) to claim tax refunds based on a prescribed formula. The formula, among other things, allows regulated operations to claim a larger refund if their attributable emissions for the year are less than or equal to their target emissions for the year.

The size of the refund is also inversely related to a notional tax rate, which is determined by Table 1 of the *Carbon Tax Regulation*. Table 1 was further amended by B.C. Reg. 260/2020, which became effective on September 20, 2020, such that the notional tax rate is $40 in both 2019 and 2020, and subsequently rises to $50 in years 2022 and onward. This effectively means that, all else being equal, the size of the claimable refund will be reduced between 2020 and subsequent years.

(iv) B.C. *Economic Stabilization (COVID-19) Act*

The *Economic Stabilization (COVID-19) Act,* S.B.C. 2020, c. 19 (the "*Act*") received Royal Assent on August 14, 2020. The *Act* intended to provide some relief in relation to the requirements of various provincial taxation schemes, recognizing the devastating impact of the COVID-19 pandemic on citizens and businesses in the province. Section 2 of the *Act* extends the deadline for returns and reports that must be delivered or filed and remittances or payments that must be made under certain provisions of the *Carbon Tax Act*. As per section 22 of the *Act*, section 2 came into force March 24, 2020.

(v) B.C. *Budget Measures Implementation Act, 2020*

Bill 4, *Budget Measures Implementation Act*, *2020* (the "2020 Budget") received Royal Assent on August 14, 2020 and makes several amendments to the *Carbon Tax Act*, S.B.C. 2008, c. 40 (the "*Carbon Tax Act*") which:

a. allow the minister to delegate power under the *Carbon Tax Act*'s appeal process, in a similar manner to the aforementioned changes to the *Forest Act*;

b. implement tax rates for various types of fuels in Schedule 1 of the *Carbon Tax Act* for the 2020 and 2021 tax years, which came into force as of April 1, 2020; and

add a new category of combustible that will be subject to tax, labelled "combustible waste" (as defined in Schedule 2 of the *Carbon Tax Act*).

(vi) Federal Bill C-262, An Act to amend the Income Tax Act (capture and utilization or storage of greenhouse gases)

Bill, *An Act to amend the Income Tax Act (capture and utilization or storage of greenhouse gases)* (the "Bill") passed introduction and first reading in the House of Commons on December 11, 2020. As of March 2021, the Bill has been placed in the order of precedence for second reading.

The Bill, in an effort to fight against climate change, amends the *Income Tax Act,* R.S.C. 1985, c. 1 (the "*ITA*") to create a tax incentive for businesses that capture, use or store greenhouse gases.

The Bill would add section 125.11 to the *ITA*, which includes the following definitions:

a. "greenhouse gas" means carbon monoxide and carbon dioxide; and

b. "qualifying corporation" means a corporation that is engaged primarily in the business of capturing, utilizing or storing natural gas.

The section then creates a tax credit under subsection 125.11(3), which allows qualifying corporations to deduct tax payable for the taxation year by the product of:

a. the amount of greenhouse gas the corporation captured and/or utilized in the taxation year; and

b. the rate set out in the *Greenhouse Gas Pollution Pricing Act,* S.C. 2018, c. 12, (the "*Pricing Act*") in its Schedule 4 for the taxation year.

For the 2020 taxation year, the prescribed rate in the *Pricing Act* was $30 per tonne.

The Bill also empowers the Minister of National Revenue to divide the tax credit among several qualifying corporations if, for example, one corporation captured greenhouse gases, and another corporation subsequently utilized or stored those greenhouse gases.

(vii) Federal Bill C-12, *An Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050*

Bill C-12, *An Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050* (the "Bill"), passed introduction and first reading in the House of Commons on November 19, 2020. As of March 2021, the Bill is undergoing second reading.

The Bill is intended to ensure transparency and accountability in the country's process toward achieving net-zero emissions by 2050, as well as meeting various related targets required to be set by the Minister in 2030, 2035, 2040 and 2045. These 5-year incremental targets are created by the Bill as milestones for the 2050 net-zero emissions requirement.

(viii) Federal Bill C-232, *An Act respecting a Climate Emergency Action Framework*

Bill C-232, *An Act respecting a Climate Emergency Action Framework* (the "Bill"), passed introduction and first reading in the House of Commons on February 26, 2020. As of March 2021, the Bill is undergoing second reading.

The Bill is intended to ensure that the Government of Canada takes all measures necessary to ensure that Canada respects its commitments under the United Nations Framework Convention on Climate Change and the Paris Agreement (collectively, the "Convention"). In order to achieve this goal, the Bill would require the Minister of the Environment to, in consultation with Indigenous peoples and civil society, develop and implement a climate emergency action framework to achieve the objectives of the Convention respecting the reduction of greenhouse gas emissions.

The Bill has been recognized in parliamentary debate as covering essentially the same material as Bill C-12 (discussed below), notwithstanding certain differences, and it appears that only one of the two bills will eventually be enacted.

2. Case Law

(i) *La Rose v. Canada*, 2020 FC 1008

Fifteen children and youth from across Canada (the "Plaintiffs") commenced a Federal Court action against the federal Crown focused on the contribution of greenhouse gases ("GHGs") to climate change. The Plaintiffs alleged that the impugned conduct had unjustifiably infringed their rights (and the rights of all children and youth in Canada, present and future) under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), and that the Defendants failed to discharge their public trust obligations with respect to identified public resources under the "public trust doctrine." The Plaintiffs sought various orders, including an order to account for Canada's GHG emissions, an order to develop and implement an enforceable climate recovery plan, and numerous declarations.

Canada brought a motion to strike the Plaintiffs' claim on the basis that it disclosed no reasonable cause of action. While both the Plaintiffs and the Crown agreed that climate change is serious, real and measurable, the issue before the Court was the justiciability of the Statement of Claim, whether the Plaintiffs had raised valid causes of action under the *Charter*, and whether a "public trust doctrine" could be relied upon and argued at trial.

The Court found that claims under both ss. 7 and 15 of the *Charter* were not justiciable because the Court did not have institutional legitimacy or capacity. Some questions were so political that the Court was incapable or unsuited to deal with them. The Court held that the Plaintiffs had effectively attempted to subject a holistic policy response to climate change to *Charter* review, as evidenced by the undue breadth and diffuse nature of the impugned conduct and the inappropriate remedies sought by the Plaintiffs.

In the alternative, the Court found that the Statement of Claim did not disclose a reasonable cause of action and that the *Charter* claims, as well as the claim in relation to the public trust doctrine, had no reasonable prospect of success. Firstly, the impugned conduct, which did not disclose a discrete law, state action or network thereof, could not sustain a s. 7 *Charter* analysis. Secondly, the Plaintiffs failed to define a state action or law that created a distinction on the basis of an enumerated ground, as required for the purposes of a s. 15 *Charter* analysis. Thirdly, the existence of the public trust doctrine, as pleaded by the Plaintiffs, was not supported in Canadian law.

The Court granted the Defendants' motion to strike the Plaintiffs' Statement of Claim without leave to amend.

(ii) *Misdzi Yikh v. Canada*, 2020 FC 1059

In a similar case, Dini Ze' Lho Imggin and Dini Ze' Smogilhgim (the "Plaintiffs") brought a claim related to climate change on behalf of two Wet'suwet'en House groups of the Likhts'amisyu (Fireweed) Clan. The Plaintiffs took the position that Canada's policy objectives for the reduction of greenhouse gas ("GHG") emissions by 2030 were insufficient, and that Canada's failure to enact stringent legislation targeting climate change was contrary to the common law principles of "public trust," "equitable waste," and the "constitutional principle of intergenerational equity." The Plaintiffs argued that there was a violation of their rights under ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), and that Canada breached its duty under s. 91 of the *Constitution Act, 1867* by not ensuring low GHG emissions under the peace, order and good government ("POGG") powers. The Plaintiffs alleged that Canada was generally violating their constitutional rights by not adhering to international environmental agreements that Canada ratified.

The Plaintiffs sought wide-ranging remedies including declaratory, mandatory and supervisory orders to keep mean global warming to between 1.5ºC and 2ºC above pre-industrial level by reducing Canada's GHG emissions in keeping with Canada's commitment pursuant to the *Paris Agreement*. One of the remedies sought was an order requiring Canada to amend each of its environmental assessment statutes that apply to GHG-emitting projects to allow the Governor-in-Council to cancel Canada's approval of the operation of such projects in the event that Canada was unable to meet its *Paris Agreement* commitment.

Canada brought a motion to have the Plaintiffs' claim struck on the basis that it was not justiciable, disclosed no reasonable cause of action, and the remedies were not legally obtainable.

The Court observed that questions of policy are not outside the jurisdiction of the courts, but should be left to the executive and legislative branches of government. The fact that an issue is political does not mean that there cannot be sufficient legal elements to render it justiciable. However, for policy choices to be justiciable, they must be translated into law or state action.

The Court found that international obligations could not impose there a positive duty on the POGG power. The Plaintiffs were asking the Court to rule on the constitutionality of the failure to enact what they considered adequate laws to fulfil international obligations, which amounted to asking the Court to tell the government to enact specific laws. The Court held that this was not its role and was thus not justiciable.

Similarly, as the Plaintiffs had not pointed to a specific law, the *Charter* claims lacked sufficient legal elements for them to be justiciable. The Court found that, while the issue of climate change is undoubtedly important, it was not justiciable because it is in the realm of the other two branches of government and beyond the reach of judicial interference.

The Court held that the remedies sought by the Plaintiffs were not appropriate, being solutions that were appropriate for other government branches to execute. The Court observed that any real effect on Canada's GHG emissions would be dependent on the cooperation of the provincial governments, and that the Court did not have the statutory jurisdiction to mandate any such cooperation between the different levels of government, meaning that any remedies would be ineffective.

In the result, the Court struck the Plaintiffs' claim without leave to amend.

H. Water

1. Legislation

(i) B.C. *Miscellaneous Statutes Amendment Act, 2020*

Bill 13, *Miscellaneous Statutes Amendment Act, 2020* (the "*Act*") received Royal Assent on August 14, 2020. Sections 31 to 34 of the *Act* amend the *Water Sustainability Act*, S.B.C. 2014, c. 15 (the "*Water Sustainability Act*"). The *Act* introduces section 117.1, which allows the minister to collect, use and disclose certain personal information for the following purposes:

a. administering the *Water Sustainability Act*;

b. publishing information in certain government registries;

d. managing risks of significant harm to public safety, the environment, land or other property; and

e. monitoring compliance with the *Water Sustainability Act* and its regulations.

2. Case Law

(ii) *MacKay v. Brookside Campsite Inc.*, 2020 BCSC 375

Robert MacKay was the owner of land and buildings located within the floodplain of Cache Creek, B.C. (the "MacKay Property"). Brookside Campsite Inc. ("Brookside") owned the upstream neighbouring property (the "Campsite Property").

Mr. MacKay alleged that he suffered loss and damage when the MacKay Property was flooded in the springs of 2017 and 2018 and that Brookside (as well as the other defendants) was responsible for these losses. He primarily grounded his claim in nuisance, asserting that Brookside made diversions and other changes in and about Cache Creek and its side channels that increased the quantity of water in the main stem of Cache Creek beyond its carrying capacity, thereby flooding his land in the 2017 and 2018 spring freshets.

During the 2017 freshet, the Village of Cache Creek (the "Village") took emergency measures and installed a temporary berm (the "Village Berm") on the Campsite Property immediately upstream from the MacKay Property in order to protect the MacKay Property from flooding. During the 2018 freshet, the Village took steps to strengthen and enlarge the Village Berm. The Village removed the Village Berm in October 2019, as it was not designed as a permanent structure. Mr. MacKay was concerned that the MacKay Property would be exposed to flooding once again in the spring 2020 freshet. He applied for a mandatory injunction compelling the Village and/or Brookside to construct a permanent berm to protect his property and restore the status quo that existed prior to the Village Berm's removal. Brookside, the Village, and the Province (the "Defendants") opposed this application.

With respect to nuisance, Mr. MacKay argued that he was entitled to the use of his land free from unreasonable interference by water directed onto his land by artificial works on adjacent land, and that he had a strong *prima facie* case against all the Defendants in nuisance and particularly against Brookside for diverting water from the Campsite Property onto the MacKay Property. He asserted that the Village and the Province authorized, created, continued, or adopted the nuisance by failing to take reasonable steps to end it.

The Court noted that generally, uphill landowners are not liable in nuisance for the natural flow of water from their property. However, a landowner who takes positive steps to change the direction and velocity of the natural flow of water from their property may be liable in nuisance where that flow causes substantial and unreasonable interference to another's property. Brookside argued that nothing it did changed the natural flow of water from its property in a manner that caused substantial and unreasonable interference to the MacKay Property. Brookside and the Village argued that any of their emergency responses to the significant and unusual freshets in 2017 and 2018 did not change the natural flow of water, but rather kept the water in its original channel, which the law allowed.

With respect to the mandatory injunction, the fundamental question before the Court was whether an injunction was just and equitable in all of the circumstances.

The Court held that Mr. MacKay failed to demonstrate a strong likelihood that he would be ultimately successful in proving the allegations. There was evidence and authorities that could potentially support either Mr. MacKay's position or the positions of Brookside and the Village. The Court found that the Province appeared to have done nothing that directly affected the MacKay Property and liability in nuisance did not extend to the Province as a regulator.

The Court also found that Mr. MacKay had not established irreparable harm. The evidence demonstrated that the 2017 and 2018 freshets were extraordinary 25- and 50-year events and whether the 2020 freshet would be of similar magnitude was entirely speculative. Further, even if it did occur and Mr. MacKay did not take mitigative measures, it was reasonable to expect that the Village would act, as it had in the past, to protect flood-prone property, such as the MacKay Property. Further, if Mr. MacKay's claim ultimately succeeded, any losses sustained would be compensable.

Lastly, the Court found that the balance of convenience did not favour Mr. MacKay's position. There was a significant risk that ordering the work sought on an interim basis would lead to permanent works being installed to Mr. MacKay's benefit and the inability of the defendants to fully recover the costs of performing that work. Moreover, to grant a mandatory interim injunction compelling the defendants to effect the construction of specific works would allow Mr. MacKay to circumvent the legislative process set out in the *Water Sustainability Act*, S.B.C. 2014, c. 15, and thereby enable an abuse of process.

The Court concluded that it would not be just and equitable to make the orders sought and dismissed the application.

(ii) *Nelson v. British Columbia (Environment)*, 2020 BCSC 479

Jeremy Nelson, owned property in the Kootenay region of B.C (the "Property"). In April 2012, a landslide caused damage to the Property and its domestic water and hydroelectric supply (the "Debris Flood"). A culvert failed and a portion of an embankment collapsed, dumping large amounts of soil into Brooklyn Creek.

Mr. Nelson submitted that the Province was liable under the former *Water Act*, R.S.B.C. 1996, c. 483 (the "*Water Act*"), or at common law in nuisance or negligence. The Province submitted that the Debris Flood was caused by natural environmental conditions. Although the Province accepted that the Debris Flood probably contributed water and suspended sediment to the stream where the community's domestic water and power intakes were located, it denied liability for the damages sought by Mr. Nelson.

The Province's primary position was that when Mr. Nelson received approval to subdivide his land and build his home, he waived his right to sue the Province for losses in relation to the Debris Flood because he signed restrictive covenants that contained liability exclusion clauses in favour of the Province. The Court agreed with the Province and found that the words of the covenant were clear and unambiguous and protected the Province "from all manner of suits, cause of actions," whether brought in negligence, nuisance, or under the former *Water Act*, arising from damage to property caused by flooding or erosion. The waiver effectively defeated Mr. Nelson's claims.

In the alternative, the Court addressed each of the claims in negligence, nuisance and under the former *Water Act*.

In denying that it was negligent, the Province argued that: (i) all of the alleged negligent acts were performed by independent contractors for which it is not vicariously liable; (ii) the alleged negligent acts constituted policy decisions, which do not attract liability; (iii) the evidence did not establish a causal link between any of the alleged negligent acts and the loss or damages claimed by Mr. Nelson; (iv) it acted reasonably and exercised due diligence thus meeting the requisite standard of care; and (v) Mr. Nelson had not established on the evidence his entitlement to the damages sought. The Court agreed that the Province did not perform the alleged negligent acts, and that the Province was not liable for actions of its independent contractors. The Court also held that it was not satisfied, on a balance of probabilities, that any of the alleged negligent acts caused the damage for which he sought compensation.

The Province further submitted that, if natural environmental conditions had caused the Debris Flood, it could not be liable in nuisance unless it had breached a duty of care to Mr. Nelson (which it submitted it had not). The Province also submitted that any interference to the Property was not unreasonable. The Court concluded that the Province had no obligation to abate a nuisance that "existed by virtue of a natural hazard resulting from a naturally occurring watercourse," and that even if the interference with Mr. Nelson's land was substantial, it had not been unreasonable.

With respect to Mr. Nelson's claim pursuant to the former *Water Act*, the Province submitted that it exercised due diligence and took all reasonable steps such that it could not be statutorily liable for the damage that occurred to the Property due to the Debris Flood. The Court noted that Mr. Nelson only added a claim under the former *Water Act* when an amended notice of civil claim that was filed on May 30, 2019, when that statute no longer existed. Therefore, the Court refused to draw any conclusions on that portion of the claim.

The Court dismissed Mr. Nelson's action.

I. Waste & Recycling

1. Legislation & Policy

(i) Federal Initiative to Ban Single-Use Plastics

As discussed in last year's chapter, the Government of Canada initially announced its support for an initiative to reduce Canada's plastic waste on June 11, 2019. Together with the Council of Ministers of the Environment and as part of its ongoing Canada-wide Strategy on Zero Plastic Waste by 2030, the Government committed to banning single-use plastics deemed "harmful" to the environment. The Government provided an update to this initiative and commitment, including a detailed discussion paper, on October 7, 2020. The update confirmed that regulations in respect of the initiative will be finalized by the end of 2021, which will be developed under the provisions of the *Canadian Environmental Protection Act,* S.C. 1999, c. 33.

(ii) Federal Bill C-204, *An Act to amend the Canadian Environmental Protection Act, 1999 (final disposal of plastic waste)*

Bill C-204, *An Act to amend the Canadian Environmental Protection Act, 1999 (final disposal of plastic waste)* (the "Bill"), passed introduction and first reading in the House of Commons on February 7, 2020. As of March 2021, the Bill is undergoing second reading.

The Bill is intended to prohibit the export of certain types of plastic waste to foreign countries for disposal. Specifically, the Bill intends to amend section 186 of the *Canadian Environmental Protection Act,* S.C. 1999, c. 33 (the *"CEPA"*) to do the following:

a. define "plastic waste" to be any type of plastic as listed in Schedule 7, which would also be added under the Bill, and currently includes a list of 31 types of plastic;

b. prohibit the export of plastic waste to foreign countries for final disposal; and

c. allow the Governor in Council, on the recommendation of the Minister of the Environment, to amend the list of plastics set out in Schedule 7.

In addition to the proposed changes to section 186, the Bill amends section 272 of the *CEPA*, to make the breach of the aforementioned prohibition in section 186 an offence.

(iii) City of Vancouver Single-Use Waste By-laws

In addition to the various initiatives by federal and provincial governments to reduce harmful single-use waste, the City of Vancouver has been rolling out city-specific by-laws for businesses and consumers to abide by. By-laws with respect to the following categories of single-use items are already in effect:

a. foam cups and foam take-out containers (banned as of January 1, 2020);.

b. plastic straws (banned as of April 22, 2020, with accessibility exceptions); and

c. disposable utensils (as of April 22, 2020, customers must explicitly request utensils to be included with their order).

By-laws with respect to disposable cups and shopping bags were scheduled to come into effect in 2020, but due to the COVID-19 pandemic and its challenges, the City postponed the effect of these by-laws until January 1, 2022.

2. Case Law

(i) *GFL Environmental Inc. and British Columbia (District Director, Environmental Management Act), Re*, 2018-EMA-021(d)-(e)

GFL operates a turf and composting operation on 29 acres of farmland specifically zoned by the City of Delta for composting operations. The total property is 57.4 hectares. The facility receives organic solid waste from Metro Vancouver and surrounding municipalities for processing to produce compost. Currently, GFL processes its compost using an "aerobic pile method" within two large, unenclosed buildings. The organic waste is piled onto the building's concrete floor, and an excavator is used to turn the material over to optimize the composting process.

In August of 2017, GFL applied for a permit to authorize the discharge of air emissions from the composting facility. At that time, it committed to constructing a substantially new, enclosed facility by February 28, 2020.

In August of 2018, the District Director for Metro Vancouver Regional District issued an air quality management permit to GFL Environmental, which is effective until September 30, 2023 (the "Permit"). The Permit, issued under both the *Environmental Management Act* and the Greater Vancouver Regional District Air Quality Management Bylaw No. 1082, 2008, authorizes GFL to discharge air contaminants to the air from its composting facility in Delta, BC.

GFL filed its Notice of Appeal with the Board on August 29, 2018. It appealed various terms and conditions in the Permit on the grounds that the District Director of Metro Vancouver exceeded his jurisdiction by including "unduly prescriptive and unnecessary requirements" which, it argued, would add unnecessary cost and which were not advisable for the protection of the environment. Specifically, GFL argued that an odour unit compliance requirement was unreasonable and too unreliable to be used as a compliance standard.

In contrast, the Resident Appellants' appeals sought more stringent enforcement conditions or, alternatively, that the Permit be stayed indefinitely or rescinded in its entirety or for the existing facility to be shut down. The appeals of GFL and the Resident Appellants were heard together. The City of Delta was a third party in all appeals.

On April 23, 2020, the Board granted GFL a 60-day extension of deadlines previously varied by the Board so that GFL could better identify and assess the impacts of the COVID-19 pandemic on its construction and commissioning activities with respect to the new facility, subject to various conditions including that GFL had to submit further evidence of the alleged delays by June 1, 2020.

In its third interim relief application, GFL requested further deadline extensions and argued that if the extensions were not granted, it would have to shut down the facility for approximately two months until the new facility was complete and operational. GFL provided evidence that delays occurred in March 2020 due to a depleted workforce and difficulties faced in finding, hiring, and training new workers on the project due to the pandemic. Additionally, personnel from the US were unable to travel to BC to perform necessary start-up and commissioning work. GFL's evidence was that the pandemic-associated delays amounted to approximately 4-5 weeks.

The Board granted GFL's third interim relief application. In doing so, the Board considered that it was not in the public interest to deny the application and allow the facility to close before the new facility commences its operations. The Board recognized the pandemic and said that there was a dearth of other facilities capable of processing the tonnage of organics to be received by GFL.

Most recently, the Board decided the District Director of Metro Vancouver's motion requesting that the Panel Chair and Panel Member Michaluk recuse themselves from the hearing because of bias or a reasonable apprehension of bias, and that the hearing continue before one panel member only. GFL also filed an application requesting an opportunity to cross-examine the person who swore an affidavit in support of the District Director's application. In its decision dated October 7, 2020, the Board denied the District Director's recusal motion. The Board further denied GFL's application to cross-examine.

A decision on the appeal is expected in 2021.

J. Environmental Considerations in Contracts

1. *R v. Resolute FP Canada Inc*., 2019 SCC 60

In 1985, the province of Ontario ("Ontario") granted an indemnity (the "Indemnity") to current and former owners of a pulp and paper mill in relation to mercury waste contamination of two rivers caused by the operation of the mill. The Indemnity was granted in connection with a settlement agreement between the original corporate owners and two First Nations. The First Nations brought litigation in response to untreated mercury waste from the mill, which was contaminating a nearby river and causing health problems for some residents.

In 2011, the Ontario Ministry of the Environment and Climate Change issued an order to Resolute FP Canada Inc. ("Resolute") and Weyerhaeuser Company Limited ("Weyerhaeuser") which imposed certain obligations, including to repair erosion at the disposal site (the "Order"). In response, Resolute and Weyerhaeuser sought indemnification from Ontario for the costs of complying with the Order, arguing the costs were covered by the Indemnity.

The motion judge held that the Indemnity applied to the Order and that both Resolute and Weyerhaeuser were entitled to indemnification for the costs of compliance. The Ontario Court of Appeal agreed that the Indemnity applied to the Order, but concluded that Resolute was not entitled to indemnification and remitted the issue to the Ontario Supreme Court. Ontario appealed the decision.

The first issue for the court was whether the costs of complying with the Order were covered by the Indemnity. If so, the court would have to decide whether Resolute or Weyerhaeuser, or both, were entitled to benefit. Ultimately, a majority of the court decided in favour of Ontario.

With respect to the scope of the Indemnity, the majority held that the motion judge failed to consider the Indemnity in its broader context, as a part of the original settlement agreement. The scope of the Indemnity was affected by the settlement agreement being limited only to mercury "in the related ecosystems," not the mere presence of mercury in the waste disposal site.

The Indemnity was also granted in the wake of two prior indemnities granted in relation to the same settlement, which specifically involved claims brought by third parties and contained no language that would imply protection against costs of regulatory compliance. In addition, the court noted that several provisions within the Indemnity would have been "utterly meaningless" if the intention of the parties was to include first party claims.

In deciding that the Indemnity did not apply to first-party regulatory claims such as the Order, the court found it unnecessary to rule on whether either Resolute or Weyerhaeuser was entitled to recover under the Indemnity.

K. Bankruptcy/Insolvency & Reclamation Obligations

1. *British Columbia (Attorney General) v. Quinsam Coal Corporation*, 2020 BCSC 640

The respondent, Quinsam Coal Corporation ("Quinsam"), owned and operated the Quinsam Coal Mine (the "Mine") and was the lessee of Middle Point Barge Terminal ("Middle Point"), where mined coal was stored and shipped. The Mine ceased operations on June 12, 2019 as a result of financial difficulties related to a mine expansion project. On July 3, 2019, Quinsam made an assignment into bankruptcy under the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (the "*BIA*").

The trustee in bankruptcy of Quinsam abandoned the Mine and Middle Point without fulfilling the closure, reclamation and remediation obligations imposed under the *Mines Act,* R.S.B.C. 1996, c. 293 (the "*Mines Act*"). The provincial government (the "Province") undertook the necessary work to protect and mitigate damage to land, watercourses, and people. The Province held $7.3 million as security for Quinsam's reclamation obligations. However, the reclamation liabilities of Quinsam were estimated to be $11.9 million, exceeding the security held by the Province.

Before its assignment into bankruptcy, Quinsam executed a promissory note in favour of the respondent, ENCECo, Inc. ("ENCECo"), and granted ENCECo a security interest in its coal inventories and the proceeds of sale from such inventories. Those coal inventories were sold for approximately USD $1 million on June 28, 2019. The sale agreement was accompanied by an irrevocable direction to pay, directing the purchaser to pay a portion of the proceeds to ENCECo. However, on September 20, 2019, Bowden J. appointed a receiver of all of the assets of Quinsam, including the coal inventory and the proceeds from the sale of the inventory.

The issue in the application was entitlement to the proceeds from the sale of inventory. ENCECo's position was that it was entitled to the proceeds as a secured creditor, while the Province argued that the proceeds from the sale of the coal inventories had to be used to fund the unfulfilled obligations under the *Mines Act* before any payment could be made to ENCECo.

While the Court considered the decision of the Supreme Court of Canada in *Orphan Well Association v. Grant Thornton Ltd.,* 2019 SCC 5 ("*Redwater*"), it declined to consider whether and to what extent *Redwater* established a super priority for reclamation obligations under the *Mines Act*. The Court held that the portion of the proceeds of the sale of the inventory that were directed to be paid to ENCECo never formed part of the bankrupt estate of Quinsam. Consequently, neither the trustee in bankruptcy nor the receiver was required or entitled to use that portion of the proceeds to satisfy Quinsam's regulatory obligations to reclaim or remediate the Mine under the principles espoused in *Redwater*. ENCECo was entitled to that portion of the proceeds from the sale of the coal inventory that were irrevocably directed to be paid to it under the direction to pay dated June 28, 2019.

The Court also discussed the facts, issues and conclusions of the *Redwater* decision in its reasons. The Court agreed with ENCECo that the Alberta regime regulating the reclamation of oil and gas wells was quite different from the regime imposed under the *Mines Act.* For example, under Alberta's regime, a trustee is made expressly responsible for regulatory obligations, whereas the *Mines Act* does not expressly impose obligations, including any environmental, reclamation or monitoring obligations, on trustees. Those obligations are imposed on the owner, agent, manager or permittee, as defined by the Mines Act. However, the Court also noted that there were some aspects of Redwater that did apply, such as the fact that the trustee's abandonment of the Mine did not affect the ongoing liability and obligations imposed on Quinsam in relation to the closure, reclamation and remediation of the Mine. In other words, the trustee was clearly not permitted to simply abandon the Mine.

BLG's Vancouver Environmental Law Group

With the strength of Canada's oldest and largest law firm behind them, lawyers in BLG's Vancouver Environmental Law Group are able to assist on complex commercial transactions, litigation, and regulatory matters involving environmental issues.

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BLG's National Environmental Group

The environmental landscape is constantly changing, with new technologies and regulations emerging at every level of government. Regulation, compliance, and remediation issues affect both businesses and individuals, and penalties for violations can be detrimental.

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