THE 12TH ANNUAL BLG ENVIRONMENTAL LAW UPDATE

2015

Borden Ladner Gervais

It Begins with Service

Borden Ladner Gervais LLP (BLG) is a leading, national, full-service Canadian law firm focusing on business law, commercial litigation and arbitration, and intellectual property solutions for our clients. We recognize the importance of delivering timely, innovative and relevant advice and information to our clients.

Introduction

A number of interesting environmental law decisions were released in 2015. Among the highlights were: a British Columbia Court of Appeal decision holding that comfort letters issued by the Ministry of Environment prior to the current contaminated sites regime coming into force cannot be relied on to limit or avoid liability for remediation costs; a British Columbia Supreme Court decision calling into question long-held assumptions about the recoverability of future remediation costs; several judicial reviews involving major infrastructure projects; and a Supreme Court of Canada decision affirming that Canadian courts have jurisdiction to adjudicate recognition and enforcement actions relating to foreign environmental claims.

On the legislative front, the provincial government promulgated the regulations necessary to implement the *Greenhouse Industrial and Control Act*, which came into effect on January 1, 2016. The provincial government also published several papers explaining the policies that will inform the regulations necessary to implement the *Water Sustainability Act*. Changes were also made to the *Environmental Management Act*, to bring the operation of the Environmental Appeal Board in line with the changes caused by the *Administrative Tribunals Statutes Amendment Act*.

Federally, changes to regulations under the *Fisheries Act* increased coherence between federal and provincial aquaculture, updated licensing requirements for Pacific aquaculture, updated the regulation of invasive species and changed how the seal hunt can be observed.

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Vancouver Environmental Law Group

Environmental regulation in Canada is a complex, multi-jurisdictional field. At BLG we can help your business navigate this framework, whether you deal directly in environmental matters, you need assistance to comply with regulations, you develop environmental management systems, are considering a major investment, or are completing soil and groundwater remediation projects. BLG's Environmental Law Group can provide you with advice relating to real estate development, oil and gas, petrochemicals, pipelines, public and private power projects, water, natural gas, energy, oil sands, forestry, fisheries, municipal law, land expropriation, emissions, commercial transactions, resource development and applicable environmental protection and compliance law.

Our Environmental Law Group has extensive experience in matters relating to:

- complex insurance and civil matters triggered by environmental claims;
- drafting and interpretation of environmental policies;
- obtaining approvals for projects subject to federal and provincial environmental assessment legislation; and
- structuring and management of environmental due diligence exercises.

With the strength of a full-service law firm behind us, lawyers in the Environmental Law Group frequently work with their colleagues in other specialized areas, including energy, real estate, bankruptcy and litigation. Together, we can handle your complex commercial transactions, such as negotiation of brownfields acquisitions, divestitures, leasing, financings and re-development, as well as any litigation over contamination, environmental charges or compliance issues.

Group Profiles

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Graham Walker is the Regional Leader of both our Maritime Group and our Insurance and Tort Law Group in Vancouver. Graham practises transportation law (with a focus on maritime law, rail and trucking), environmental law, insurance and tort law, and general commercial litigation. He has been recognized as a "Litigation Star in British Columbia" in the 2014 edition of *Benchmark Canada – The Definitive Guide to Canada's Leading Litigation Firms and Lawyers*.

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Rick Williams is the Regional Leader of our Environmental, Municipal, Expropriation and Regulatory Group. Rick represents and advises clients on all forms of dispute resolution including regulatory proceedings, corporate/commercial litigation and arbitration, with a particular focus on the areas of oil and gas, expropriation, environmental law and transportation. He was selected by peers for inclusion in the 2015 edition of *The Best Lawyers in Canada*® , recognized in the 2014 edition of *The Canadian Legal Lexpert*® *Directory* and received a peer review rating by a Martindale-Hubbell® AV® Preeminent™ 4.8 out of 5.

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Dionysios Rossi is partner in our Vancouver office. He practices in the areas of environmental law, transportation law, and oil and gas law. He has represented and advised clients on a wide range of environmental issues in the litigation, regulatory and transactional contexts. This includes representing clients in cost-recovery proceedings (involving both residential and commercial contaminated sites), pollution-related matters (air, water, and soil), spill response incidents, and environmental prosecutions. He has also advised clients on the federal and provincial environmental assessments processes, other regulatory compliance issues, and the allocation of environmental risks and liabilities in a wide range of commercial agreements (including asset purchase agreements, site access agreements, remediation agreements, leases, indemnity agreements, and releases). Dionysios frequently speaks and publishes on environmental law matters, and is the author of the "Environmental Law" chapter of the Continuing Legal Education Society *Annual Review of Law and Practice*. He has represented clients before the Federal Court and the Federal Court of Appeal, all levels of court in British Columbia, and before a number of administrative tribunals. He currently serves as the Vice-President (Communications) and a Director of the Environmental Managers Association.

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Luke Dineley focuses his practice on civil litigation, with an emphasis on environmental law, insurance and tort law and transportation law. In the area of environmental law, Luke's experience includes representing and advising clients on a wide variety of contaminated site issues relating to both commercial and residential properties – including cost-recovery actions on behalf of plaintiffs and defendants. Luke's transportation law work includes assisting clients with matters involving ocean carriers, trucking companies, airlines, marine terminals, warehouses, and automobile manufacturers.

Case Law

1. Contaminated Sites

(a) "Comfort Letters" Provide Little Comfort under the EMA

Readers of the *Annual BLG Environmental Law Update* will remember the case of *J.I. Properties Inc. v. PPG Architectural*, 2015 BCCA 472. The plaintiff and respondent, J.I. Properties ("JIP") sued PPG Architectural Coatings Canada Inc. ("PPG") (formerly known as ICI Canada Inc., "ICI") for the cost of remediating environmental contamination that occurred when ICI owned and operated an explosives manufacturing and storage operation on James Island. JIP was awarded $4.75 million at trial, but PPG appealed.

At issue in the appeal was whether, under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "EMA"), a party that previously owned and contaminated land, but remediated it to prior applicable standards, may escape or reduce liability for remediation costs incurred by a current owner. In this case, JIP specifically sued ICI pursuant to s. 47 of the EMA, which allows the recovery of remediation costs from one or more responsible persons.

ICI had obtained a "comfort letter" from the Ministry of Environment in 1987, which stated that the clean-up of the land met established criteria for lead, mercury, dinitrotoluene, and trinitrotoluene.

At trial, ICI tried to avail itself of the "certificate of compliance exemption" to avoid liability for the costs of remediation. It argued the comfort letter was the equivalent of a certificate of compliance. The court held that the comfort letter did not meet the statutory definition of a "certificate of compliance" and there was no express intent in the EMA or the Contaminated Sites Regulation, B.C. Reg. 375/96 (the "CSR"), to exempt persons who remediated contaminated sites before the regulatory regime was implemented. Accordingly, ICI could not rely on the comfort letter to avoid liability.

On the appeal, ICI argued the trial judge was wrong and that it fell within the exclusion in s. 46(1)(m) of the EMA because the comfort letter was the equivalent of a certificate of compliance.

The Court of Appeal upheld the trial judge's decision on the basis that the Comfort Letter had been supplied prior to the contaminated sites regulatory regime coming into force and did not meet the statutory definition of a certificate of compliance. Further, the Court of Appeal affirmed the trial judge's finding that the legislation did not provide any immunity or "grandfathering" for those who had undertaken remediation before the current regime or had been given a comfort letter by the Ministry of Environment.

In addition, the trial judge had had to determine the limitation period applicable to cost recovery actions under the EMA that arose prior to the repeal and replacement of the former *Limitation Act*, R.S.B.C. 1996, c. 266, on June 1, 2013. The trial judge held that cost recovery actions under the EMA are not based on contract, tort, or statutory duty and therefore, are not governed by the two year limitation in subsection 3(2) of the *Limitation Act* and the default six year limitation period applied. The trial judge also held that if any costs of remediation were incurred within the limitation period, all costs were aggregated and recoverable, even those incurred well in the past and outside the limitation period.

The Court of Appeal upheld the ruling by the trial judge that a six year limitation period applied. Given that the parties had agreed that the remediation costs here began to be incurred within the six year period before the action was started, the Court of Appeal did not need to deal, and so did not, with the trial judge's findings about when the cause of action arose.

(b) Court Allows Recovery of Future Remediation Costs

In *Dolinsky v. Wingfield*, 2015 BCSC 238, the plaintiff's residential property in Saanich was contaminated by oil migrating from her neighbour's adjacent property. The former and current owners of that property, as well as the contractors who renovated the property, comprised the defendants.

This case was a garden-variety cost recovery claim under Part 4 of the EMA and the CSR, specifically: s. 45, which sets out who is considered a "responsible person" for remediation of a contaminated site; s. 46 (informed by ss. 19-33 of the CSR), which sets out the specific and narrow exemptions for someone who might otherwise be a responsible person; s. 47, which sets out the principles of liability

for remediation of contaminated sites; and s. 50, which provides relief from joint and separate liability under s. 47(1) to those responsible persons who can establish that they meet all of the criteria for minor contributor status.

The defendants argued that the contaminating oil did not originate from their property, but rather, came from an accidental oil spill on another property several houses further up the hill. They contended that the contamination migrated to their property and subsequently onto the plaintiff's property. The court nonetheless held the three former owners of the adjacent property jointly and severally liable for remediation (50% for the original owner and 35% for the next pair of owners), and found that the two current owners had been minor contributors (liable together severally at 15%).

The court concluded that the defendants constituted "responsible persons" under s. 45 because they were previous and current owners of the property from which the substance migrated. The court stated that the "definition of 'owner' must be interpreted broadly, keeping in mind the fundamental 'polluter-pay' principle of the EMA, and the clear legislative intent to cast a wide net of liability".

Most significantly, the court also concluded that it had jurisdiction under the EMA to award remediation costs that have not yet been incurred.

The court stated that "it is often the case that property owners will await findings of liability in a cost recovery action before embarking on the full remediation of a contaminated site", and cited *Gehring v. Chevron Canada Limited*, 2006 BCSC 1639, as support for the idea that future remediation costs can be awarded.

Gehring and other previous decisions (such as *Swamy v. Tham Demolition Ltd.*, 2001 BCSC BCSC 551; *Seabright Holdings Ltd. v. Imperial Oil Ltd.*, 2001 BCSC 1330; and *Workshop Holdings Ltd. v. CAE Machinery Ltd.*, 2003 BCCA 56) had previously been interpreted as requiring remediation costs to be incurred before they could be recovered through the courts. The court in this case, however, interpreted the EMA to only require "some costs of remediation" to be incurred before the entire estimated cost could be recovered.

The decision was not appealed, but it will be interesting to see whether and to what extent future cases follow its reasoning.

(c) Assessing the Value of a Brownfield Property

In *Victory Motors (Abbotsford) Ltd. v. British Columbia (Assessor of Area No. 15—Fraser Valley)*, 2015 BCSC 1230, the court considered how to properly assess the value of a brownfield property for taxation purposes.

The property in question was located in Abbotsford. Historically it had been operated as a retail gas station and automobile dealership. This use led to significant contamination of the soil under the property, which spread to neighbouring properties, including a commercial property across the street. A sale of that commercial property fell through, after the owners (the "Jansens") were unable to obtain a satisfactory environmental assessment as a result of the contamination. The Jansens then commenced an action against the usual array of defendants.

The owner of the property tried to sell it for $1,200,000, but found no purchasers. The property fell into disrepair and property taxes went into arrears. Eventually, the Jansens, concerned that not enough was being done to assist in allocating responsibility to the oil companies in the lawsuit, arranged to acquire the property through a share purchase agreement. The purchase price was $42,363.24.

The Jansens then renovated the existing single-storey structure on the property, being careful not to undertake any work that would involve excavation or require a building permit from the City of Abbotsford. These renovations, costing $750,000, allowed the Jansens to lease out two commercial units on the property, with the potential to lease a third.

The property was not on any list of contaminated sites, nor had the Province issued any remediation orders.

The Assessor assessed the value of the property at $975,000. A review panel reduced this to $500,000, satisfying neither party. The Jansens appealed to the Property Assessment Appeal Board of British Columbia, who found the market value of the property to be $1,080,000, and reinstated the original assessed value of $975,000. The basis for the Board's decision was provided by the report of Ramaish Shah, an appraiser, who assessed the value of the property based on "the highest value that could be achieved without the need to undertake remediation", which he found to be the property's then current use as a one-storey multi-tenanted building. Redevelopment into the conventional highest and best use, as a multi-story structure, was discounted as it would bring with it the risk that the owner would be required to remediate the environmental contamination.

The Jansens had argued that the assessed value should be closer to the amount he had paid for the property, and take into account the likely remediation costs of $1.5 to $2 million.

Several stated questions were then taken to the British Columbia Supreme Court. The court's conclusion was pithily provided at paragraphs 31 and 32, which read:

> [31] The Board assessed the value in a manner that gave no meaningful recognition to the property's brownfield status, particularly in light of the provisions of the EMA, which any potential buyer would have in mind as a potential economic risk. Moreover, it ignored the fact that the current owner acquired the property under circumstances which made the potential economic risk uniquely acceptable to that owner. It therefore fell into the trap revealed by the Court of Appeal in *Southam Inc (Pacific Newspaper Group Inc) v. British Columbia (Assessor of Area No 14—Surrey/White Rock)*, 2004 BCCA 245, by accepting a highest and best use which was of value only to the current owner, and for which there was no evidence of any market. In doing so, it rejected evidence in the form of the amount for which the property sold to the applicant for reasons that were wrong in law and were unreasonable.
>
> [32] As a result, the Board's method of assessment was wrong in principle and failed to achieve a result that reflected the property's fair market value.

Accordingly, the court remitted the matter back to the Board for reconsideration.

(d) Ontario Court has Jurisdiction to Adjudicate Ecuadorian Recognition and Enforcement Action

In *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, the Supreme Court of Canada upheld the Ontario Court of Appeal's ruling that an Ontario court has jurisdiction to adjudicate a recognition and enforcement action by Ecuadorian plaintiffs. The plaintiffs sought to enforce a US$9.51 billion judgment for environmental damage against Chevron and its Canadian subsidiary, Chevron Canada. The environmental damage stemmed from Chevron's oil extraction operations in Ecuador.

Chevron Canada argued that a company carrying on business in Ontario, as opposed to a company headquartered in Ontario, cannot be brought before the courts unless there is a relationship between the claim and that province. The Supreme Court disagreed and held that jurisdiction over Chevron Canada was established simply because it had a business presence in Ontario.

The Supreme Court noted that the prerequisite to recognize and enforce a foreign judgment is the foreign court having a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction are satisfied. The act of service on the basis of a foreign judgment, therefore, will grant an Ontario court jurisdiction over the defendants. The court held that two principles supported the fact that the "real and substantial" test should not be extended to an enforcing court in an action for recognition and enforcement. First, the mere purpose of this type of action is to allow a pre-existing obligation to be fulfilled. Second, the principle of comity favours generous enforcement rules. Third, other jurisdictions, academic commentary, and comparable statutory provisions reinforced this approach.

Furthermore, jurisdiction also existed with respect to Chevron Canada because it was served at its place of business in Ontario. Chevron Canada's bricks and mortar office constituted a "place of business" under the service provisions of Ontario's *Rules of Civil Procedure*, thereby establishing jurisdiction.

Nonetheless, the court acknowledged that the plaintiffs would not necessarily succeed in their action despite the finding that the court had jurisdiction to hear it. Chevron and Chevron Canada could "use the available procedural tools to try to dispose of the plaintiffs' allegations" (at para. 94). In addition, the court emphasized that it had not determined whether Chevron Canada could properly be considered a judgment-debtor to the Ecuadorian judgment, and whether, if the plaintiffs are successful, Chevron Canada's shares or assets would be available to satisfy Chevron's debt.

The decision further reiterates Canadian courts' commitment to the principles of comity to and respect of foreign legal systems, and upholds the principles outlined in previous authorities, including *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 and *Beals v. Saldanha*, 2003 SCC 72. By taking a strong position with respect to the rights of the plaintiffs, the court confirmed that there are few circumstances in which a Canadian court will not have jurisdiction to recognize and enforce a foreign judgment.

With this decision, the Supreme Court has also made it clear that judgment creditors are entitled to commence proceedings to enforce foreign judgments in Canada regardless of whether or not the underlying dispute has any connection to Canada, the defendant operates in Canada, or the defendant has assets in Canada. Further, although it remains to be see whether their assets will be available to satisfy a judgment, judgment creditors are entitled to join local subsidiaries of their creditors to such an action.

(e) The Authorized Release of Contaminants by Industry Does Not Constitute an 'Escape' Within the Meaning of the Rule in Rylands v. Fletcher

In *Canada (Attorney General) v. MacQueen*, [2015] SCCA 35706, the long-running Sydney Tar Ponds class action was finally brought to a close by the Supreme Court of Canada's decision to deny leave to appeal to the plaintiff homeowners. The class action concerned remediation costs for numerous properties around the former site of the Sydney steel mill and coke works and its tar ponds. The Nova Scotia Court of Appeal had overturned the class proceeding certification granted by the Supreme Court of Nova Scotia (in reasons indexed at 2013 NSCA 143). The defendants, including the Attorneys General of both Canada and Nova Scotia, and Sydney Steel Corporation, had appealed the certification decision.

Before the Nova Scotia Court of Appeal, the appellants had argued that the statement of claim did not disclose valid causes of action for *Rylands v. Fletcher* liability, trespass, battery, or nuisance. Further, the appellants claimed that the certification judge erred in his analysis of whether the issues were really common between the members of the class.

The Court of Appeal held that the authorized release of contaminants by industry does not constitute an "escape" within the meaning of the rule in *Rylands v. Fletcher*. Rather, the release of substances in the ordinary course of manufacturing is an intentional and continuous escape. Second, the court also held that the pleadings did not meet the requirements for a claim in trespass. Trespass requires that an intrusion be a direct interference. The pleadings alleged that contaminants were "deposited" on, and "migrated" to, lands owned or occupied by the plaintiffs in the class. However, the migration of contaminants is not sufficient to constitute a direct interference. The alleged deposit was also not sufficient to constitute a direct interference because the deposit was not made directly onto lands owned or occupied by the plaintiffs. Similarly, directness is a requirement for the tort of battery, and directness was not included in the pleadings. As such, the court also held that the battery claim should not have been certified.

The court identified only one common issue, which was the nuisance claim, but held that the certification judge erred by certifying all the common issues without conducting a separate analysis to determine whether the issues were common with respect to each cause of action. Although the issue of whether the contaminants were emitted by the steel company was common to the class, the class should not have been certified on the basis of that issue alone. Hence, in the interests of judicial economy, the court did not allow the proceeding to continue as a class action, and set aside the class certification order.

The original plaintiffs subsequently sought reconsideration of this decision, arguing that subsequent decisions of the Supreme Court of Canada needed to be taken into account; namely, *AIC Limited v. Fischer*, 2013 SCC 69, and *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1. In reasons indexed at 2014 NSCA 73, the Court of Appeal rejected the request for reconsideration, holding that as the decision had already been made (as opposed to the hearing having occurred by not judgment having been issued), the matter could only be reconsidered by means of an appeal to a higher court.

(f) Pollution Caused by Fire Subject to Pollution Exclusion Clause

Readers of the *CLE Annual Review of Law & Practice* will be familiar with *Precision Plating v. Axa Pacific Insurance Company*, 2014 BCSC 602, which was highlighted in the 2014 edition. Precision Plating Ltd. ("Precision") sought a declaration that its insurer, Axa Pacific Insurance Company ("Axa") was obligated to defend third party claims under a commercial general liability insurance policy (the "CGL Policy"). When a fire broke out in Precision's premises, the sprinkler system activated and water from the system caused Precision's chemical vats to overflow, thereby leaking onto neighbouring strata units. Four lessees of nearby units sued Precision, claiming the cost of containment and remediation as well as various damages related to lost revenue.

After a summary trial, the judge found in favour of Precision and declared that Axa was obligated to defend the claims. Axa appealed that order. The issue on appeal was whether the pollution exclusion endorsement excluded the damages caused by a release of pollutants which itself was partly caused by a fire.

In reasons indexed at 2015 BCCA 277, the Court of Appeal relied on *Vallieres v. Vozniack*, 2014 ABCA 290, and *Ledcor Construction Limited v. Northbridge Indemnity Insurance*, 2015 ABCA 121, in determining the standard of appellate review. Both cases involved standard form contracts, and the Alberta Court of Appeal had held that the applicable standard of review was correctness. The Court of Appeal agreed, stating that general principles of appellate review were "not intended to apply to questions of contractual interpretation that have great precedential value such as the one in the case at bar", and that, like in *Vallieres* and *Ledcor*, the CGL Policy was a standard form contract in wide use in the Canadian and American insurance industries.

The court held that the trial judge erred in framing his analysis as a question of causation of the damage, and not causation of the liability: "what the judge needed to determine in this case was whether the pleadings alleged the escape of pollutants as the source of liability, which would then be a cause of the potential 'loss' for the insured".

The court also examined the "concurrent causes" language in the CGL Policy. The clause excluded property damage "caused by, contributed to by or arising out of" the pollution. The court found that such language ousted coverage when liability for the release of pollutants is a concurrent cause of the loss. Finally, the court assessed the trial judge's finding that the CGL Policy was ambiguous, and held that a strict and literal interpretation of the clause would exclude coverage for liability.

The court concluded that the third party claims were for liability for contamination, not for fire damage, and thus allowed the appeal. The court set aside the trial judge's order and dismissed the application for a declaration that Axa must defend the third party claims against Precision.

(g) Question on Whether the EMA Applies to First Nations Lands is not Suitable for Disposition by Summary Trial

Atlantic Waste Systems Ltd. v. Canada (Attorney General), 2015 BCSC 1998, involved the lease of reserve land of the Kwantlen First Nation (the "Reserve") by the federal government to Atlantic Waste Systems Ltd. ("Atlantic") for the operation of a landfill. In 2011, Canada terminated the lease. Atlantic then sued Canada for damages, claiming that the lease was wrongfully terminated. Canada countersued Atlantic, an Atlantic director, and Atlantic's environmental consultant, Hemmera Envirochem Inc., for breaching the lease and for causing or contributing to environmental damage to the property and Reserve, thus requiring remediation. Canada further alleged that it suffered and continued to suffer loss and damage, including diminution in value of the land and the Reserve. Canada sought a cost recovery claim under the *Fisheries Act*, R.S.C 1985, c. F-14; the EMA, and the CSR.

The main issue was whether the EMA applied to First Nations lands. In the summary trial, Hemmera sought a declaration that the EMA and the CSR were constitutionally inapplicable to the Reserve land, and an order that Canada's claims against Hemmera with respect to the two pieces of legislation be dismissed. Canada argued that this constitutional question should not be determined by way of summary trial, and that on the merits, the question should be decided against Hemmera.

The court decided that Hemmera's question was not suitable for disposition by summary trial. The question was "one of first instance and [had] broad implications". First, many key factual issues remained to be determined, such as whether contamination was present in the Reserve. Second, the court affirmed the principle from *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy*, [1995] 2 SCR 97, in which it should only decide constitutional issues where necessary to resolve the issues between the parties. In this case, a decision may be moot if Canada fails on the facts at trial, which is set to start in September 2016.

(h) Environmental Consulting Company Named as Third Party in Contamination Case

In *Hercules Forwarding Inc. v. Ski-Hi Scaffolding Ltd.*, 2015 BCSC 1859, the plaintiff Hercules claimed that its property was contaminated with various substances by Ski-Hi, the previous owner. Hercules sought recovery of remediation costs under the EMA. Ski-Hi sought leave to file and serve a third party notice for contribution and indemnity against its environmental consultants, Keystone Environmental Ltd ("Keystone").

Prior to buying the property from Spruce Terminals Inc. ("Spruce") in October 2005, Ski-Hi retained Keystone in June 2005 to provide a site investigation report on the property's environmental condition (the "Report"). The Report found no significant contamination in the soil and groundwater, and concluded that the property was suitable for commercial and industrial use. Keystone was aware that the Report would be used in connection with Ski-Hi's purchase of the property. Ski-Hi claimed against Keystone for alleged negligence in the preparation of the Report.

The court allowed Ski-Hi's application to serve a third party notice. Ski-Hi's third party notice pleaded material facts that were sufficient to support a negligence claim. Keystone had argued that it did not owe a duty of care to Hercules because of the limitation of liability and disclaimer provisions it provided in the report. However, the court sided with Ski-Hi's submission that, despite the "absence of any privity in contract between Keystone and Hercules", liability still extended to Keystone as a result of its alleged negligence.

(i) Court of Appeal Confirms Nuisance Must Originate Elsewhere

In *1317424 Ontario Inc. v. Chrysler Canada Inc.*, 2015 ONCA 104, the appellants sought to amend their statement of claim against Chrysler Canada to also include a claim in nuisance. The original claim involved a piece of land that originally operated as a foundry and asbestos insulation producer, which led to contamination.

Chrysler acquired the land in 1987 and decommissioned it to then-current standards. Chrysler sold the land to another company in 1989, with a certificate from the Ministry of the Environment confirming that the land was decommissioned. The appellants acquired the land in 1999, and sued Chrysler for negligence in decommissioning the property and failing to remediate it, the negligent misstatement that Chrysler had properly remediated the land, and the creation of stigma to the land.

The motion judge dismissed the claim, stating that the facts did not support a nuisance claim. The appellants, in their appeal, submitted that the scope of nuisance had not been settled. The issue was whether a claim in nuisance can be made when it emanates from the plaintiff's own land and not from outside that land. In this case, the failure to remediate caused an "unreasonable interference with the use and enjoyment of the land".

The Ontario Court of Appeal dismissed the appeal. Citing *W. Eric Whebby Ltd. v. Dough Boehner Trucking & Excavation Ltd.*, 2007 NSCA 92, the court found that regardless of who causes the nuisance, the nuisance must originate elsewhere than on the plaintiff's land. As a result, the appellants' case did not qualify for a nuisance claim. The court concluded that the appellants sought to "fundamentally change the law of nuisance".

2. Environmental Prosecutions

(a) Deference Given to Sentencing Judge who Heard Testimony on Clearing Activities Near Fish Habitat

In *R. v. Larsen*, 2015 BCSC 1334, the court dealt with the sentencing phase of an appeal from a provincial court decision (reasons indexed at 2013 BCPC 92), after earlier dismissing the summary conviction appeal (reasons indexed at 2014 BCSC 2084). The appellants, Mission Western Developments Ltd. ("Mission West") and one of its shareholders and officers were convicted of two counts under s. 35(1) of the *Fisheries Act*. At the time of the offence, this provision stated that no person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of a fish habitat. The appellants partook in clearing activities around a fish habitat in Mission, B.C.

The sentence imposed by the trial judge consisted of a $60,000 fine against Mission West and a $20,000 fine against Larsen. In addition, Mission West was ordered to pay $26,540 to the Fraser Valley Conservancy (the "Conservancy") for the restoration of a fish habitat. The appellants argued that the sentencing judge: (1) incorrectly emphasized the fact that the appellant failed to follow the advice of its environmental consultant; (2) failed to consider the trial judge's unwarranted dismissal of the appellant's donation of title to a portion of the lands around the creek to the Conservancy; and (3) imposed a fine that represented too large a difference from the range of sentences for similar statutory environmental offences.

The court disagreed with the appellants on the first two claims. First, the appellate judge gave deference to the sentencing judge who heard the testimony for several days. Second, the judge held that it is not the role of a summary conviction appeal court to alter a sentence because it is regarded as too high or too low, unless it is demonstrably unfit. Nonetheless, the court reduced the corporate fine from $60,000 to $35,000 because it found that Mission West was entitled to mitigatory consideration of not less than $25,000 for its deeding of the lands to the Conservancy, an amount that should have been factored into the imposition of the fine.

(b) Fair for Trial Judge to Infer After-Effects of Dumping Waste into a Fire

In *R. v. Cotter*, 2015 BCSC 1370, the Crown successfully appealed a Provincial Court acquittal of Cotter after he was charged with unlawfully introducing waste produced by a prescribed activity into the environment, contrary to ss. 6(3) and 120(3) of the EMA. The charge was based on observations by conservation officers, in which trucks that Cotter operated allegedly dumped demolition waste from a site in Naramata on or near a fire that burned in the salvage yard operated by the co-accused, Kruger.

The trial judge acquitted Cotter, holding that the Crown failed to both prove that Cotter or his employee "directly burned the demolition waste on Mr. Kruger's land … [and] that any smoke that was created from the burning came within the definition of waste in the [EMA]". A conservation officer testified that he believed waste was dumped into the fire because when the load was dumped, he saw the flames

go higher. The trial judge, focusing on video evidence, stated that she did not see any conclusive evidence of a truck dumping any material directly into the fire, and thus rejected the officer's evidence on where the material was dumped.

The Supreme Court held that it was fair for the trial judge to "draw the inference that the after effects [the conservation officer observed] were the basis of his certainty". However, the court found that the trial judge, in her reasons, did not articulate her basis for rejecting the officer's evidence. Judges have a duty to give adequate reasons in their rulings, but the trial judge did not explain where reasonable doubt was established during trial. The lack of an explanation led to the court allowing the appeal and ordering a new trial.

(c) West Coast's Decision to be Proactive During Oil Leak Taken into Account in Sentencing

In *R. v. West Coast Reduction Ltd.*, 2015 BCPC 207, West Coast Reduction Ltd. ("West Coast") pleaded guilty to unlawfully depositing or permitting the deposit of a deleterious substance of any type of in water frequented by fish, contrary to s. 36(3) of the *Fisheries Act*.

When West Coast employees were transferring canola oil to a vessel, the loading master noticed oil in the water during a routine inspection. The leak occurred due to a connection point not having been fully tightened. West Coast quickly stopped the loading pumps, and notified and cooperated with the appropriate authorities, such as the Ministry of Environment and Port Metro Vancouver, upon discovery of the leakage.

In determining the appropriate sentence, the judge focused on the environmental protection principles espoused in *R. v. Terocco*, 2005 ABCA 141, namely, culpability, prior record and past involvement with the authorities, acceptance of responsibility and remorse, damage/harm, and deterrence. After discussing these factors, the judge determined that the steps West Coast took were commendable and were the steps that "any good corporate citizen would undertake in the circumstances". The court imposed a fine of $5,000 and a further amount of $85,000 payable to the Environmental Damages Fund.

(d) Lack of Remorse Not a Consideration in Sentencing for Damaging a Fish Habitat during Bungalow Development

In *R. v. Northland Properties Corporation*, 2015 BCSC 1571, the Crown appealed a sentence imposed against the respondents, Northland Properties Corporation ("Northland") and its owner, Gaglardi, for two counts of violating s. 35(1) of the *Fisheries Act*. The respondents were charged with damaging a fish habitat during the addition of two storeys and five bedrooms to an existing bungalow owned by Gaglardi.

In the sentencing decision, reasons indexed at 2014 BCPC 298, the total of the fines, penalties, and remediation costs for both respondents was $225,000. Each respondent was fined $5,000 on each count, for a total of $20,000.The sentencing court also ordered a community service order pursuant to s. 79.2(e) of the *Fisheries Act*, ordering each respondent to pay $60,000 to the B.C. Conservation Foundation. Finally, the sentencing court accounted for the respondent's remediation efforts, which cost $85,000.The Crown submitted that the sentences did not meet the criteria for serious environmental offences, and that the fines and penalties should have amounted to $150,000 for each respondent.

The court dismissed the appeal, stating that the trial judge correctly set out the principles for sentencing. The court particularly disagreed with the Crown's submission that the respondents had a lack of remorse for the offence; rather, the trial judge did not err in assessing the respondents' moral culpability, since the respondents' deliberate actions to forge ahead with the bungalow development were properly assessed at trial. Furthermore, the court held that the trial judge properly applied the facts to the seriousness of harm to the environment, degree of culpability of the respondents, and the need for deterrence; hence, the sentence was not demonstrably unfit.

(e) Forestry Companies Convicted for Destroying Fish Habitat

In *R. v. Gwaii Wood Products Ltd. et al*, 2015 BCPC 292, three defendants, Gwaii Wood Forest Products Ltd. ("Gwaii"), Howe Sound Forest Products Ltd. ("Howe Sound"), and I. Crosby Contracting Ltd. ("Crosby") faced 20 counts alleging that they unlawfully partook in logging and road construction that resulted in harmful alteration, destruction or disruption of fish habitat. Specifically, riparian vegetation, wetlands, and three tributaries flowing into the Kumdis Bay Estuary, three tributaries flowing into Mallard Creek, and Mallard Creek itself were affected. The Crown alleged that actions violated s. 35(1) of the *Fisheries Act* and thereby constituted an offence contrary to s. 40(1) of the *Fisheries Act*.

Gwaii purchased District Lot 413 ("DL 413") and entered into a log-sales agreement with Howe Sound, which subsequently hired Crosby as a contractor to harvest the timber. This contract particularly required Crosby to "not permit any harmful substances … to be spilled or deposited in any stream or other body of water".

On October 2010, a citizen filed a complaint with Fisheries and Oceans Canada ("DFO"), alleging that logging on DL 413 caused damage to Mallard Creek. An investigation ensued, which consisted of numerous visits to DL 413 by DFO representatives, meetings with the defendants, and the collection of data from fish habitats. The results showed that the stream habitat that comprised the fish habitat was damaged, additional stream alterations had occurred as a result of logging activities, and sediment and logging debris had entered the streams.

The court considered whether the defendants could rely on a defence of due diligence. The defendants did not call any evidence. Howe Sound and Crosby did not appear at trial, while Gwaii simply claimed that it was assured that Howe Sound would comply with the permits and regulations required to fulfill the contract and that it checked the contract between Howe Sound and Crosby to confirm that a proper job would be done. However, the court noted that a company accused of a strict liability offence cannot contract out of its legal responsibilities.

In addition, Gwaii's decision to not call evidence meant that the court could not discern whether the company had taken any steps to prevent the damage to the fish habitat. Gwaii, therefore, was not able to rely on a due diligence defence. The defendants were found guilty on each of the 20 counts.

3. Judicial Review

(a) Attempt to Quash EA Certificate for Site C Dam Fails

In *Peace Valley Landowner Association v. British Columbia (Environment)*, 2015 BCSC 1129, the Peace Valley Landowner Association ("PVLA") applied for judicial review of the decision of the Minister of Environment and Minister of Forests, Lands and Natural Resource Operations (collectively, the "Ministers") to issue an Environmental Assessment Certificate (the "Certificate") to B.C. Hydro for the construction of a dam at Site C (the "Project"). PVLA, a society whose members consist of landowners affected by the Project, sought to quash the Ministers' decision to issue the Certificate.

The Director of the Environmental Assessment Office (the "Director") advised the Ministers that the economic recommendations regarding the cost of the Project (the "Recommendations") were outside the mandate of the Joint Review Panel (the "JRP"). The main issue in the proceedings was whether the Ministers gave adequate consideration to the Recommendations in their decision. PVLA submitted that the *Environmental Assessment Act* required the Minister of Environment to consider all recommendations, while the respondents submitted that PVLA did not establish a basis for the court to interfere.

The court dismissed the PVLA's petition. The court agreed with the respondents and concluded that the Director did not err when he advised the Ministers that the Recommendations were outside the scope of the JRP's mandate. The court held that the Recommendations "related to the political decision to proceed with the Project in preference to other available options rather than any adverse environmental consequences of the Project" and thus dismissed the application.

(b) Province Must Consult with Fort Nelson First Nations for Frack Sand Mine

In *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2015 BCSC 1180, the Fort Nelson First Nation (the "FNFN") alleged that the Environmental Assessment Office (the "EAO") failed to designate the Komie North Mine as a reviewable project under the Reviewable Projects Regulation, B.C. Reg. 370/2002 (the "Regulation") of the *Environmental Assessment Act*. The mine was intended for silica extraction for use in hydraulic fracturing ("fracking") to extract natural gas. The FNFN was concerned about the mine's environmental impact, but the EAO determined, without consultation, that the mine was not reviewable and approved the proposed development by Canadian Silica Industries ("CSI").

The court determined that correctness was the proper standard to be applied to the EAO's determination that no consultation was necessary. The court then stated that the EAO had a duty to consult with the FNFN because the decision to designate the mine as a reviewable project was similar to a strategic high level decision, thereby triggering the duty.

In particular, the Province's duty to consult with the FNFN concerned the "potential adverse impact of the mine on its treaty rights as opposed to either a decision requiring no consultation, or alternatively, one made at the 'low end of the consultation spectrum' as postulated by the EAO". The court stated that the Province's "uncritical acceptance of a proponent-driven assessment" had the potential to defeat treaty rights.

Finally, the court found that the EAO did not meaningfully engage with the FNFN in good faith and did not seek to accommodate the FNFN's treaty rights. In particular, the EAO failed to provide the FNFN with the opportunity to make submissions before the Decision was made.

The court set aside the EAO's decision and remitted the determination of whether the mine met the Regulation thresholds to the EAO. The court also issued declarations that the Crown both owed and failed in its duty to meaningfully consult with the FNFN in good faith and seek to accommodate the FNFN's treaty rights.

(c) Awards for Public Interest Cost Awards Should be Truly Exceptional and Limited to the Rarest of Cases

In *Gagne v. Sharp*, 2015 BCSC 154, the court considered whether special costs in favour of a public interest litigant should be awarded against a private party. The costs resulted from a judicial review application in which the petitioners (several individuals and environmental NGOs) had been denied standing before the Environmental Appeal Board (the "EAB") to appeal a permit amendment granted to Rio Tinto Alcan Inc. The EAB denied the petitioners standing because they were not persons aggrieved within the meaning of s. 100(1) of the EMA. After a judicial review of that decision resulted in the issue being sent back to the EAB for reconsideration, the EAB again denied the petitioners' standing. That decision was itself appealed and subsequently dismissed, and the parties were ordered to bear their own costs of the application. The issue of costs on the first judicial review remained outstanding. The petitioners only sought costs against Rio Tinto.

The petitioners argued that they deserved special costs because of the public interest nature of the litigation, their lack of personal interest in the outcome of the litigation, and Rio Tinto's far superior ability to bear the costs of the proceeding. In contrast, Rio Tinto denied that the petitioners satisfied the *Adams* test for public interest costs. Rio Tinto argued that the issues in the judicial review were neither novel nor of broad public importance, and that no new legal ground was broken as the issue had been remitted back to the EAB on procedural fairness grounds only. Rio Tinto also argued that its superior capacity to bear the costs was not a determinative factor.

The court first decided that the petitioners were not even entitled to ordinary costs. It held that since the petitioners had been unsuccessful on the issues concerning the statutory test for standing and the standard of review and only partially successful on the issue of procedural fairness, they had not been "substantially successful" and were not entitled to costs under Rule 14-9.The court also found that while Rio Tinto was "not merely caught in the crossfire" of the judicial review and had occupied a dominant role in the litigation, the court refused to order special costs. The court emphasized the fact that the petition was prompted by the EAB's alleged errors, not Rio Tinto's, and was not convinced that the issues on which the petitioners were successful were sufficiently novel to warrant an exceptional order for special costs. The decision provides further support for the idea that any such awards should be truly exceptional and limited to the rarest of cases.

(d) VTACC Lacked Public Interest Standing to Bring Petition on Ministry Decision to Issue Permits

Voters Taking Action on Climate Change v. British Columbia (Energy and Mines), 2015 BCSC 471, involved a challenge of two separate decisions by the Chief Inspector of the Ministry of Energy and Mines (the "Chief Inspector") and the Minister of the Environment (the "MOE"), respectively. Voters Taking Action on Climate Change ("VTACC") asked that the court review:

(1) a decision of the Chief Inspector to issue a permit amendment to Texada Quarrying Ltd. ("TQL"), which approved an increase in coal storage and amalgamated Permit M-66 with a newly amended Permit Q-65, under section 10(1) of the *Mines Act*, R.S.B.C. 1966, c. 293; and

(2) a MOE decision to not require TQL to obtain a permit under the EMA for its operations.

VTACC argued that the jurisdiction over TQL's coal operation lay with the MOE under the EMA. In addition, VTAAC alternatively argued that the Chief Inspector breached procedural fairness rules when he received and considered new materials from TQL that were relevant to public issues of concern, but did not make the information publicly available. VTACC sought an order quashing the permit amendment, a declaration that the MOE erred in determining that TQL did not require a permit, and an order remitting the matter back to the MOE for reconsideration.

The court applied the test for public interest standing, which weighs three factors: (i) whether the case raises a serious justiciable issue (no); (ii) whether the party bringing the action has a real stake or a genuine interest in its outcome (yes); and (iii) whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court (no). Accordingly, the court determined that VTACC lacked public interest standing to bring the petition. In any event, the court also held that the decision of the Chief Inspector and the determination of the MOE were reasonable.

(e) Executive Director's Assessment with respect to the Adequacy of Public Consultation for Vancouver Airport Fuel Delivery Project Reasonable

VAPOR v. British Columbia (Environment), 2015 BCSC 1086, A Society for Vancouver Airport Fuel Project Opposition for Richmond ("VAPOR") sought an order declaring that the provincial environmental assessment of the Vancouver Airport Fuel Delivery Project (the "Project") conducted pursuant to the *Environmental Assessment Act*, S.B.C. 2002, c. 43 ("EAA ") failed to satisfy public consultation requirements of the EAA and its regulations. In the alternative, VAPOR also sought an order declaring that the issuance of the Environmental Assessment Certificate by the Minister of the Environment to the Vancouver Airport Fuel Facilities Corporation ("VAFFC") for the Project failed to comply with the requirements of natural justice and procedural fairness.

The two issues to be determined were whether the public consultation met the requirements of the EAA and its regulations, and whether the opportunities provided to the petitioners to participate in the environmental assessment satisfied the requirements of procedural fairness. Examples of alleged deficiencies that VAPOR claimed in relation to the consultation process included the public consultation website being confusing to navigate and reports and tracking tables not being made available to the public within required periods.

The court determined that the assessment by the executive director of the Environmental Assessment Office ("EAO"), with respect to the adequacy of public consultation, was reasonable. The court examined each of the VAPOR's alleged deficiencies of the consultation process, but found that the executive director had a substantial record upon which to conclude that public consultation was adequate. Furthermore, the court concluded there was no denial of procedural fairness. The public was properly consulted through multiple information sessions held in open houses, had reasonable and timely access to all of the application materials for the Project, and was able to formally comment on the Project. The court dismissed the petition.

(f) Judicial Review of Permit Authorizing Sinking of Decommissioned Ship Barred by 30-Day Time Limit

In *Save Halkett Bay Marine Park Society v. Canada (Environment)*, 2015 FC 302, Save Halkett Bay Marine Park Society (the "Applicant") sought judicial review of a Disposal at Sea Permit (the "Permit") that the Minister of the Environment granted to the Artificial Reef Society of British Columbia (collectively, the "Respondents"). The Permit authorized the sinking of the decommissioned ship HMCS Annapolis, to turn it into an artificial reef at Halkett Bay Marine Park.

The Applicant sought to have the Permit quashed because the ship contained allegedly banned substances, namely dibutyltin dichloride and tributyltin chloride ("TBTs"), and in the alternative, that the issuance of the Permit was unreasonable in the circumstances. The Society relied on the provisions dealing with disposal of waste or other matter at sea in the *Canadian Environmental Protection Act*, S.C. 1999, c. 33.The Respondents disputed both contentions and also argued that the application was out of time.

The court concluded that the Application was statute-barred, since it was not commenced within the 30-day time limit set out in subsection 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. In any event, the court determined that the Minister was not legally prohibited from issuing the Permit and that the issuance was not unreasonable. The TBTs had been used in "anti-fouling" paint to prevent barnacles from growing on the ship when it was active. The court determined that: the anti-fouling coating was in a non-active state, in accordance with Environment Canada's Clean-up Standard for Disposal at Sea of Vessels, Aircraft, Platforms & Other Structures (the "Clean-up Standard"); the Clean-up Standard provisions were consistent with other jurisdictions such as the United States; and the Minister conducted extensive analysis prior to issuing the Permit. The court dismissed the application and awarded costs to the Respondents.

(g) Environmental Appeal Board Must Investigate Smelter's Effects on Human Health

Unifor Local 2301 v. British Columbia (Environmental Appeal Board), 2015 BCSC 1592, concerned a judicial review by Unifor Local 2301 ("Unifor"), a union that represents Rio Tinto Alcan Inc. ("Rio Tinto") workers and retired workers, of an EAB decision refusing to hear Unifor's appeal with respect to the impact on human health of increased sulfur dioxide (S02) emissions at Rio Tinto's Kitimat smelter.

The original decision had increased the permissible amount of SO2 emissions from the smelter from 27 metric tons per day to 42 metric tons per day, subject to Rio Tinto submitting an Environmental Effects Monitoring Plan ("EEMP"). Unifor was concerned that although Rio Tinto could mitigate its emissions if there were detrimental effects on plants, soil, or water, there were no similar protections for detrimental effects on humans under the EEMP. After the Director approved the EEMP, Unifor tried to appeal under s. 101 of the EMA, which states that "the time limit for commencing an appeal of a decision is 30 days after notice of the decision is given". However, the EAB held that the approval "did not constitute a 'decision'", and therefore did not allow an appeal to take place.

Appeals to the EAB are governed by s. 100 of the EMA, which states that a "person aggrieved by a decision of a director or a district director may appeal the decision to the appeal board in accordance with this Division". Sections 14 and 16 of the EMA give the Director discretion to impose certain requirements or exercise certain powers with respect to permits and permit amendments.

The court found that the appropriate standard of review was reasonableness, as the EAB was interpreting its home statute. In applying this standard to the decision to permit increased emissions, the court found that the EAB's decision was unreasonable. In particular, the court held that it was unreasonable for Unifor to have to appeal the objectionable decision until the full content of the decision was known. In addition, the court found that interpreting the approval as not constituting a "decision" essentially "strains the limits of interpretation of the English language". The court remitted the matter to the EAB for reconsideration.

The EAB, in *Unifor Local 2301 v. Director, Environmental Management Act* (November 16, 2015), 2014-EMA-005(b), found that the letter constituted a "decision" under s. 99 of the EMA. As such, Unifor has standing to appeal the letter.

(h) Minister Ordered to Reconsider Refusal to Recommend Emergency Order for Western Chorus Frog

In *Centre Québécois du droit de l'environnement v. Canada (Environment)*, 2015 FC 773, the applicants applied for judicial review, challenging the legality of a decision in which the Minister of the Environment refused to recommend that an emergency order (the "Order") be made to the Governor in Council. The Order, which would have been issued under s. 80 of the *Species at Risk Act*, S.C. 2002, c. 29 ("SARA"), involved the protection of the Western Chorus Frog (the "Frog"), a wildlife species likely to become endangered, from the development of a housing project (the "Project") in La Prairie, Québec. The applicants sought a writ of *mandamus* to force the Minister to recommend that the Order be made.

The Minister's refusal to issue the Order was based on the reasoning that the Project did not threaten the species' presence elsewhere in Ontario and Québec. The Minister also explained that a recovery plan for the Frog would be implemented in future years. However, the evidence showed that urbanization and agricultural development jeopardized the survival and recovery of the Frog in Canada. Relying on the interpretation in *Adam v. Canada (Environment)*, 2011 FC 962, the court affirmed that s. 80 of the SARA must be given a liberal interpretation. The intention of the provision was designed to "protect the critical habitat of a listed species while awaiting a recovery strategy. An emergency order [would] therefore contain protective measures that would normally be found in an action plan".

The Frog had been listed on the federal Species at Risk Public Registry since 2010. In addition, a "decimated metapopulation cannot recover after its critical habitat is destroyed". With respect to the proposed recovery plan, the court noted that the plan was not yet in force and there were no tangible measures in place to assist in the recovery of the species. Therefore, the court allowed the application for judicial review, but did not grant *mandamus*. Rather, the case was referred back to the Minister for redetermination, to account for the opinions of scientists, provincial and municipal authorities, and public stakeholders.

4. Miscellaneous Cases

(a) City of Burnaby Loses Bid to Stop Expansion of Trans Mountain Pipeline

In *Burnaby (City) v. Trans Mountain Pipeline*, 2015 BCSC 2140, the court ruled against the City of Burnaby (the "City"), which had attempted to stop the defendant's Trans Mountain Expansion Project (the "Expansion Project"). The Expansion Project would expand the existing pipeline system by twinning it along approximately 1,000 kilometres of its route between Alberta and coastal B.C. The existing pipeline had a right of way in Burnaby leading to facilities along the Burrard Inlet shoreline. Furthermore, it operated under the jurisdiction of the National Energy Board ("NEB"), acting pursuant to the federal *National Energy Board Act*, R.S.C. 1985, c. N-7 (the "NEB Act").

The City challenged the Expansion Project on constitutional grounds, arguing that the pipeline violated the City's bylaws. In particular, the City argued that its bylaws controlled the routing of the Expansion Project. Trans Mountain argued that the routing of an interprovincial pipeline was within Parliament's exclusive jurisdiction through the NEB and NEB Act.

The issues in this appeal were whether: (i) Burnaby's bylaws were constitutionally inoperative to the extent that they conflict with actions taken under the authority of s. 73 of the NEB Act (yes); (ii) Burnaby's bylaws were constitutionally inapplicable to actions taken under s. 73 of the NEB Act in respect of a federally-regulated, interprovincial undertaking, by operation of the doctrine of interjurisdictional immunity (yes); (iii) the NEB Act, and in particular s. 73(a), applied to override municipal bylaws, and authorize the contravention of municipal bylaws,

including Burnaby's bylaws, and provided the authority to direct or limit a municipality in the enforcement of its validly-enacted bylaws (yes); (iv) the NEB Act was *ultra vires* the Parliament, and has force and effect in respect of Burnaby's enforcement (no); and (v) the NEB Act was constitutionally inapplicable to a municipality, Burnaby, in the enforcement of its bylaws concerning land use planning for protection of the local environment and local traffic (no).

The third issue, on whether s. 73(a) applied to override municipal bylaws, is especially important. The court noted that the "core of federal power over pipelines is determining where pipelines are located". The City's two bylaws, which addressed traffic and parks respectively, effectively gave the City the ability to stop excavation and engineering feasibility work for the Expansion Project. The court applied the paramountcy and interjurisdictional immunity doctrines and concluded that the City could not apply its bylaws to impede or block the location of the pipeline or works to locate the pipeline.

(b) Court Determines that B.C. Not the Appropriate Jurisdiction to Adjudicate Claims Arising From Guatemalan Mine Shootings

The claim in *Garcia v. Tahoe Resources Inc.*, 2015 BCSC 2045, concerned the actions of mine security personnel at the Escobal mine in Guatemala. The mine is owned by two subsidiaries of Tahoe, a Canadian corporation. In April 2013, the mine was the site of protests, which were forcibly broken up by mine security personnel. The plaintiffs were all participants in those protests who alleged that they had been shot or otherwise injured in the incident.

The plaintiffs attempted to link Tahoe to the abuses that were alleged to have been committed in a novel way. Rather than seeking to have courts "pierce the corporate veil" to hold Tahoe liable for its subsidiaries' actions, the plaintiffs instead alleged that Tahoe was directly liable on the traditional tort grounds of negligence and battery. In order to make a direct link to Tahoe, the plaintiffs pointed to Tahoe's adoption of various international human rights and social responsibility standards. The plaintiffs alleged that these commitments represented acknowledgement by Tahoe that they retained ultimate control over and had responsibility for mining operations, particularly security practices.

The plaintiffs commenced this claim in Vancouver. Tahoe responded by taking the position that while the court had jurisdiction to hear the case (because Tahoe was registered in B.C.), the action should be heard in Guatemala. In order to succeed with its application, Tahoe had to convince the court that Guatemala was the "clearly more appropriate" forum.

The plaintiffs' main argument in support of having the action heard in B.C. was that they could not be assured a fair and impartial trial in Guatemala, as a result of what they characterized as "serious systemic barriers to justice" in the Guatemalan legal system.

The court rejected this argument, concluding that while Guatemala's legal system "may be imperfect, it functions in a meaningful way". The court also held that Canadian courts must proceed extremely cautiously in finding that a foreign court is incapable of providing justice to its own citizens.

Further, the court found that consideration of the comparative expense and convenience for the parties and their witnesses weighed heavily in favour of Guatemala as the forum for the plaintiffs' action for two reasons. First, many of the witnesses and all of the plaintiffs only spoke Spanish and most if not all of the records required to assess the plaintiffs' claims for damages were in Spanish. Obtaining and translating all of this evidence would be a significant challenge if the case as heard in B.C. Second, while Tahoe was registered in B.C., it did not carry on its operations there. The majority of its personnel and documents were located in Reno, Nevada.

Accordingly, the court declined to take jurisdiction and granted Tahoe's application for a stay.

(c) Government's Failure to Comply with Legislative Timelines may constitute Negligence

In *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163, the court upheld the dismissal of Canada's application to strike Carhoun's pleadings. Carhoun, a property developer, wanted to fill ravines for the purpose of building a large commercial development. These ravines were considered to be potential fish habitats by Fisheries and Oceans Canada ("DFO"). Carhoun thus applied for an exemption under s. 35(2) of the *Fisheries Act*. Before an exemption could be granted, DFO needed to first conduct an environmental assessment and obtain a screening report pursuant to the *Canadian Environmental Assessment Act* ("CEAA"). Carhoun applied for authorization to fill the ravines in 2009, but did not receive the authorization from the DFO until May 2012.

Carhoun sued Canada for negligence and misfeasance after the company's financing collapsed. Canada sought to strike Carhoun's pleadings with respect to negligence and misfeasance, on the arguments that it owed no duty of care to Carhoun and that the pleadings failed to identify an alleged wrongdoer. The court noted that the Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements, SOR/97-181, imposed a requirement that a decision as to whether an environmental assessment is to occur must be made within 30 days of receipt of the proposal.

The court held that the government is not exempt from civil liability. The court relied on the legislative purpose of the CEAA, which suggested that Canada should conduct environmental assessments by balancing both the public interest in protecting fisheries and the private interest in efficient processing of applications. The court held that these two interests are not irreconcilable.

Canada also contended that there were residual policy reasons for negating a private duty of care to Carhoun, since Carhoun could have sought judicial review as an alternative remedy, finding a duty of care would create indeterminate liability, and the court should not interfere with true policy decisions of the DFO. However, the court focused on the requirement to balance public and private interests in its analysis, and allowed the case to proceed to trial.

5. Environmental Appeal Board Decisions

(a) EAB Revokes Nexen Water Licence

In *Chief Sharleen Gale v. Assistant Regional Water Manager* (September 3, 2015), 2012-WAT-013(c), the EAB reversed a water licence issued to Nexen due to serious technical flaws in the scientific evidence upon which the licence was granted, as well as defects in the consultation process with the Fort Nelson First Nation (the "FNFN").

Nexen applied for the licence on April 6, 2009 under s. 12 of the *Water Act*. The Ministry of Environment (the "Ministry") granted the licence on May 11, 2012 (active until December 31, 2017), which authorized Nexen to divert water from the North Tsea Lake into storage dugouts for the purpose of oilfield injection and storage. Due to drought conditions and extremely low river water levels in 2012, on April 18, 2013, the Ministry issued an order imposing conditions on the licence. The EAB found it did not have jurisdiction to review that order and only reviewed the decision to issue the licence.

First, the EAB held that the licence was technically flawed. It concluded that the flow-weighted withdrawal scheme was not supported by "scientific precedent", appropriate modelling or field data. In the EAB's opinion, the withdrawal rate was arbitrary and without scientific basis, and neither the Ministry nor Nexen could explain the rationale for the withdrawal rate.

Second, the EAB held that the Ministry incorrectly determined the level of consultation owed to the FNFN, based on the mistaken premise that granting the licence would not impact the environment or the FNFN's treaty rights. The EAB stressed that a First Nation only needs to establish that there would be a potential, non-speculative, impact. Given that the intended water use was consumptive and that Nexen used 14% of the North Tsea Lake in 2012, and 9% in 2013, the EAB found that there was "the potential for adverse effects on (species and habitat) that the (FNFN) depends on for the exercise of its treaty rights".

With respect to the issue of treaty rights, the EAB found that the Ministry failed to inform itself of the scope and extent of the FNFN's treaty rights by not informing itself of the specific locations where FNFN exercised its treaty rights and which species it harvested. However, the EAB also found that the FNFN had specific information about its treaty rights that it failed to live up to its obligation to provide information about its interests to the Ministry.

Finally, the EAB found the Ministry had not consulted the FNFN in good faith. It noted that consultation proceeded for over two years without hard deadlines, but this approach changed suddenly following a teleconference between the Ministry and Nexen. Shortly thereafter, the Ministry issued a letter to the FNFN imposing a 30-day deadline for consultation, during which internal Ministry correspondence indicated that the Ministry intended to grant the licence but had no intention of substantively addressing the FNFN's concerns.

The EAB determined that the mere suspension of the licence would not be an adequate remedy, and revoked the licence. In considering the resulting prejudice to Nexen, the EAB noted that Nexen had already benefited by having had the licence for three out of the five-and-a-half years for which it had originally been granted. As such, Nexen could not claim that it had relied on the licence when it incurred those costs.

(b) EMA Section 95(2)(b) Costs Meant to Punish Vexatious, Frivolous or Abusive Behaviour

Readers of last year's *Annual Review of Law & Practice* will be familiar with Seaspan ULC's ("Seaspan") contamination case in 2014, which related to the contamination of the company's shipyard *(Seaspan ULC (formerly Seaspan International Ltd.) v. Director, Environmental Management Act* (September 15, 2014), 2010-EMA-005(c) and 2010-EMA-006(c)). The EAB granted three applications for costs against Seaspan. In awarding costs to the applicants, the EAB found that Seaspan had knowingly advanced a theory at the hearing that "was so ill conceived that it crumbled almost immediately under cross-examination".

The issue of costs for the EAB arose in *Seaspan ULC (formerly Seaspan International Ltd.) v. Director, Environmental Management Act*, (April 1, 2015), 2010-EMA-005(d) and 2010-EMA-006(d). In this appeal, the EAB had asked Seaspan to provide submissions on whether it could pay the EAB's expenses in respect of the appeals pursuant to s. 95(2)(b) of the EMA, which states:

> In addition to the powers referred to in section 93(2) [environmental appeal board, the appeal board may make orders as follows:
>
> (b) if the appeal board considers that the conduct of a party has been vexatious, frivolous or abusive, requiring the party to pay all or part of the expenses of the appeal board in connection with the appeal. (Emphasis added).

Seaspan submitted that the circumstances did not warrant an order being made and that the decision dealing with costs did not find the company's appeals as vexatious, frivolous or abusive. However, the EAB stated that the test is whether the party's conduct, not appeals, meets the preconditions.

The purpose of s. 95(2) is punitive; the costs are not meant to compensate the EAB, but rather, to punish the party. In addition, a high threshold of unwanted behaviour must be met before an order for the EAB's expenses can be made. The EAB also noted that the Panel "came close" to describing Seaspan's conduct with the words listed under s. 95(2)(b).

Nonetheless, although Seaspan's decision to advance an ill-conceived theory could be considered vexatious or frivolous, there was no adverse finding made against the company's conduct when it advanced a constitutional claim during the appeals. In addition, the EAB found that Seaspan had already been sufficiently sanctioned by being required to pay the applicants' costs. Hence, the EAB concluded that a s. 95(2) award was not justified.

(c) Denying a Stay Under Section 104 of the Environmental Management Act May Cause Irreparable Harm in terms of Business and Professional Reputations

In *Executive Flight Centre Fuel Services Ltd. et al v. Director, Environmental Management Act* (February 17, 2015), 2014-EMA-007(a) & 2014-EMA-008(a), the applicants, a company and one of its employee drivers, applied for a stay of a s. 80 certificate (the "Certificate") under the EMA. The applicants were issued the Certificate because they were allegedly liable for the government's costs of $127,161.89 incurred in response to a spill of hazardous substances into Lemon Creek in July 2013. The applicants agreed to provide mobile fuel services to the Province under a Standing Offer Agreement. When delivering fuel in July 2013, the applicants' truck overturned, thereby puncturing the tanker and leading to over 30,000 litres of fuel discharging into Lemon Creek.

Section 80 of the EMA allows the Province to carry out actions in response to a spill that may pose a hazard to health or the environment, and subsection (4) allows the director of the EMA (the "Director") to issue a certificate who had "possession, charge, or control") of the spilled substance, requiring the person(s) to pay the cost of the Province's response.

The applicants argued that any cost recovery against them should be stayed pending a determination of whether one of the three parties was negligent, and whether there was proportional liability, through an appeal to the Director. They submitted that denying a stay would result in suffering irreparable harm. The Director argued that the applicants' participation in concurrent litigation relating to the incident (class action litigation and a prosecution under the *Fisheries Act*) was not determinative of liability under the EMA.

The EAB, applying the *RJR-MacDonald* test, determined that granting a stay pending resolution of the above-noted issues would not cause significant inconvenience to the Director or harm to the public interest. However, denying a stay would possibly cause the applicants to suffer irreparable harm, especially to the company's business reputation and the professional reputation of its driver. Accordingly, the EAB granted a stay of the Certificate, pending a final decision on the appeal.

Legislation

1. Provincial Legislation

(a) Greenhouse Gas Industrial Reporting and Control Act, SBC, c. 29

On January 1, 2016, the *Greenhouse Industrial Reporting and Control Act* came into effect. Passed in 2014, the Act empowers the provincial government to establish greenhouse gas performance standards for industrial sectors and facilities. In its current iteration, the Act focuses on the liquefied natural gas (LNG) industry, but also sets benchmark emission standards for coal-based electricity generation operations. The Act brings the GHG reporting framework under the *Greenhouse Gas Reduction (Cap and Trade) Act* into the same regulatory regime.

The Act establishes a benchmark of 0.16 carbon dioxide equivalent tonnes per tonne of LNG produced. This benchmark covers all emissions from a facility, including combustion, electricity generation, venting and fugitive emissions. The aim is to cover all emissions from the point the natural gas enters a facility to the point it leaves the facility. Under the Act, a "facility" is defined as:

(a) all buildings, structures, stationary items and equipment that

  (i) are located or used primarily on a single site, contiguous sites or adjacent sites,

  (ii) are controlled and directed by the same person, and

  (iii) function as a single integrated site,

(b) wastewater collection and wastewater treatment systems that treat wastewater from a facility, if the systems are on or adjacent to a site or sites referred to in paragraph (a)(i) and are controlled and directed by the person referred to in paragraph (a)(ii),

(c) storage of petroleum or natural gas products at a terminal that receives petroleum or natural gas products from a facility, if the terminal is adjacent to a site or sites referred to in paragraph (a)(i) and controlled and directed by the person referred to in paragraph (a)(ii), and

(d) mobile equipment, used primarily at the site or sites referred to in paragraph (a)(i), that functions as part of the integrated site.

Three regulations necessary to implement the Act also came into effect on January 1, 2016:

(1) Greenhouse Gas Emission Reporting Regulation (the "GHG Reporting Regulation");

(2) Greenhouse Gas Emissions Control Regulation ("GHG Control Regulation"); and

(3) Greenhouse Gas Emission Administrative Penalties and Appeals Regulation ("GHG Penalties Regulation").

(i) GHG Reporting Regulation

The GHG Reporting Regulation replaced the existing industrial Reporting Regulation and added compliance reporting requirements, including specific requirements for LNG operations. The GHG Reporting Regulation sets out criteria for determining which facilities are required to report, reporting requirements, quantification methods for emissions, and verification requirements.

The previous Reporting Regulation will continue to apply to facilities reporting emissions for the 2015 reporting year; the new GHG Reporting Regulation will apply for the 2016 reporting year. Industrial operations will continue to report greenhouse gas emissions as they have since 2010.

The GHG Reporting Regulation addresses the greenhouse gases and sources subject to reporting, the reporting and verification thresholds and associated requirements, as well as definitions such as "single facility operation" and "linear facilities operation" that are subject to reporting requirements. The GHG Reporting Regulation also sets out the activities and emission sources that must be reported, along with the timing, form and content of required registration, emission reports and supplementary reports. The GHG Reporting Regulation creates specific compliance obligations for LNG operations and the prescribed emissions that would be attributable based on the scope of operations. Public sector organizations are not subject to the emissions compliance obligations created under the Regulations.

The GHG Reporting Regulation sets out the requirements for reporting greenhouse gas emissions from B.C. facilities emitting 10,000 tonnes or more of carbon dioxide equivalent emissions per year beginning on January 1, 2010. Those reporting operations with emissions of 25,000 tonnes or greater are required to have emissions reports verified by a third party. Where the total amount of attributable emissions falls below the threshold of 10,000 tonnes, specific rules and exceptions apply. For the purposes of the Act, the reporting period under the Regulation is the calendar year. Potential reporting operations must undertake an emissions forecast, based on data of the industrial operation, and comply with the prescribed registration requirements within a specified time frame in order to avoid penalties.

The GHG Reporting Regulation includes a duty to collect data and quantify emissions for emission report on operators, while also setting out the timing, form and content of emission reports that must be filed. The Regulation also sets out the methodologies for quantifying emissions and the requirements that instrumentation used to measure emissions must meet.

Compliance reports must be submitted on or before May 31 of the calendar year immediately following the calendar year of the compliance period. The Regulation creates certain duties in relation to the compliance reports, and prescribes the content of the compliance reports. Reports must be verified by an independent peer reviewer with an absence of any threat to the independence of the reviewer.

(ii) GHG Control Regulation

The GHG Control Regulation is the legislative mechanism by which industrial operations in B.C. are required to submit their Facility Greenhouse Gas Reports to the Province, under the legislative framework of the Act.

The GHG Control Regulation establishes the B.C. Carbon Registry. The B.C. Carbon Registry will allow the tracking of compliance unit transactions.

Where the Act includes the ability to set a greenhouse gas emissions intensity benchmark for regulated industries, the GHG Control Regulation enables the benchmark to be met through flexible options, such as purchasing offsets or paying a set price per tonne of greenhouse gas emissions.

The GHG Control Regulation sets out the requirements for the reporting of greenhouse gas emissions from B.C. facilities emitting 10,000 tonnes or more of carbon dioxide equivalent emissions per year beginning on January 1, 2010. Those reporting operations with emissions of 25,000 tonnes or greater are required to have emissions reports verified by a third party. The Development and implementation of the emission reduction program is reliant upon accurate emissions data of consistent quality. This data also supports an ongoing provincial emissions inventory and will contribute to the development, implementation and evaluation of climate action policies.

The GHG Control Regulation establishes the framework and requirements for issuing offset units and funded units under the Act. Offset units and funded units are types of compliance units which enable regulated operations to satisfy compliance obligations based on the emission intensity limit set in the Act. Funded units are priced at $25. Emission offset projects that implement their project activities in accordance to the Act and the GHG Control Regulation, and offset units are credited to the B.C. Carbon Registry and may be used for compliance. The offset framework established by the GHG Control Regulation builds on the Emission Offset Regulation ("EOR") established under the *Greenhouse Gas Reduction Targets Act*, which provided the framework for offsets purchased by government to meet its carbon neutral requirements. The EOR was repealed by the Act and the GHG Control Regulation.

The GHG Control Regulation sets out the greenhouse gases and sources subject to the reporting requirements, along with the reporting and verification thresholds and associated requirements. The GHG Control Regulation provides definitions of "single facility operation" and "linear facilities operation" that are subject to reporting requirements. The GHG Control Regulation provides that activities (associated with, for example, industrial production, manufacturing, processing, refining and electricity generation) and emission sources (associated with these activities) that must be reported. The GHG Control Regulation also sets out:

- the timing, form and content of required registration, emissions reports and supplementary reports;
- the methodologies for quantifying greenhouse gas emissions;
- the calculation and reporting of emissions from biomass sources (such as wood and wood products, agricultural residues and landfill gas);
- requirements for the management and retention of records, including publication of information and requests for confidentiality; and
- inspection, compliance and appeal powers and procedures.

(iii) GHG Penalties Regulation

The GHG Penalties Regulation establishes the process for when, how much, and under what conditions administrative penalties, including administrative monetary penalties, may be levied for non-compliance with the Act its regulations. This GHG Penalties Regulation outlines the process for how appeals may be sought after a decision has been made by the Director under the Act. Under the GHG Penalties Regulation, the term "environmental legislation" includes the Act and its regulations; the *Environmental Management Act* and its regulations; the *Greenhouse Gas Reduction (Cap and Trade) Act* and its regulations; the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* and its regulations; and the *Oil and Gas Activities Act* and its regulations.

The GHG Penalties Regulation sets out certain activities as prescribed contraventions, including a failure to submit emission reports, a failure to meet operator's compliance obligations, failure to submit a compliance report, and a failure to produce a record for examination. The maximum monetary administrative penalty is set at $50,000 for these prescribed contraventions.

The GHG Penalties Regulation requires that the Director must serve a person with a notice of intent to impose an administrative penalty before sending an administrative penalty notice to the person, where the notice must set out certain information and provide for the opportunity to be heard within 30 days after the date of service of the notice.

It also sets out the method for calculating automatic administrative penalties, the failure to meet compliance obligations, imposed administrative penalties, along with inaccurate reports or failure to report. The GHG Penalties Regulation governs the matters to be considered in determining the amount of an administrative penalty to be imposed.

Under the GHG Penalties Regulation, an administrative penalty notice must set out certain information, including the person's right to an appeal under the Act.

If a contravention or failure continues for more than one day, separate administrative penalties, each not exceeding the maximum administrative penalty for the contravention, may be imposed for each day the contravention continues. Payments of administrative penalties are due within 30 days after the penalty is issued, and additional penalties of up to 10% of the outstanding balance may be imposed for each 30 day period that the balance remains unpaid.

For appeals to the Environmental Appeal Board, the GHG Penalties Regulation sets out what decisions may be appealed, including decisions related to the suspension or cancellation of accounts, validation bodies and verification bodies, acceptance of project plans, and the issuance of offset units. The Regulation sets out the time limit for commencing appeals, the procedure on appeals, and the powers of the appeal board in deciding appeals.

(b) Water Sustainability Act, SBC 2014, c. 15

In 2015, the government released the pricing details for applications and water rentals under the *Water Sustainability Act* (the "WSA"). It also released other policy papers on regulations that will later be brought into effect under the Act. The Act is expected to be brought into effect in 2016.

(i) Pricing Scheme

In February 2015, the government issued new details on the revised pricing scheme for water fees and rental rates that will take effect under the WSA in 2016. Under the new fee structure, water will cost roughly $2.25 per 1000$m^3$ for industrial and commercial uses, and roughly $0.02 per 1000$m^3$ for storage and conservation.

The new fee and rental rates will only recover the costs of implementing the new *WSA* including, for the first time, groundwater regulation. Unlike surface water, groundwater use has not previously required permission or payment of fees and rentals.

While users of groundwater will require a water licence and will be required to pay water fees and rentals, individual household wells throughout the province will not be licensed or charged. Homeowners with wells will be exempt from licensing and fees, and those supplied by municipal water systems may pay $1 to $2 more per year for their water. Surface and groundwater users will pay the same fees.

(ii) Licensing Policies

The policy paper entitled *Licensing Groundwater Use Under British Columbia's Water Sustainability Act* described some proposed groundwater licensing policies. For groundwater users, the new licensing scheme will clarify how much they can use, and increase the security of access. For the first time, irrigators, industries, waterworks and others who use groundwater for non-domestic purposes will have defined water rights and greater clarity regarding their priority of use.

Stream water and groundwater rights will be integrated, to enable management of water as one resource. The WSA will allow people and businesses to drill a new well without a groundwater licence, though they will be required to obtain a licence before using water from that well for a non-domestic purpose.

The approximately 80,000 owners of domestic wells cannot obtain a licence, and are not expected to pay water fees and rentals. The WSA enables the statutory decision maker to consider potential impacts on existing domestic use of an aquifer when reviewing licence applications for existing non-domestic uses of the same aquifer. When considering potential impacts on domestic use, the government deems the owners of domestic wells to have a water right of up to 2,000 litres per day. In cases of water shortages or conflicts, domestic water licenses may be required for those areas.

The WSA will recognize the following three exceptions to the First-in-Time, First-in-Right (FITFIR) system:

(1) During times of water scarcity those who use stream water and groundwater for domestic purposes are allowed to divert water for 'essential household uses'–established as 250 litres per day for each private dwelling.

(2) Under a temporary Critical Environmental Flow Protection Order, the Comptroller may define the minimum flow required to avoid significant or irreversible harm to a specific stream. That minimum flow will have precedence over licensed water uses of the stream and any hydraulically connected aquifer.

(3) Under a Fish Population Protection Order, the Minister can order any licensee to temporarily reduce or stop water use in order to save a population of fish.

(iii) Enforcement and Administrative Penalties

The July 2015 paper, *Strengthening Compliance with British Columbia's New Water Sustainability Act*, summarized the additional authority to impose and collect fines and to order site remediation or prosecution as an alternative to fines. If an offender benefitted financially from committing an offence, additional penalties may be imposed.

Certain offences will be reclassified under the WSA to penalise those who do not comply with orders or continue offenses after being fined. For example, contravening the prohibition on introducing foreign matter into a well—currently classified as a high penalty offence–would be reclassified as a general offence. The fine would be reduced from $500 to $350. But, failing to comply with an order to stop the introduction of foreign matter into a stream would be reclassified from a general offence to a high penalty offence with an increased fine of $500.

The WSA will add offences to Schedule 2 of the Violation Ticket Administration and Fines Regulation. For example, expanded government powers to regulate groundwater under the WSA would result in the following corresponding new VTAF offences:

(a) Failure to carry or provide proof of the required amount of liability insurance.

(b) Failure to comply with the applicable regulations when installing, maintaining, repairing, removing or testing a well pump or wellhead, conducting a flow test of a well or disinfecting a well or well pump.

(c) Failure to ensure that works are deactivated or decommissioned when required.

(iv) Well Construction and Maintenance

The July 2015 policy paper *The New Groundwater Protection Regulation Under B.C.'s Water Sustainability Act*, outlined the new policies for construction and maintenance of wells to ensure groundwater is extracted in an environmentally safe manner.

The new *Groundwater Protection Regulation* will distinguish between closed-loop geoexchange wells and geotechnical wells, while excluding from the definition of "well" those types of holes that have little or no impact on groundwater, or that are regulated under other legislation. These include drains, trenches and ditches; soak-away pits that are uncased and backfilled with drain rock; and mineral exploration drill holes, whose regulation and decommissioning are already covered under the 2008 Health, Safety and Reclamation Code for Mines in B.C.

Under the WSA, constructing and closing wells, installing well pumps, disinfecting wells, and conducting flow tests are restricted activities that can only be performed by qualified well drillers, well pump installers or professional engineers and geoscientists. The Groundwater Protection Regulation will recognize all currently registered professional drillers and their qualifications as well drillers and well pump installers, while also adding two new types of professionals certified to drill wells in B.C., the Geotechnical/Environmental Drillers, and the Geoexchange Drillers.

The new Groundwater Protection Regulation will require that new wells be set back at least 15 metres from existing water supply wells; this setback would not apply where an existing well is not in use and not intended to be used in future. Owners of existing water supplies would be permitted to drill one additional well within 15 metres of the existing well. Smaller setbacks may be approved if the new well was not likely to interfere with the existing well.

The new Groundwater Protection Regulation will:

- require a qualified hydrogeologist or geotechnical engineer to design and oversee the construction of groundwater wells;
- prohibit the direct recharge/injection of storm-water runoff into the saturated zone of an aquifer;
- require the point of release of urban runoff to be above the saturated zone at all times of year; and
- require that new recharge wells be set back at least 60 metres from existing water supply wells.

For locations where land use and traffic interference are concerns such that it may still be appropriate for wells to be constructed below the ground, the government proposes to prohibit new well pits for new and altered water supply wells, to prohibit the addition of a new well pit to an existing well, and to allow an exception for well pits designed by a professional and accepted by the statutory decision maker or under an authorization.

(v) The New Dam Safety Regulations

The policy paper, *The New Dam Safety Regulation Under British Columbia's Water Sustainability Act*, outlined update the existing regulation when the WSA comes into force. While the new Regulation would incorporate most existing dam safety policies, it will be aligned with the WSA and include new policies designed to create dam safety and awareness.

The definition of 'dam' would be amended to include those structures that impound water from an aquifer as well as those that impound water from a stream, and those that do both.

Also, government proposes to direct dam owners to prepare one written plan that describes the actions the dam owner must take in case of an emergency at the dam, and that also includes key information about the dam and emergency contacts. It would also require dam owners to provide information about the dam and emergency contacts to local authorities for emergency planning and response.

Other changes contemplated under the new Dam Safety Regulation include:

(a) replacing the term "professional engineer" with a new term, "engineering professional"; this would allow both licensed professional engineers (P.Eng.) and persons holding an APEGBC limited licence to carry out reviews and oversee invasive dam investigation procedures—the latter only when such actions are acceptable and within the scope of the limited licence;

(b) clarifying the distinction between ongoing site surveillance and formal, detailed inspection, and confirm that both are required;

(c) exempting investigations carried out under s. 10(4) (regarding drilling and other invasive activity within or near a dam) from requirements for approvals, licences or orders when appropriate;

(d) clarifying the types of information that the dam owner may need to provide to the Dam Safety Officer;

(e) providing greater discretion to the Comptroller or regional manager on the type of independent expert opinion a dam owner can be required to draw upon under different circumstances; and

(f) clarifying the minimum frequency of visual inspections in Schedule 2 of the Dam Safety Regulation.

(c) Water Act, SBC 1996, c. 483

Section 44 of the *Water Act* is amended to allow persons who hold neither an approval or a licence authorizing changes in and about a stream to make changes if the person holds a permit issued under the *Oil and Gas Activities Act* authorizing the activities, and the changes made are made in accordance with the applicable conditions in line with the permit. Any related damage to habitats caused by making changes in and about a stream must be reported to the Oil and Gas Commission within 72 hours after the damage is caused.

(d) Environmental Management Act

(i) Environmental Appeal Board Procedure

On December 18, 2015 the Environmental Appeal Board Procedure Regulation B.C. Reg. 1/82 was repealed by B.C. Reg 240/2015 (O.I.C. 797/2015), and a new Environmental Appeal Board Procedure Regulation was made effective. The new Regulation sets out new rules and procedures with respect to notices of appeal, reasons and decisions provided by the board, and transcripts of proceedings.

The Environmental Appeal Board ("EAB") will have the authority to make early dispute resolution methods—such as mediation—mandatory, while enhancing the accountability of tribunals through new reporting requirements.

The changes impact flow from the application of the *Administrative Tribunals Statutes Amendment Act*, 2015, S.B.C. 2015, (the "ATSAA") to the EAB in relation to appointment of members, as well as practice and procedures related to appeals, including, but not limited to, notices, time limits, interveners, witnesses, costs and sanctions, decisions, immunities, time limits for judicial review, and the power to make regulations.

(ii) Waste Discharge Regulation (B.C. Reg. 320/2004)

Schedule 1 of the Waste Discharge Regulation (B.C. Reg. 320/2004) was amended by Order in Council 806/2015. It added the definition of "burning or incineration of prohibited material", which now includes the burning, partial burning or incineration of one or more of the an extensive list of materials including animal carcasses and waste from animal slaughtering, asphalt, batteries, biomedical waste, carpets, demolition waste, fiberglass, fuel and lubricant containers, rubber, tires, railway ties, and other materials.

In Schedule 2, s. 1(1) was amended by repealing the old definition of "beverage industry". The new definition is now: "establishments, each establishment of which is engaged in producing or manufacturing a volume of alcoholic or non-alcoholic beverages, other than water, in excess of 16 000 000 litres per calendar year".

(e) Clean Energy Act, SBC 2010, c. 22

The Greenhouse Gas Reduction (Clean Energy) Regulation, B.C. Reg. 102/2012, was amended to reflect changes to the vehicles and their usage that qualify for rebates under the *Clean Energy Act*. Section of the Greenhouse Gas Reduction (Clean Energy) Regulation have been amended to include definitions for eligible vehicles, heavy-duty vehicles, and the applicable undertaking period. Section 2 was amended to add subsections defining contracted demand and early adopter vehicle while setting out a table showing market segment, contracted demand and the number of persons who receive grants or zero-interest loans.

(f) Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act, SBC 2008, c. 16

The Act requires suppliers of fuels used for transportation to supply a prescribed percentage of renewable fuels, such as ethanol and biodiesel, and to submit annual compliance reports to the Ministry of Environment. The Renewable and Low Carbon Fuel Requirements Regulation was amended to add the definition of "natural gas-based gasoline" to the defined terms in s. 1(1) and expanded the definition of "gasoline class fuel" while altering the definition of "petroleum-based gasoline or renewable fuel in relation to gasoline class fuel".

2. Federal Legislation

(a) Fisheries Act

(i) Aquaculture Activities Regulations, SOR/2015-177

The Aquaculture Activities Regulations aims to increase the coherence of federal and provincial/territorial regulation of aquaculture activities related to the control of disease, pests, and biofouling, and the feeding and cultivation of fish. The Regulations authorize licensed aquaculture facilities to carry out husbandry activities and also contain requirements that support the pollution prevention provisions of the *Fisheries Act*. These requirements are intended to minimize harm to fish and fish habitat while permitting essential aquaculture activities.

The Regulations enable the federal government to monitor aquaculture activities nationwide, contribute to ongoing efforts to support fisheries protection and pollution prevention, and increase public transparency in regulatory practices and outcomes through public reports on the combined regulatory measures. DFO has worked with its provincial/territorial and other federal regulatory partners to develop the Regulations to authorize aquaculture-related husbandry activities under s. 36 (deposit of deleterious substances) and s. 35 (fisheries protection) of the *Fisheries Act*. In addition, the Regulations also authorize the Canadian Food Inspection Agency to conduct activities related to ss. 35 and 36 of the *Fisheries Act* for the purpose of aquatic animal health under the *Health of Animals Act*.

Before exercising any power under subsection 35(3) of the *Fisheries Act*, the Minister must consider the factors prescribed in s. 6 of the *Fisheries Act*.

(ii) The Pacific Aquaculture Regulations, SOR/2015-96

Pursuant to s. 8, fees for fishery or fishing licenses, and subsection 43(1) of the *Fisheries Act*, section 1 of the Pacific Aquaculture Regulations is amended to change the meaning of "shellfish" to include *Mollusca*, *Echinodermata* and *Crustacea*. *(mollusques et crustacés)*. Also, s. 3 of the Regulations has been updated to reflect changes to the licensing scheme and calculation of fees. The Minister may issue an aquaculture license authorizing a person to engage in aquaculture prescribed activities upon payment of the flat fee and annual fee for the license for the first year of the period during which it is valid.

(iii) The Aquatic Invasive Species Regulations, SOR/2015-121

Pursuant to subsections 34(2), 36(5), and 43(1) of the *Fisheries Act* (R.S.C., 1985, c. F-14), the Ministry of Fisheries and Oceans issued the annexed Aquatic Invasive Species Regulations, SOR/2015-121, in force May 29, 2015, governing various aspects of aquatic invasive species. The Regulations set out a list of aquatic invasive species, and establish prohibitions against the importation, possession, transportation, release and introduction of non-indigenous species, while also outlining certain exceptions to the Regulations. The Regulations set out the requirements for permits, licenses and authorizations issued under a number of provincial Acts and Regulations, and also sets out a list of prescribed persons. The Regulations also establish a compliance and enforcement regime that includes control and eradication of invasive species, as well as measures and directions that may be carried out by fishery officers or fishery guardians. The Regulations also set out the consequential amendments to Provincial Acts and the Regulations impacted by the Regulations. Part 2 of the Regulations includes a listing of species subject to prohibitions and controls covering 89 varieties of species, and Part 3 lists the species subject to controls only in areas where they are not indigenous.

(iv) The Marine Mammal Regulations, SOR/2015-188

Pursuant to s. 43 of the *Fisheries Act* (R.S.C., 1985, c. F-14), the Marine Mammal Regulations govern the presence of both licensed and unlicensed observers of the annual Canadian seal harvest. Individuals may seek seal fishery observation licenses from the Minister of Fisheries and Oceans. The Regulations include a prohibition against a stated aim of disrupting the seal fishery. Subsection 33(1) is amended by increasing the approach distance from one-half nautical mile to one nautical mile. This is the amended distance that any individual who is observing the seal fishery without a seal fishery observation license must maintain.

This regulatory change aims to improve safety by giving enforcement officers more time to respond to observers' actions.

Para. 33(2)(e) is amended by increasing the distance from one-half nautical mile to one nautical mile. This provision is an exception to subsection 33(1) for those persons who reside on land within one nautical mile from a person fishing for seals. Paragraph 32(2)(d) is amended to address the possibility that the applicant may have been convicted in the preceding five years of contravening subsection 33(1) when the distance requirement was one-half nautical mile. The provision authorizes the Minister to issue seal fishery observation licences if the issuance of the licence will not cause a disruption to the seal fishery. In making this determination, the Minister must consider several factors, including whether the applicant has been convicted in the previous five years of violating the one-half nautical mile distance that unlicensed observers must maintain. To ensure clarity, para. 32(2)(d) will now refer to a contravention of subsection 33(1) rather than simply replacing "one-half nautical mile" with "one nautical mile".

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