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Borden Ladner Gervais

# Environmental Law

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## Introduction

2017 was full of compelling developments in the area of environmental law. There were several notable developments in the case law on areas such as contaminated sites, aboriginal and treaty rights in relation to industrial development, injunctions, and other subjects. Further legal challenges to the Site C Clean Energy Project were dismissed. The British Columbia Court of Appeal allowed a claim against a mining company to proceed in respect of wrongs that allegedly occurred in a foreign developing country, including alleged breaches of customary international law. The B.C. Supreme Court has clarified the scope of coverage for all risk insurance policies in relation to contaminated sites liability. And there were several notable cases relating to prosecutions of environmental offenses, among other interesting developments.

Environmental legislation and regulations saw several significant changes as part of the provincial and federal governments' efforts to improve environmental protection. Highlights include more stringent provincial spill reporting regulations, as well as more severe penalties and new sentencing guidelines for various federal environmental offences. The federal government also released a discussion paper as part of its plan to overhaul Canada's environmental assessment scheme.



# Case Law

## 1. Contaminated Sites

### a. *Victory Motors (Abbotsford) Ltd. v. British Columbia (Assessor of Area No. 15 - Fraser Valley)*, 2017 BCCA 295

Victory Motors (Abbotsford) Ltd. (“Victory”) owned property upon which various vehicle related businesses had operated. These businesses had stored gasoline underground, resulting in underground contamination. After the contamination was discovered, the property was placed on the market to be sold at \$1,200,000 but no buyers were found with the exception of Mr. Jansen, the owner of the neighbouring property, which had also been contaminated. A numbered company controlled by Mr. Jansen acquired the property for a sum of approximately \$42,000 in order to advance a claim for the contamination against the suppliers of the gasoline. (Mr. Jansen later changed the name of the numbered company to Victory Motors Ltd.)

While that claim was ongoing, the property underwent an assessment that assessed its value at \$975,000 on the basis of the value the property had to its current owner and the income it produced. This was based in part on a number of renovations conducted by Victory. On appeal, the assessment was reduced to \$500,000. Victory appealed this reduced sum further to the Property Assessment Appeal Board (the “Board”) on the basis that there was no competitive market for the property due to the contamination and as a result Victory was the only entity to which the land could have any value. The Board reinstated the original assessment on the basis that the multi-tenant commercial building that Victory had constructed on the site had a market value of \$1,080,000, taking into account the contamination.

Victory then appealed to the Court. At the Supreme Court, the judge accepted the argument that the Board had made an error in how it had assessed the value of the property given the presence of environmental contamination. The judge therefore remitted the matter back to the Board for reconsideration. The assessor then appealed that decision.

The British Columbia Court of Appeal allowed the appeal and reinstated the original assessment of \$975,000. In doing so, the BCCA held that because the Board was engaged in interpretation and application of its home statute, the reasonableness standard of review applied. Further, in making its original assessment, the Board reasonably considered the current owner of a property as a potential purchaser. Specifically, the amount the current owner would be willing to spend to purchase the land was a reasonable method for assessing the value of the property. As a result, the BCCA held that *Southam Inc (Pacific Newspaper Group Inc) v British Columbia (Assessor of Area No 14 – Surrey/White Rock)* 2004 BCCA 245 was no longer valid case law and an assessment no longer required a second potential purchaser.

### b. *Burnaby (City) v. Environmental Appeal Board*, 2017 BCSC 2267

Suncor Energy Inc. (“Suncor”) owned and operated a gas station for over three decades in Burnaby, British Columbia. During this time contamination occurred through the leakage of petroleum hydrocarbons, and migrated offsite onto neighbouring lands owned by the City of Burnaby (the “City”). Suncor admitted responsibility and undertook remediation of the site and surrounding areas for several years. Suncor tested the site and found it to be within the acceptable risk standards for human health and the environment.

Suncor then applied for a certificate of compliance (“Certificate”) from the Director. Suncor argued that they were not responsible for some of the contaminants on the City lands and therefore should be issued the Certificate despite the presence of these contaminants. The Director found this persuasive and granted the Certificate. The City sought to appeal the Certificate before the EAB but was found to lack standing to appear before the board on the basis that it was not an aggrieved person, and that the City’s concerns could be addressed through other regulatory actions. The City sought to have the decision of the EAB quashed.

On the standard of reasonableness, the Supreme Court declined to quash the findings of the EAB. The Court found that the EAB was reasonable in defining a “person aggrieved” under s.100(a) of the *Environmental Management Act* (“EMA”) as a person with a genuine grievance because an order has been made that, prima facie, prejudicially affects its interests. The Board found that the City did not meet this standard because other alternative remedies were available to the City. For example, the Director could, at any time, order an additional remediation under his powers from the EMA. The Board found that such alternative remedies alleviated any potential prejudice that the City might have experienced from the Director’s decision.

### c. *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2017 BCSC 2397

Two related companies, West Van Holdings Ltd. (“West Van”) and West Van Lions Gate Cleaners Ltd. (“Lions Gate”) were defending an ongoing action (the “Original Action”) related to contaminants which allegedly flowed from their property into neighbouring soil. In a separate West Van and Lions Gate sought to rely upon their insurance policy from Economical Mutual Insurance Company (“Economical”) and Intact Insurance Company (“Intact”) to advance their claim that the insurance companies had a duty to defend and indemnify the policy holders in the Original Action based on an all risk insurance policy.

In the Original Action, the Plaintiffs alleged that Lions Gate and West Van historically operated automobile repair business and dry-cleaning businesses on the property and that contaminants from these operations entered into the groundwater, which flows to the neighbouring property. Importantly, was also alleged that the pollutants may have existed or resulted from operations prior to the operations of Lions Gate and West Van but that they were now liable for the leakage. For a period of these operations, insurance was provided by Intact and Economical based on policies, which included environmental and pollution liability exclusions.

The Court held that Intact and Economical were responsible to defend West Van and Lions Gate under the policies. This responsibility was established based on two considerations: first, whether the claim triggered the insurance policy, and second, whether any of the exclusions applied. On the first point, the Court held that the general, broadly worded grant of coverage included the damage at issue. The insurers did not seriously dispute this point, relying instead primarily on the exclusions in the policy.

When considering the exclusion clauses, the Court held that the policies did not “clearly and unambiguously” preclude coverage, and therefore did not meet the applicable legal test. The policies from Intact failed to exclude coverage for environmental claims for which the insured was deemed to be liable, but for which they had not caused the underlying pollution (such as pollution from a previous owner, with absolute and retroactive liability arising under the EMA.) The policy contained a broad catchall, but also listed a number of specific exceptions that the judge found created ambiguity as to whether deemed liability would be covered.

As a result, the Court held that at least one or more of the claims – specifically those related to liability arising from pre-existing pollutants – were not clearly and unambiguously excluded under the policy. The mere possibility that one or more of the claims was potentially not excluded was sufficient to trigger Intact and Economical’s duty to defend. As a result, the Court held the duty to defend had been triggered.

#### **d. *Sorbam Investments Ltd. v. Litwack*, 2017 ONSC 706**

In *Sorbam Investments Ltd. v. Litwack*, 2017 ONSC 706, the plaintiff alleged that land that was adjacent to land owned by the defendants had been contaminated by a previous tenant of the defendants. As a result, the plaintiff sought damages for the cost of remediation, and for the diminution in the value of the lands from the “stigma” of contamination. The plaintiffs sought to advance their claim on three grounds: nuisance, negligence and a claim under s.99 of the *Ontario Environmental Protection Act*, R.S.O. 1990, c. E. 19 (the “EPA”).

The court dismissed all three claims. The claim under the EPA failed because no evidence was adduced at trial that the defendants were the “owners” of the pollutants at issue. The nuisance claim failed because under Ontario common law it must be shown that the nuisance was either “plainly contemplated by the lease” or reasonably foreseeable. Based on the facts found at trial, neither was the case – the previous tenant was a dry-cleaning business and the landlord had no indication or expectation that contaminants would be leaked at the time.

Although the court recognized that neighbours have a duty to each other to not use their lands in a way that would pose a foreseeable risk to adjacent properties, the third claim in negligence failed as well. The court emphasized the fact that the harm which occurred in this case from the drycleaners was not reasonably foreseeable by the defendant at the relevant time.. The property was loaned to a low-risk business, and was therefore distinguishable from cases involving obviously risky businesses, such as a propane business that might carry the risk of escaping gas, explosion or fire. Thus the harm that occurred was not something the landlord could have reasonably foreseen or expected at the relevant time, and the claim in negligence was dismissed. .

## **2. Environmental Prosecutions**

#### **a. *R. v. Rio Tinto Alcan Inc.*, 2017 BCCA 440**

Rio Tinto Alcan Inc. (“Rio Tinto”) maintained and operated a hydroelectric power station on a river in British Columbia. At the bequest of BC Hydro, Rio Tinto initiated a rapid reduction in the volume of water passing through the station in order to enable BC Hydro to conduct emergency repairs on a power transmission line. Changing the water flow resulted in casualties amongst the local juvenile salmon population, which was a violation of the *Fisheries Act*, R.S.C. 1985 c. F-14 (“Act”).

At trial, the court held that Rio Tinto had not exercised sufficient due diligence in order to avoid such harm, that Rio Tinto had acted unlawfully, and that compliance with the law in the circumstances was not demonstrably impossible. As a result, all four defenses raised - due diligence, necessity, ministerial authorization and officially induced error – were rejected. Rio Tinto was convicted of violating the Act on two counts related to the destruction of fish and fish habitat and was sentenced to pay fines and penalties totaling \$200,000. Of this amount, \$125,000 was a payment to the Crown under s. 79.2(f) of the Act “for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat. . .” in northern BC.

Rio Tinto appealed the convictions and sentence to the summary conviction appeal court. The appeal court upheld the convictions but found that the trial judge did not provide sufficient consideration or reasons as to why the \$125,000 payment had been ordered. In the appeal court's view, the trial judge had allowed the ability of Rio Tinto to pay a fine of that magnitude without significant hardship to overwhelm all other sentencing considerations. As a result, the appeal overturned that aspect of the sentence.

The Crown then sought leave to appeal this decision to the BC Court of Appeal. However, the Court dismissed the Crown's application due to a lack of merit. The court held that the appeal judge had appropriately considered the need for deference to the sentencing judge and had acted reasonably in deciding that the sentencing judge had allowed Rio Tinto's ability to pay the fine to overwhelm all other principles of sentencing. As a result, there was no basis on which an appeal could succeed, and therefore leave to appeal was denied.

#### **b. *R v. 3853942 Canada Inc., 2017 BCPC 290***

The defendant in this case was a group of companies operating as Saputo Dairy Products Canada, General Partnership ("Saputo"). Saputo was charged with 6 counts under s. 36(3) of the *Fisheries Act* (the "Act") for releasing a deleterious substance in a place where a deleterious substance may enter water frequented by fish.

The charges stemmed from an incident that occurred on April 21, 2013, at Saputo's dairy plant in Abbotsford, when a coupler joining two sections of pipe within Saputo's new waste treatment facility pulled apart, resulting in the release of 76,000 litres of waste water into a nearby creek. The treatment facility operated by collecting all waste water into a "lift tank". The water would then travel by pipe from the lift tank to Tank 1 and then to Tank 2 for treatment before being released into the local sewage system. The spill occurred where the pipe connected the lift tank to Tank 1.

As section 36(3) of the Act is a strict liability offence, at issue was whether Saputo committed the prohibited act, and if so, whether Saputo could avoid liability by demonstrating that it exercised due diligence. Because there was no evidence as to the Ph level of the waste water at the point it entered the creek, all charges were based on the second mode of committing a s. 36(3) offence, i.e., that a release of a deleterious substance occurred that *may* enter water frequented by fish.

The court first determined that the substance was deleterious. Evidence from the Ph probe in Tank 1 demonstrated that the Ph level of the water in the tank at the time of the spill was at a level that would kill fish. However, as no other direct evidence of Ph levels of the waste water existed, the Crown failed to prove that the waste water at other points in the treatment facility were deleterious, and there was insufficient evidence to draw any such inference. As a result, counts related to deposits of the waste water at Tank 2, the lift tank, and other sections of connecting pipe were dismissed, and only the charge related to the deposit from Tank 1 remained.

Defence counsel argued that under the second mode of s. 36(3), the Crown must prove there was a real and foreseeable risk that the substance "may" enter water frequented by fish. The Court disagreed, finding that "foreseeability" is not part of the *actus reus* analysis but only is considered at the due diligence stage. All the Crown must prove is that there was a factual risk that the substance may enter water frequented by fish. The court accepted such a risk existed in this case and found that the defendant had committed the *actus reus* with respect to the waste water from Tank 1.

Moving on to whether Saputo exercised due diligence, the court considered whether the spill was reasonably foreseeable. The court stated that foreseeability is considered with respect to the particular event. The issue is not whether it is reasonably foreseeable that a spill would reach the creek, but whether it was foreseeable that the spill would occur due to the coupler failing.

The court found that the spill from Tank 1 was not reasonably foreseeable based on the following factors:

- The system was not connected in any way to the storm sewer system and no waste water was expected to go outside the sanitary system.
- Related to the above, Saputo employees were shocked that the spill occurred: "shock or surprise is by itself not a defense, but it is so when combined with the due diligence used to construct and maintain the waste water treatment system." (para. 134)
- Saputo retained and relied on the expertise of an experienced engineering firm to design and oversee the construction of the system, and provided adequate instructions to the firm.
- The firm's decision to use the coupler was reasonable given its intended use and the expected total axial load.
- The cause for misalignment was uncertain and could have been due to natural events such as the ground settling.

As a result, Saputo was acquitted of all charges.

### c. *R. v. Morshedian, 2017 BCSC 408*

Readers of last year's CLE Environmental Law update may recall the conviction and sentencing of a couple who violated several West Vancouver bylaws. The couple undertook significant landscaping work without acquiring the requisite permits and maintaining appropriate sediment control plans. The defendants acquired approximately 100 dump truck loads of soil over the course of several months and deposited these onto their residential property. Due to weather conditions and persistent moisture, there was seepage of mud onto adjacent properties, along with the collapse of a fence between the properties. In 2017 the conviction and sentences were appealed on nine different grounds before the British Columbia Supreme Court. In upholding the decision of the lower court, the Supreme Court found that the sentencing judge had sufficient evidence on the record, had correctly interpreted and applied the relevant law and authorities, and had the appropriate jurisdiction to make the decision made. In particular, those findings with regards to the credibility of the husband and wife's testimony and the leniency granted to the district with regards to some uncertainty about the exact boundaries of the property were noted by the Court. The appellants sought to raise two novel arguments on appeal: that the relevant bylaws were *ultra vires* and unenforceable, and that the fines violated s.12 of the *Charter*. Both of these grounds of appeal failed as a result of not being raised at trial.

## 3. Judicial Review

### a. *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., 2017 SCC 41*

The Chippewas of the Thames First Nation ("Chippewas") challenged the scope of the consultation that occurred during a National Energy Board ("NEB") review of a proposed pipeline by Enbridge Pipelines Inc. ("Enbridge"). The NEB is a statutory body with delegated executive responsibility, and in this capacity makes decisions that may adversely impact Aboriginal treaty rights. In approving the application to build a pipeline, the NEB acted as the agent of the Crown and therefore had an obligation to consult.

The Crown may rely on steps undertaken by a body such as the NEB to meet its obligations so long as the body has sufficient powers to undertake actions to meet the obligations and that the affected Aboriginal parties are aware the Crown intends to rely upon those steps to fulfil its duty to consult.

In these circumstances, the NEB issued a notice to the Chippewas ahead of the hearing process. The NEB also provided funding so that representatives from the Chippewas could attend the hearings and present their concerns over the pipeline. After reviewing the concerns and other submissions of all parties, the NEB approved the pipeline, finding that any impact on the rights and interests of Indigenous groups would be minimal and mitigated, and that they had received adequate notice, information, and the opportunity to share their views.

The SCC held that the constitutional obligations of the Crown were satisfied by the actions undertaken by the NEB. The NEB provided early notice of the hearings, and invitations to participate in the earliest stages of the process. The Chippewas were aware no other Crown entities were involved in the decision making process, and that the NEB was the final decision maker. The Chippewas accepted and participated in the hearings, and their concerns were addressed in the written reasons provided by the NEB.

### b. *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54*

The Ktunaxa Nation ("Ktunaxa") is a British Columbian First Nation, for whom the Grizzly Bear Spirit represents a key figure in their belief structure. The spirit resides in an area the Ktunaxa call Qat'muk, which is located within their traditional territories in British Columbia. Beginning decades ago, Glacier Resorts Ltd. ("Glacier Resorts") sought government approval to build a year-round ski resort in Qat'muk and undertook consultations with the Ktunaxa. As a result of these consultations, changes were made to the proposed ski resort to accommodate Ktunaxa concerns.

After these accommodations, the Ktunaxa were still dissatisfied. This resulted in them adopting the stance that accommodation of any sort would never suffice as the project would drive the Grizzly Bear Spirit from Qat'muk. The Ktunaxa alleged that this would cause irreparable harm to their beliefs. After negotiations failed, the Minister responsible declared that reasonable consultation had occurred, and the project was approved. The Ktunaxa sought judicial review of that decision on the grounds that the decision breached the Crown's duty of consultation and accommodation, as well as that by driving off the Grizzly Bear Spirit the project would ultimately violate their right to freedom of religion. The chambers judge dismissed the petition and the Court of Appeal affirmed that decision.

The Supreme Court of Canada unanimously upheld the decisions of the lower courts. In doing so, they held that the Minister's decision did not infringe on the Ktunaxa's right to freedom of religion. The Ktunaxa's freedom to hold their belief was not impaired by the development, nor was their freedom to manifest those beliefs. The SCC held that instead they were attempting to advance a novel claim by seeking judicial protection of the focal point of their beliefs, the Grizzly Bear Spirit, rather than protection of their ability to hold their beliefs or practice them. Further, the SCC held that the Minister had met its duty to consult based on the two decades of in-depth consultation that had occurred and the fact that reasonable accommodation had been offered. As a result, the SCC dismissed the appeal and upheld the Minister's decision to allow the resort.

**c. *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40**

The National Energy Board (“NEB”) issued authorization for offshore seismic testing for oil and gas to occur in Nunavut. The authorization was opposed by the Inuit of Clyde River (“Clyde River”) and they sought judicial review of the NEB’s decision. In making the decision, the NEB triggered a duty to consult, and undertook to fulfil this duty through an inquiry and hearings. The Federal Court of Appeal found that the Crown’s duty to consult was triggered, that the Crown was entitled to rely on the NEB’s actions to fulfil this duty and that the NEB’s process had satisfied the duty to consult. The Supreme Court of Canada allowed the appeal by Clyde River and quashed the authorization granted by the NEB. The SCC noted that the NEB can be relied on by the Crown to completely or partially fulfil the Crown’s duty to consult. This is because the NEB possesses the powers needed to hear all relevant information, and must conform with s. 35(1) of the Constitution Act, 1982 when making a decision. As a result, as long as the NEB addresses the concerns of any Indigenous groups whose rights are affected by a decision then it is possible that the duty to consult will have been fulfilled.

The SCC quashed the authorization in these circumstances because the NEB’s consultation and accommodation efforts were found to be inadequate. The inquiry conducted was primarily into the environmental effects, but in order to fulfil the duty to consult the NEB must also take into consideration the impact on the right allegedly being infringed. The assessment which was undertaken failed to give any consideration to Clyde River’s treaty rights or how they would be affected. In part, this was because the process was severely limited with no oral hearings or participant funding. The SCC noted that these are not always required, but that when absent it may indicate insufficient consultation. These failures were compounded by a lack of notice on behalf of the Crown that they intended to rely upon the decision of the NEB to fulfill their duty to conduct.

**d. *Unifor Local 2301 v. Rio Tinto Alcan Inc.*, 2017 BCCA 300**

Rio Tinto Alcan Inc. (“Rio Tinto”) applied for an amendment to a permit it held allowing it to discharge an increased amount of sulphur dioxide into the air. The director granted the permit, but sought additional information and submissions prior to making a decision on how the increased discharges were to be monitored. After receiving the submissions, the director gave his approval of the monitoring plan proposed. Unifor Local 2301 (“Unifor”) appealed the approval to the Environmental Appeal Board (“EAB”). The EAB rejected the appeal on the basis that the approval of the monitoring plan was not a “decision” such that it was appealable under the authority granted to the EAB by the *Environmental Management Act* (“EMA”).

On judicial review, the chambers judge set aside the decision of the EAB on the basis of unreasonableness. The director, by granting approval, had exercised power and imposed a requirement upon Rio Tinto and as a result triggered the provisions of the EMA which allowed for appeal. The interpretation of the EMA by the EAB was overly narrow in terms of what constituted a decision.

The BCCA upheld the decision of the chambers judge, dismissing the appeal by Rio Tinto. It held that the decision of the EAB was unreasonable in light of the provisions of s. 99 of the EMA, which was broadly worded. The BCCA further stated that the EAB’s attempt to distinguish a decision derived directly from the EMA and a decision which arose from provisions enacted under the EMA in order to determine which were appealable was incorrect. The exercise of the powers granted to the Director by the statute was sufficient to create an appealable decision.

**e. *Prophet River First Nation v. British Columbia (Minister of the Environment)*, 2017 BCCA 58**

Prophet River First Nation (“Prophet River”) sought judicial review of a decision of the Minister to issue an Environmental Assessment Certificate (“Certificate”). The Certificate in question was related to the Site C hydroelectric dam (“Site C”), the construction of which would allegedly impact the treaty rights of several First Nation groups including Prophet River. As a result, after the decision to issue the Certificate required for the project to proceed was made, Prophet River along with another First Nations sought review of that decision. The application for judicial review was dismissed, and Prophet River appealed.

The British Columbia Court of Appeal dismisses the appeal. There were two issues: the first was whether the Minister was constitutionally obliged to determine whether Site C constituted an infringement of the treaty rights of Prophet River, and whether that infringement was justifiable. The BCCA held that the Minister was not required to make a determination on infringement as long as there was a proper appreciation of the treaty rights at play. Those exercising administrative decision making powers are not required to make a determination of a constitutional nature such as whether a treaty right will be unjustifiably infringed.

The second question was whether the scope of consultation was sufficient with Prophet River. An extensive multi-stage consultation process was conducted during the decision making process leading up to the issuance of the Certificate. This was held to suffice for the purposes of meeting the Crown’s duty to consult.

## 4. Miscellaneous

### a. *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 401

The British Columbia Court of Appeal confirmed that customary international law may be used as a basis to seek damages from B.C. companies alleged to have acquiesced in human rights abuses in foreign jurisdictions. The decision in *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 401 (“*Araya*”) is a novel and important step in the development of “transnational law” that could expand the scope for liability for corporations conducting resource development projects abroad. The defendant Nevsun Resources Inc. (“Nevsun”) is a B.C. mining company that entered into a joint venture with Eritrean state companies to develop and operate the Bisha gold mine near Asmara, Eritrea. Through its foreign subsidiaries, Nevsun owns 60% of the mine. The plaintiffs are a group of Eritrean citizens who alleged that they were forced by Eritrean authorities to work in the mine in inhumane conditions under the constant threat of punishment, torture, and imprisonment. They eventually fled to Canada as refugees and commenced an action in 2014 against Nevsun on the basis that Nevsun violated customary international law (“CIL”) by aiding or permitting the use of forced labour, slavery, torture, and other crimes against humanity.

In 2016, Nevsun brought a number applications seeking to prevent the action from proceeding to trial (2016 BCSC 1856). Nevsun first sought to stay the proceedings on the grounds that Eritrea is the more appropriate forum for a trial (the “Forum Application”). The lower court denied the application because there was compelling evidence that the Eritrean judicial system was corrupt and unlikely to adjudicate the issues fairly, and there was a real risk of imprisonment or death if the plaintiffs returned to Eritrea to pursue their action.

Nevsun also sought to have the action dismissed on the basis of the “Act of State” doctrine, which is a rule that precludes courts from adjudicating the legality of a foreign state’s conduct (the “Act of State Application”). The lower court denied the application because Eritrea was not a party to the action and the doctrine had never formed the basis of a decision in a Canadian court before.

In the third application, Nevsun sought to have the portions of the notice of civil claim that relied on CIL struck on the grounds that breaching CIL norms is not an actionable wrong (the “CIL Application”). Prior to this case, no Canadian court had ever recognized a civil remedy for breaching CIL norms. The Court denied the application because Nevsun had not proved that the claim was certain to fail. The Court concluded that this novel issue should be properly considered on its merits after a trial.

The Court of Appeal upheld all three decisions. On the Forum Application, the court held that the lower court reasonably concluded that the risk of death, corruption, and unfairness to the plaintiffs outweighed considerations of expense, inconvenience, and practical challenges.

On the Act of State Application, the Court of Appeal found that the plaintiffs were not challenging Eritrea state action per se. Rather, their claim focused on Nevsun’s conduct, which could be adjudicated without the need to pass judgment on Eritrean laws or actions. In any event, even if this case involved some consideration of the legality of Eritrean state acts or laws, the Court stated that the public policy exception to the Act of State doctrine would apply given the serious wrongs alleged in this claim.

Finally, the Court upheld the lower court’s decision in CIL Application. The Court noted that causes of actions against private parties for breaching CIL norms have been recognized in other jurisdictions, and that “transnational law” (which regulates “actions or events that transcend national frontiers”) is an emerging area of law that might be adopted into Canadian law. As such, the plaintiffs’ claim was not “bound to fail” and ought to proceed to trial.

This decision could have significant ramifications for companies engaging in resource projects in foreign jurisdictions, particularly in developing countries. Companies may find themselves in a B.C. courtroom having to answer for events that occurred half a world way in which they did not directly participate and which were legal in the country in question.

It is important to note, however, that the Court has only permitted the action to proceed to trial, and has not made any determination on the merits of the claim. Whether a court ultimately recognizes this novel claim remains to be seen, and both levels of court recognized that the plaintiffs will have to overcome significant hurdles to succeed at trial. At the same time, both courts also recognized, and at times seemed to welcome, the incremental development of the common law in this area and the effectiveness of such legal mechanisms in an increasingly globalized economy.

### b. *Goodyear Canada Inc. v. Canada (Minister of the Environment)*, 2017 FCA 149

Goodyear Canada Inc. (“Goodyear”) appealed a decision by the Federal Court (2016 FC 466) dismissing their application for judicial review of a decision by the Minister of the Environment (“Minister”). The Minister published an order proposing the addition of the substance BENPAT to the List of Toxic Substances maintained under Schedule 1 of the *Canadian Environmental Protection Act*, 1999 S.C. 1999, c. 33 (“CEPA”). Upon publication of this order, Goodyear sought the establishment of a board of review to inquire into the nature and extent of the hazard BENPAT represented.

The Minister declined to convene a board of review. Goodyear had failed to provide any new scientific information upon which the conclusion of the Minister could be changed or reviewed. The information that Goodyear did have had been provided previously to the Minister through a lengthy consultation process which included several opportunities to present data and challenge the data on which the order was made. Goodyear sought judicial review of this decision and the Federal Court dismissed the application.

The Federal Court of Appeal dismissed the appeal by Goodyear. The FCA held that on the basis of transparency, justification, acceptability, defensibility and intelligibility, the decision to not convene a board was reasonable. The Minister had provided Goodyear numerous opportunities to present their concerns, and that the Minister has discretion within s. 333 of CEPA to decide what test to use when determining whether to convene a board. Finally, the FCA noted that Goodyear would have some recourse open to it if a final order is issued adding BENPAT to the List of Toxic Substances. .

### **c. *Marine Harvest Canada Inc. v. Morton, 2017 BCSC 2383***

Marine Harvest Canada Inc. (“Marine Harvest”) applied for an injunction preventing a number of individuals from continuing to occupy one of its aquaculture facilities (the “Facility”). Marine Harvest operates a number of fish hatcheries throughout British Columbia. These fish hatcheries rely upon specific timing in the birthing and raising of salmon, interference with which can quickly result in significant losses.

The defendants, two individuals of several who were occupying the Facility (collectively, the “Occupiers”), did not significantly deny or contradict any of the allegations put forth by Marine Harvest. Marine Harvest stated that the Occupiers had caused damage to equipment at the Facility, built structures including a bunk house, kitchen and outhouse at the Facility, threatened some of the employees of Marine Harvest, increased the risk to staff working at the Facility by denying access to certain walkways, and interfered with operations of the Facility.

The defendants relied on three assertions for their defence. First, that a claim of aboriginal title had been advanced in a separate proceeding. Second, that as a result of that claim there was an aboriginal right to govern in the region where the Facility was located. This right to govern, it was claimed, included a responsibility to protect the resources within the region and therefore the defendants were exercising their aboriginal rights to monitor the activities of Marine Harvest out of a concern they posed a threat to those resources.

The Court rejected this defence entirely. First, no evidence of the aboriginal title claim had been presented but the Court noted that even if it existed there is no line of existing authority which recognizes a right to govern or monitor prior to title being determined. The Court notes this does not preclude such a right from existing, but it makes the claim more difficult.

Further, the Court held that the activities of the defendants went well beyond mere monitoring and crossed into occupation. The construction of structures at the Facility and the invasive nature of the activities of the defendants raised the question as to where a mere assertion of aboriginal title should suffice to enable such activities.

Finally, the Court noted that Marine Harvest had made numerous offers to discuss, or negotiate with the defendants all of which had been refused. Marine Harvest has numerous agreements with different aboriginal groups, which include monitoring of its activities, but the defendants outright refused to participate or engage at all.

As a result, the Court granted the injunction after finding that irreparable harm would occur to Marine Harvest. This harm, though economic in nature, would likely be unrecoverable from the defendants who are unemployed and without significant assets. Even if irreparable harm did not exist in these circumstances, the Court found that in some instances, where balance of convenience strongly favours an injunction, irreparable harm is not necessary. The Court held that in the alternative, the balance of convenience so strongly favours Marine Harvest that it must grant the injunction.

### **d. *Kirk v. Executive Flight Centre Fuel Services, 2017 BCSC 726***

In *Kirk v. Executive Flight Centre Fuel Services*, 2017 BCSC 726, the plaintiff sought certification of a class action brought on behalf of all parties affected by an oil spill (the “Spill”). The Spill resulted from a tanker truck, which slipped down an embankment and overturned. The defendant owned tanker truck, in attempting to deliver oil to helicopters engaged in fighting a forest fire, took an incorrect turn off the highway.

At some point during his return, the truck fell down the embankment and overturned. As a result, around 35,000 litres of helicopter fuel spilled into a waterway. This in turn caused extensive pollution, resulting in an evacuation order being issued for 2,776 properties by the Interior Health Authority. An additional “do not use water” order was issued for the residents who drew water from Lemon Creek, Slocan River and the Kootenay River.

Certification was sought for a class action on behalf of everyone affected by the evacuation order against the various defendants, the owner of the fuel tanker and the Province. The representative plaintiff sought recognition of the accident as a “single incident mass tort” and advanced claims against the defendants in negligence, nuisance and the rule in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 (U.K.).

The court certified the action after consideration of the factors under s.4(1) of the *Class Proceedings Act*. In particular, the court found that: the representative plaintiff was an appropriate person to advance the claim; that the class was identifiable; that there were causes of action alleged against each defendant; and that the common issues were best resolved through a class action.

The ramifications of this decision are significant. Defendants against actions arising from environmental emergencies are likely to face an uptick in plaintiffs seeking certification. In particular because in British Columbia, class action certification proceedings are “costs-free” and because certification may offer certain procedural benefits to the plaintiffs when, as in this case, the damages alleged are not obvious.

**e. *Yaiguaje v. Chevron Corporation*, 2017 ONSC 135**

In *Yaiguaje v. Chevron Corporation*, 2017 ONSC 135 the Ontario Supreme Court heard a claim brought against Chevron Corporation (“Chevron”) for recognition and enforcement of an Ecuadorian judgment against Chevron for \$9.5 billion in environmental damage. The Supreme Court of Canada had cleared the way for the hearing by ruling that Ontario had the jurisdiction to hear the claim, as such a claim does not require a real and substantial connection between Canada and the facts giving rise to the judgment. However, the Court also noted that the plaintiffs would have to convince the Ontario court that it was appropriate to enforce the judgment against Chevron Canada Limited (“Chevron Canada”) – an indirect subsidiary of Chevron that was not a party to the Ecuadorian judgment. This is the decision on that issue.

The two issues before the court were: (1) whether the shares of Chevron Canada were exigible and available for execution and seizure under the Ontario *Execution Act*, R.S.O. 1990, c. E-24; and (2) if not, whether the Court should pierce to corporate veil so and enforce the judgment against Chevron Canada.

Addressing the first issue, the court concluded that the *Execution Act* was a procedural statute that only created remedies for parties who already have the right to execute judgment against another party. It does not create a substantive right to execute against a person who is not the subject of an existing judgment. Therefore, the shares in Chevron Canada were not available for execution and seizure.

Accordingly, the Court considered whether to pierce the corporate veil. Chevron Canada relied upon the existing jurisprudence on veil piercing, which provides that the corporate veil should only be pierced as against a subsidiary where (1) the subsidiary is “completely dominated and controlled” by the parent; and (2) the subsidiary is being used by the parent in a wrongful manner akin to fraud. The Court found that neither condition was satisfied in this case: Chevron Canada functioned independently of its Chevron in a manner that was typical of a parent-subsidiary relationship (Chevron Canada was not a “puppet”); and in any event, the plaintiffs did not allege that the corporate structure at issue was being misused for wrongful or fraudulent purposes.

The plaintiffs asserted that the usual test for veil piercing should not be applied as a “strict, inflexible rule” and that it should be relaxed where its strict application would yield a result that is “flagrantly opposed to justice”. The Court did not accept that submission, noting that the case law was well established and made it clear that there were no exceptions to the usual rule on equitable grounds.

Therefore, the court dismissed the claim against Chevron Canada.

**f. *Chingee v. British Columbia*, 2017 BCCA 250**

Readers of last year’s CLE Environmental Law update may recall the striking of a claim on the basis that it was an abuse of process. The plaintiff in the claim was a member of an aboriginal band who alleged that as a result of logging operations conducted or allowed by the defendants he was unable to use his traplines as he had previously done so. The claim was a purely private action, as the Chief of the band had sworn an affidavit to the effect that the plaintiff was not able to represent the band in this matter. The trial court dismissed the claim as an abuse of process on the basis that the plaintiff had been given appropriate notice and opportunity to voice his concerns about the logging.

The British Columbia Court of Appeal found that the pleading did not, and could not, contain a viable cause of action. The BCCA found that the pleadings were generic and failed to articulate the material facts necessary to demonstrate why the timber harvesting was unreasonable. The pleadings merely stated what had occurred, without demonstrating any potential for a claim arising from the facts. The Court held that for similar reasons, the claims advanced in trespass, negligence, duty of care, and fiduciary duty were all bound to fail. In particular, the fiduciary claim was bound to fail because the claim was private, not an Aboriginal interest or right. As a result, the Court did not consider whether the claim was an abuse of process and dismissed the appeal.

## 5. Environmental Appeal Board Decisions

### a. **2016-EMA-121(a) *George E. Curtis and Kevin F. Curtis v. Director, Environmental Management Act* (Steele Springs Water District, Participant)**

George and Kevin Curtis (“Appellants”) own and operate a farm which includes a cattle feed lot for the past 42 years (“Farm”). The Farm sits above an unconfined aquifer (“Aquifer”) and is surrounded by other homes and farms. The Aquifer provides water to approximately 150 residents, along with additional drinking water wells. In 2014, increased nitrate levels were detected near the intake for local water supply and an investigation occurred. The investigation found large, uncovered piles of manure on the Farm. Manure can be a source of nitrates, and based on this evidence the Director issued an order to the Appellants to “prepare and implement a monitoring plan and environmental impact assessment for nitrates in the soil and groundwater on their lands.”

The Appellants appealed the order, arguing that they were not responsible for the nitrate contamination and that the order lacked an evidentiary foundation. The Director contended that even if the Appellants were not the sole source of the contamination, they contributed to the problem. The Environmental Appeal Board (“EAB”) held that in making a pollution abatement order, the Director was required to obtain sufficient evidence establishing reasonable grounds for the order. In this case, the evidence merely had to show that on the balance of probabilities the manure was more likely than not to be leaching nitrates into the Aquifer.

The evidence adduced by the Appellants showed that in the past twenty five years, the level of manure on the farm was fairly consistent. During that same period, the level of nitrates found within the Aquifer had twice reached levels of concern similar to those currently occurring. Further, there was no evidence that the nitrates from the Farm ever reached the Aquifer through water runoff, or that the manure was exceptionally likely to contribute to the increase in nitrate levels when compared to other sources such as crops. As a result, the EAB found that there was no evidence to support the Director’s decision and reversed the order, allowing the appeal.



NO SMOKING

# Legislation

## 1. Provincial Legislation

### a. *Environmental Management Act, SBC 2003, c 53*

#### (i) *Spill Reporting Regulation (BC Regulation 187/2017)*

On October 30, 2017 the B.C. Ministry of Environment and Climate Change Strategy repealed the *Spill Reporting Regulation*, B.C. Reg. 376/2008 (the “Old Regulation”) and replaced it with the *Spill Reporting Regulation* (Ministerial Order No. M329) (the “New Regulation”). The New Regulation, which is currently in effect, expands the circumstances in which spill reports must be provided to the Province and increases the information which must be contained within such spill reports.

Under the Old Regulation, a person who had possession, charge or control of a listed substance when it was spilled in an amount equal to or greater than the amount specified in the Schedule to the Old Regulation, was obligated to provide a spill report to the Provincial Emergency Program immediately after the spill occurred. The spill report was required to include, among other things, the contact information of the person who caused the spill, the location and time of the spill, the type and quantity of the substance spilled, the cause and effect of the spill, and the details of spill response actions. In addition, where a spill occurred, the person who had possession, charge or control of the listed substance when it was spilled was required to take all reasonable and practical steps to stop, contain and minimize the effects of the spill.

Under the New Regulation, the triggers for reporting a spill, and the information which must be provided to the Province in connection with a spill, have been substantially altered. New definitions in the New Regulations include:

“emergency response completion date” means the date on which all of the following criteria are met:

- a. the incident command post is disestablished;
- b. the source of the spill is under control and is neither spilling nor at imminent risk of spilling;
- c. emergency actions to stabilize, contain and remove the spill have been taken;
- d. the waste removed from the spill site has been received at a facility for disposal or received for transportation to a facility for disposal;
- e. if applicable, all notices respecting evacuation from the spill site have been expired or rescinded; and
- f. all equipment, personnel and other resources used in emergency spill response actions have been removed from the spill site, other than equipment, personnel or other resources required for sampling, testing, monitoring or assessing at the spill site, or recovery or restoration of the spill site.

“regulated person” means

- a. a person who, in the course of operating an industry, trade or business, has possession, charge or control of a prescribed substance in prescribed quantities, or
- b. a person referred to in paragraph (a) whose employee, under the person’s direction, has possession, charge or control of a prescribed substance in prescribed quantities;

“responsible person” means a person who has possession, charge or control of a substance or thing when a spill of the substance or thing occurs or is at imminent risk of occurring;

“spill” means the introduction into the environment, other than as authorized under the *Environmental Management Act* and whether intentional or unintentional, of a substance or thing that has the potential to cause adverse effects to the environment, human health or infrastructure.

The new triggers for reporting a spill include:

- If a spill of a listed substance (i.e. a substance listed in the Schedule to the New Regulation) other than natural gas occurs or is at imminent risk of occurring, and the spill enters or is likely to enter a “body of water” in any amount, a responsible person must immediately report the spill to the Provincial Emergency Program. A “body of water” includes a stream, an aquifer, fish habitat, and any naturally formed pool of water or ditch that could drain or empty directly into a stream, an aquifer, or fish habitat.

- If a spill of a listed substance other than natural gas occurs or is at imminent risk of occurring in an amount equal to or greater than the amount specified for the listed substance in the Schedule to the New Regulation, a responsible person must immediately report the spill to the Provincial Emergency Program.
- If a break in a pipeline or fitting operated above 100 psi results in a sudden and uncontrolled spill of 10 kg or more of natural gas, a responsible person must immediately report the spill to the Provincial Emergency Program.

The spill report to the Provincial Emergency Program must now include information similar to that required under the Old Regulation (e.g. the contact information of the person who caused the spill, the location and time of the spill, the type and quantity of the substance spilled, the cause and adverse effects of the spill, and the details of proposed spill response actions). However, under the New Regulation, a responsible person for a spill (other than a person who holds a permit to carry out an oil or gas activity to which the *Emergency Management Regulation*, B.C. Reg. 204/2013 applies) may be required to provide a “lessons-learned report” to a director and, in relation to a spill that occurs on or after October 30, 2018, will be required to provide periodic spill reports and an “end-of-spill” report to the B.C. Minister of Environment and Climate Change Strategy (the “Minister”).

A director may order a responsible person to submit a lessons-learned report to the director within six months after the emergency response completion date for the spill. A lessons-learned report must include:

- a description of the effectiveness of the spill response actions;
- a description of actions taken to prevent future spills and improve response to future spills;
- responses to any specific questions the director asks in the order; and
- if the responsible entity for the spill is a regulated person:
  - a description of any changes that the person intends to make to the person's spill contingency plan to improve response to future spills;
  - if the spill occurred in a geographic response area, a description of any changes that the person considers should be made to the related geographic response plan to improve response to future spills, and
  - if spill response actions were carried out by a PRO (a preparedness and response organization that holds a PRO certificate), a description of any changes that the person considers should be made to the PRO's area response plan to improve response to future spills.

A person responsible for a spill that occurs on or after October 30, 2018 must submit written reports on the spill to the Minister until the emergency response completion date for the spill. These reports must be submitted: as soon as practical on request of the Minister; at least once every 30 days after the date the spill began, and; at any time the responsible person has reason to believe that information included in prior reports submitted by the responsible person was or has become inaccurate or incomplete. These reports must include, to the extent practicable, the information required in an end-of-spill report.

The person responsible for a spill that occurs on or after October 30, 2018 must submit an end-of-spill report to the Minister within 30 days after the emergency response completion date for the spill. The end-of-spill report must include the information provided in the initial spill report to the Provincial Emergency Program, as well as:

- a description of the circumstances, cause and adverse effects of the spill;
- details of spill response actions;
- an explanation of how and where waste from the spill was disposed of;
- a copy of data from and reports of sampling, testing, monitoring and assessing carried out during spill response actions;
- a map of the spill site and the area surrounding the spill and photographs of the spill; and
- the names of agencies on the scene and the names of other persons or agencies advised about the spill.

#### (ii) ***Recycling Regulation (BC Regulation 449/2004)***

On November 14, 2017, the Minister of Environment and Climate Change Strategy amended the *Recycling Regulation*. The amendments replace Project Stewardship Plans with Extended Producer Responsibility Plans, repeal transitional provisions, and provide greater clarity as to what kinds of paper fall within the scope of the regulations.

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

**(i) Renewable and Low Carbon Fuel Requirements Regulation (BC Regulation 394/2008)**

On December 7, 2016 and January 1, 2017, additional amendments to the *Renewable and Low Carbon Fuel Requirements Regulation* became effective. The amendments add Part 1.1 – General Requirements, which includes certain record retention requirements. In addition, sections 7.2 and 11.022, which are exemption provisions regarding renewable fuel content requirements and low carbon fuel requirements, respectively, were repealed and replaced. Signed statements will now be required for any Part 2 and Part 3 compliance reports, as well as any proposal for an alternate method for carbon intensity by the component.

The amendments also repeal and replace subsection 13(2), which enumerates the contraventions for which a maximum administrative penalty of \$100,000 or a maximum administrative penalty of \$10,000 may apply. New provisions are introduced regarding:

- carbon intensity and fuel regards required for exclusion agreements;
- exclusion reports required for exclusion agreements;
- content requirements for carbon intensity records;
- applications for validation of credits; and
- transfer of debits and validated credits during the transition period.

The amendments also set the carbon intensity limits for gasoline, diesel class fuels, and other fuels.

## 2. Federal Legislation

**a. Environmental Enforcement Act, chapter 14 of the Statutes of Canada, 2009**

In June 2017, the federal government passed a number of environmental regulations and orders as part of the third and final stage of implementing the *Environmental Enforcement Act*. In particular, new fine levels and Administrative Monetary Penalties were brought in force.

**(i) Order Fixing July 12, 2017 as the day on which Certain Provisions of the Act Come into Force**

*Order Fixing July 12, 2017 as the day on which Certain Provisions of the Act Come into Force* (the “Order”) brought into force a number of sections of the *Environmental Enforcement Act*, which will introduce new fine regimes and sentencing provisions to the *Canada Wildlife Act*, the *Migratory Birds Convention Act, 1994*, and the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*.

The new fine regimes will provide fine ranges applicable to different categories of offenders, such as individuals, corporations, small-revenue corporations, other persons, and vessels. Minimum fines are being introduced, and existing maximum fines are being increased for offences that cause direct harm or the risk of direct harm to the environment or for providing authorities with false or misleading information. The new fine regimes also establish double fines for repeat offences.

The new sentencing regimes will codify a stronger set of sentencing principles under each Act and will provide a list of aggravating factors for the court to consider when sentencing offenders.

The Order represents the culmination of a nearly decade-long process of strengthening Canada’s environmental enforcement laws. The *Environment Enforcement Act*, which amended nine environmental statutes, was first assented to in 2009. Implementation of the Act has taken place in three stages: most of the Act was brought into force by Order in Council in 2010 (stage one), and the fine and sentence provisions related to *Canadian Environmental Protection Act, 1999* came into force in 2012 (stage two). This Order brings into force the remaining sections of the *Environmental Protection Act* and is one half of the third and final stage of implementing the Act.

**(ii) Environmental Violations Administrative Monetary Penalties Regulations, SOR/2017-109**

The other half of the third and final stage of implementing the *Environmental Enforcement Act* occurred through the enactment of the *Environmental Violations Administrative Monetary Penalties Regulations* (the “AMP Regulations”). The *Environmental Enforcement Act* first brought the *Environmental Violations Administrative Monetary Penalties Act* (“EVAMPA”) into force in 2010. EVAMPA introduced the administrative monetary penalty (“AMP”), which is a penalty that an authority may issue for a failure to comply with legislated

environmental requirements. AMPs are intended to supplement existing enforcement measures, as one cannot be subject to both an AMP and an additional prosecution for committing the same offence. Although EVAMPA was brought into force in 2010, regulations were needed before AMPs could be used by authorities. The AMP Regulations filled that gap when they came into force on June 2, 2017.

The AMP Regulations establish which environmental offences under the following six Acts may be enforced by way of an AMP:

- *Antarctic Environmental Protection Act*
- *Canada Wildlife Act*
- *Canadian Environmental Protection Act, 1999*, Parts 7 and 9
- *International River Improvements Act*
- *Migratory Birds Convention Act, 1994*
- *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*

Most offences under these Acts are subject to AMPs, with the exception being *mens rea* offences that require the offender to “knowingly” or “wilfully” commit the offence.

The AMP Regulations provide a formula used to calculate the penalty amount applicable in a specific situation. The baseline amount of the AMP is determined by two factors: the category of offence (Type A, B, or C violation, based on the severity of the offence) and the category of violator (whether the offender is an individual or “any other person”, such as a corporation or vessel). No discretion exists to vary the baseline amount of an AMP. Once the baseline amount is determined, the enforcement officer may increase the penalty amount by considering aggravating factors, such as any history of non-compliance, the degree of environmental harm, and whether there was economic gain. The AMP Regulations state that the penalty cannot exceed \$5,000 for a single offence caused by an individual or \$25,000 for a single offence caused by “any other person”. The AMP Regulations also provide for aggregating penalties, as a violation committed over successive days will constitute a separate violation for each day on which the offence continues to be committed.

## **b. Bill C-64: The *Wrecked, Abandoned or Hazardous Vessels Act***

### **(i) New Act tabled in the House of Commons**

On October 30<sup>th</sup>, 2017, the federal government tabled Bill C-64 to enact the *Wrecked, Abandoned or Hazardous Vessels Act* as part of Canada’s broader Oceans Protection Plan. The Act’s objective is to promote the protection of the public, of the environment, and of infrastructure by regulating abandoned or hazardous vessels and wrecks in Canadian waters. The Act was enacted in response to widespread discontent among coastal communities over the costs associated with removing derelict vessels from and remediating the pollutants they discharge. It seeks to address both the environmental and financial aspects of abandoned vessels by implementing a ten-part approach to wrecked vessels.

First, the Act will incorporate the Nairobi International Convention on the Removal of Wrecks (2007) (the “Convention”) into Canadian law. The Convention is an International Maritime Organization treaty that established uniform rules for the prompt and effective removal of shipwrecks in states’ exclusive economic zones.

Second, the Act will require the owners of vessels with 300 gross tonnage and above, and unregistered vessels being towed, to maintain wreck removal insurance or other financial security. Although this portion of the Act does not address the many abandoned vessels currently sitting in Canadian waters whose owners cannot be found, it will help prevent owners from neglecting their financial obligations in the future.

Third, the Act expressly prohibits vessel abandonment except as authorized by law or as required in a maritime emergency. A vessel will be deemed abandoned if an owner has left it unattended for a period of two years.

Fourth, the Act prohibits persons from leaving a dilapidated vessel in the same place for more than 60 days without authorization. A dilapidated vessel is one that is significantly degraded or dismantled or is incapable of being used for safe navigation.

Fifth, the Act authorizes the Minister of Transport or Minister of Fisheries and Oceans to order the removal of a dilapidated vessel from any federal property.

Sixth and seventh, the Act authorizes the Minister of Fisheries and Oceans and the Minister of Transport, respectively, to take measures to prevent, mitigate or eliminate hazards posed by vessels or wrecks and to hold the owner liable for their incurred costs. The term “hazard” is given a broad definition in the Act to include harmful consequences to the environment, coastlines, shorelines, infrastructure, or any other interest including health, safety, well-being, and economic interest.

Eighth, the Act establishes an administration and enforcement scheme to ensure compliance. This scheme includes powers of search, seizure, and an administrative monetary penalties regime. If a vessel owner contravenes certain provisions of the Act – including the prohibition against leaving a dilapidated vessel stranded or grounded for more than 60 consecutive days – the vessel owner may be subject to criminal penalties and even imprisonment.

Ninth, the Act authorizes the Governor in Council to make regulations excluding certain vessels from the application of the Act, setting fees and establishing requirements for salvage operations and towing vessels.

Finally, the Act makes related and consequential amendments to other Acts.

### **c. Environmental and Regulatory Reviews: Discussion Paper**

On June 29, 2017, the federal government released an environmental and regulatory review discussion paper. The paper included a review of the *Canadian Environmental Assessment Act, 2012*, the *National Energy Board Act*, the *Fisheries Act*, and the *Navigation Protection Act*, and was drawn from extensive public consultations, expert panel reports, and parliamentary studies conducted over the course of 12 months. The paper is the first step in a broader effort to modernize environmental assessment and regulatory processes to introduce modern safeguards, support reconciliation with Indigenous peoples, and ensure resources get to market sustainably.

While the paper does not describe specific legislative changes to the environmental regime, it does discuss some of the key measures being considered. These include restoring lost protections to the *Navigation Protection Act*, modernizing the National Energy Board to facilitate transparency, diversity, and impartiality, and establishing a single government agency responsible for the assessment of federally designated projects which considers social, health, and economic aspects of a project.

### **d. Canadian Environmental Protection Act, 1999, SC 1999, c 33**

#### **(i) Off-Road Small Spark-Ignition Engine Emission Regulations, SOR/2003-355**

On October 4, 2017, the Canada Gazette published updated changes to the proposed amendments to the *Off-Road Small Spark-Ignition Engine Emission Regulations* originally published on June 11, 2016. Significant changes include: 1) the establishment of more-stringent standards for air pollutants from exhaust systems in non-handheld machines; 2) standards for air pollutants formed when gasoline evaporates from the fuel systems in handheld and non-handheld machines; and 3) labelling requirements. The amended regulations will affect manufacturers, distributors, and importers of small-spark ignition engines. Most of the amendments come into force on March 22, 2018, with more stringent emission standards applying to engines of 2019 and later model years.

#### **(ii) Microbeads in Toiletries Regulations, SOR/2017-111**

On June 14, 2017, the *Canada Gazette* published the *Microbeads in Toiletries Regulations*. Microbeads are used in many products, including toiletries such as bath and body products, skin cleansers and toothpaste. The regulations will prohibit the manufacture, import, and sale of toiletries used to exfoliate or cleanse that contain plastic microbeads, including non-prescription drugs and natural health products.

On January 1, 2018, the manufacture and import of toiletries that contain plastic microbeads will be prohibited unless the toiletries are also natural health products or non-prescription drugs, in which case the prohibition will begin July 1, 2018.

As of July 1, 2018, the sale of toiletries that contain plastic microbeads will be prohibited, unless the toiletries are also natural health products or non-prescription drugs, in which case the prohibition will begin July 1, 2019.

#### **(iii) Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector)**

On May 27, 2017, Environment and Climate Change Canada published proposed regulations to reduce methane emissions in the oil and gas industry for a 60-day comment period. As proposed, the *Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector)* would introduce control measures to reduce fugitive and venting emissions of methane from the upstream oil and gas industry at both the facility and equipment levels. At the facility level, requirements would include emission limits on facility production venting and leak detection and repair (LDAR) standards. At the equipment level, there would be requirements for well completion by hydraulic fracturing, as well as limits on emissions from pneumatic devices (controllers and pumps) and compressors.

**(iv) *Regulations Amending the Ozone-depleting Substances and Halocarbon Alternatives Regulations, SOR/2017-216***

On October 18, 2017, the *Regulations Amending the Ozone-Depleting Substances and Halocarbon Alternatives Regulations* SOR 2017-216 were published in the Canadian Gazette. These regulations are aimed towards phasing down the consumption of bulk hydrofluorocarbons (HFCs) in Canada by establishing controls on specific products containing or designed to contain HFCs. The regulations will directly impact bulk importers of HFCs, manufacturers of air-conditioning and refrigeration equipment, foams and aerosols, and one hydrochlorofluorocarbons manufacturer.

**(v) *Regulations Amending the Export of Substances on the Export Control List of Regulations, SOR/2017-11***

Even at very low levels, mercury is persistent, bioaccumulative and toxic to human health and in aquatic and terrestrial ecosystems. The *Regulations Amending the Export of Substances on the Export List of Regulations*, SOR/2017-11, which came into force on February 3, 2017, aim to address the dearth of measures in Canada controlling or prohibiting the export of elemental mercury (except when the mercury is contained in hazardous waste). To be in a position to ratify the Minamata Convention – a global treaty to protect human health and the environment from the adverse effects of mercury – Canada had to implement controls on the export of elemental mercury.

**e. *Species at Risk Act, SC 2002, c 29*****(i) *Critical Habitat Orders under the Species at Risk Act***

On December 4, 2017, Critical Habitat Orders for two species / populations were established under s. 58 of the *Species at Risk Act*: (1) Beluga Whale (St. Lawrence Estuary population); and (2) North Atlantic Right Whale. These Critical Habitat Orders trigger a prohibition on the destruction of any part of the critical habitat for these species / populations.

**f. *Fisheries Act (R.S.C., 1985, c. F-14)*****(i) *Regulations Repealing the Fish Health Protection Regulations, SOR/2017-122***

Effective June 9, 2017, the *Fish Health Protection Regulations*, C.R.C., c. 812 are repealed. The objective of the repeal is to remove redundant regulations related to interprovincial movement of salmonids, streamline regulatory requirements for industry, and complete the regulatory responsibility for the domestic movement of salmonids to the Canadian Food Inspection Agency.

The government has received feedback to the paper, and continues to consult with provinces and territories, Indigenous peoples, and a variety of stakeholders to explore specific issues. Proposed changes to Canada's environmental assessment and regulatory processes can be expected in 2018.



## BLG's Vancouver Environmental Law Group

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



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