BLG
Borden Ladner Gervais

Environmental Law

Review of Case Law and Legislative Developments

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A. Introduction

There were many important developments in environmental law in 2021. Reconciliation with Indigenous peoples, climate change, and managing industrial impacts were key topics that shaped judicial, legislative, and policy changes in British Columbia and across Canada.

With respect to judicial developments, jurisdictional disputes, approval of industrial developments, contaminated sites, and environmental prosecutions resulted in groundbreaking changes in environmental law.

There were also important legislative developments: several significant amendments were proposed, introduced, and passed. At the provincial level, there are new regulations that require more rigorous procedures for operations using fossil fuels. Federally, developments include the introduction of new regulations respecting hazardous waste and recyclables, air pollutants, and gasoline.

Finally, key policy developments include the Government of Canada's participation in the United Nations Conference on Climate Action: COP26 and the Government of British Columbia's announcement of various climate action plans to address recent environmental crises in the province.

B. Case Law

1. Supreme Court of Canada Cases

a. *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11

Parliament enacted the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, in 2018. The Act establishes minimum national standards of carbon pricing and operates as a "backstop" where provincial or territorial pricing policies fall short of the stringency required by the Act. Various provinces challenged the Act's constitutionality. The Supreme Court of Canada upheld the Act as a valid exercise of the federal government's power over peace, order, and good government ("POGG").

The majority of the court held the Act's pith and substance is to establish minimum national standards of greenhouse gas ("GHG") price stringency to reduce GHG emissions. The targeted mischief is some provinces' or territories' failure to have a GHG pricing system or a sufficiently stringent system, and the resulting failure to reduce emissions. The legal effect is to create a pricing scheme and to apply that scheme to provinces or territories with no or with an insufficiently stringent pricing mechanism.

The court accepted the federal government has the power to enact the Act under its POGG power. The POGG power requires the matter be of sufficient concern to the country as a whole; have a singleness, distinctiveness, and indivisibility; and have a scale of impact that is reconcilable with the division of powers.

The matter was of sufficient concern. Carbon pricing is a critical measure for reducing GHG emissions. The matter is critical to our response to an existential threat to human life. The matter is single, distinctive, and indivisible. GHGs are a specific type of pollutant. They are predominantly extra-provincial and international in their character and implications. Pricing emissions is a distinct form of regulation. Provinces are constitutionally incapable of establishing a minimum national standard to reduce GHG emissions, and voluntary cooperation between provinces would not assure a sustained approach. Finally, the scale of impact is reconcilable with the division of powers as the impact on provincial freedom to legislate is limited. Parliament will impose the Act only as a backstop and to the extent necessary. This limited constitutional impact is justified by the irreversible harm that would arise if Parliament could not address the matter at a national level.

Justice Côté, dissenting in part, agreed with the majority's formulation of the national concern doctrine but found the Act unconstitutional. Justice Brown and Justice Rowe, dissenting separately, both found the Act wholly *ultra vires* the federal government as its subject matter fell within provincial jurisdiction.

2. B.C. Court of Appeal Cases

a. *A Speedy Solutions Oil Tank Removal Inc. v. Garraway*, 2021 BCCA 220

The appellant, A Speedy Solutions Oil Tank Removal Inc. ("Speedy"), provided contaminated soil remediation services to the respondent, Ms. Garraway. She contracted with Speedy to remove contaminated soil and restore her property; the contract provided for a flat rate unit price. When the parties entered the contract, they did not know how much soil would need to be removed. Ms. Garraway did not pay the final bill for $166,702.73. Speedy brought an action for the unpaid sum. Ms. Garraway argued the contract was unconscionable pursuant to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2. The trial judge agreed it was unconscionable and ordered Ms. Garraway pay a reduced sum of $80,000.

On appeal, the majority of the court found the trial judge erred by finding the contract was unconscionable. The evidence did not support the finding that the amount charged grossly exceeded the price of comparable transactions. The judge misapprehended the expert report; the expert assessed the cost incurred in carrying out the work, not the price at which he or others might have charged to conduct the work. Indeed, the $80,000 value arrived at was very close to the actual costs incurred by Speedy.

Additionally, while core testing may help determine the scope of the work required prior to starting work, Speedy's failure to perform core testing was not unconscionable. It was also not pleaded that core testing should have been performed. It was also not unconscionable not to inform Ms. Garraway of the cost as work proceeded, as she had not asked to be so informed.

In dissent, Chief Justice Bauman found it was open to the judge to conclude that Speedy failed to rebut the presumption of unconscionability and that Ms. Garraway was vulnerable and unable to protect her financial interests.

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

A former gas station owned by Victory Motors (Abbotsford) Ltd. ("Victory") created contamination which migrated across the street to Jansen Industries 2010 Ltd.'s ("Jansen") property. Jansen and Victory hired Levelton Engineering Consultants Ltd. ("Levelton") to remediate the sites.

Jansen commenced an action against Victory. Victory, in turn, commenced an action against the former operators of the gas station.

Victory and Jansen were both awarded costs for retaining Levelton in order to obtain Certificates of Compliance under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*EMA*"). They also sought their legal fees associated with arranging for remediation of the sites as remediation costs under the *EMA*. The trial judge did not award legal fees because neither party adduced evidence about the legal expenses they had incurred.

On appeal, the court found that the trial judge erred in his allocation of responsibility to the extent that he allocated a higher percentage to Victory because it obtained the benefit of the Certificate of Compliance. This adjustment could discourage owners who are "responsible persons" from remediating their lands in a timely way.

In terms of costs, the court upheld the trial judge's decision to dismiss the claim due to a lack of evidence. However, the court suggested that "actual legal costs" reasonably incurred in a site's remediation could be recovered as remediation costs under the *EMA*. This does not include legal costs incurred in litigation over the contaminated site; those costs would be subject to the *Supreme Court Civil Rules* cost rules. The tariff items in the *Rules* are specific to the steps in litigation; remediation legal costs cover quite different tasks.

c. *Highlands District Community Association v. British Columbia (Attorney General)*, 2021 BCCA 232

Highlands District Community Association appealed the dismissal of a petition for judicial review of a mines inspector's decision. The inspector issued a permit to the respondent, O.K. Industries Ltd., to operate a rock quarry. The permit incorporated parts of an environmental report and contained numerous environmental protection conditions. The inspectors' extensive reasons for the decision set out environmental issues, as well as impacts on neighbouring land use, property values, and quality of life.

In his reasons, the inspector noted that climate change is an important issue but stated climate change is not relevant under the *Mines Act*, R.S.B.C. 1996, c. 293. The issue on appeal was whether the decision was unreasonable because the inspector failed to consider the quarry's climate change impacts.

The court dismissed the appeal. The inspector's reasons described his statutory authority. Though his statement that "climate change is not relevant under the *Mines Act*" was overly broad, his interpretation of the factors he was required to consider was reasonable. His stated understanding of the statutory scheme was accurate. The *Mines Act* gives broad discretion to the inspector to determine what information is required for permit applications, does not define environmental issues broadly, and does not refer to climate change. This broad discretion imposes no mandatory requirements. It is not the court's role to direct a decision maker to consider a specific issue. Here, the inspector provided extensive reasons in which he assessed the factors he considered relevant. His failure to consider climate change was not an improper fettering of discretion. Though he could have requested information about climate change impacts, his failure to do so did not render the decision unreasonable.

d. *R. v. University of British Columbia*, 2021 BCCA 188 (Chambers)

UBC and a co-accused, CIMCO Refrigeration ("CIMCO"), were charged with violations of the *Fisheries Act*, R.S.C. 1985, c. F-14, for discharging ammonia into the water system. Prior to completion of the trial, UBC and CIMCO brought a *Jordan* application based on delay, which the court dismissed. CIMCO pleaded guilty. The court convicted UBC on all counts. UBC appealed the summary conviction, the *Jordan* ruling, and its sentence. The court dismissed that appeal.

In this application, UBC sought leave to appeal to the Court of Appeal. UBC advanced five grounds of appeal: three related to the *Jordan* application and two related to the conviction itself. The court refused leave to appeal.

In respect of the conviction appeal, UBC intended to argue the summary conviction appeal judge erred by misapplying the test for conviction in cases involving circumstantial evidence. UBC argued there was an absence of direct evidence of guilt and circumstantial evidence of innocence and the judge failed to consider all reasonable inferences arising from this.

The court found no merit to this argument. UBC's argument centred on the suggestion that the judge ignored a sample taken the day after the incident, which did not show that the water was deleterious to fish. However, the record showed that evidence for the Crown's case that ammonia found its way into the water system was overwhelming. The concentration of ammonia was extremely high when initially sampled. Additionally, shortly after the incident, UBC began diluting the ammonia; as such, the absence of ammonia a day later did not ground any reasonable inference consistent with innocence. The judge also correctly declined to draw speculative inferences, such as an inference that other toxins may have killed fish in the creek.

In addition to the lack of merit, the issues raised were not sufficiently important and it was not in the interests of justice to grant leave.

e. *Ward v. Cariboo (Regional District)*, 2021 BCCA 423 (Chambers)

The appellant, Cariboo Regional District (the "District"), applied for a stay of execution of orders made at the conclusion of trial.

The underlying claim related to flooding of the respondents' land with sewage in 2015 and 2020 after a sewer line overflowed. The trial judge found the District liable for both floods and found that the property was still contaminated. This CLE chapter discusses the details of the trial decision further below.

The trial judge awarded non-pecuniary damages and injunctive relief. One injunction required the District to prepare and execute a plan for testing for contaminants. If testing identified contaminants, the injunction required the District to remediate. Other injunctive orders required the District to make installations, repairs, and inspections. The District sought a stay of the orders that it develop and execute a testing and remediation plan and that it install a gravity overflow system on the property.

The court refused to grant a stay of the requirement that the District test for and remediate contamination. The court found no merit to the argument that the judge erred by finding the land remained contaminated. The District's submissions disagreed with how the judge weighed the evidence; this was not an arguable ground of appeal. The court also found no irreparable harm. Testing would cost around $112,000. This cost would likely be unrecoverable. However, the court found it was unlikely the District would succeed on appeal unless testing demonstrated little or no contamination. If testing showed little or no contamination, then testing would benefit the District. If, however, testing showed contamination, then testing will have revealed the truth and thus cannot be harmful. Costs of actual remediation were only speculative. Additionally, the respondents would potentially suffer irreparable harm if the District did not test for and remediate contamination because they would continue to live on contaminated property.

The court did find sufficient merit to the argument that, at trial, the parties had not properly addressed the requirement that the District build a gravity overflow system. Additionally, irreparable harm arose: the system would cost approximately $200,000 and costs would not be recoverable.

The court briefly concluded that the balance of convenience only favoured granting a stay of the order to install a gravity overflow system.

3. B.C. Supreme Court Cases

a. *Kirk v. Executive Flight Centre Fuel Services*, 2021 BCSC 987

The plaintiff brought an application to recertify his action as a class proceeding. The action related to the spill of jet fuel into a creek in 2013. The spill led to an evacuation order and a "do not use water" order. The plaintiff claimed in negligence, nuisance, and pursuant to the rule in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 (U.K.).

The court certified the action in 2017. However, the defendants were partially successful on appeal; the Court of Appeal struck, remitted, or amended several of the common issues.

The court began by considering if the evacuation and "do not use water" orders established a common experience giving rise to a non-trivial interference. The plaintiff argued the evacuation order resulted in a complete loss of the every class members' right to use and occupy the affected properties. The court certified the following amended common issue: Did the fact of the resulting evacuation and water advisory amount to non-trivial and unreasonable interference with class members' use and enjoyment of the affected properties?

The court also certified a question on aggregate damages: Can a part of the class members' damage in nuisance be assessed in the aggregate? If so, in what amount? The court rejected the argument that the court should not certify the question because liability has not yet been shown; certifying the question did not amount to a commitment to award aggregate damages.

Finally, based on the Court of Appeal's instructions, the court certified a question dealing with liability under *Rylands v. Fletcher*. The first three elements of the test (whether the defendant was engaged in non-natural use of the land; whether the defendant brought something on the land that could make mischief; and whether that thing subsequently escaped) were common issues. However, the fourth element (damage caused to the plaintiff) requires individual assessment and is not a common issue.

Finally, the court found that proceeding by class action was still preferable, even in light of the reduced scope of the common issues. Questions around causation and responsibility were still common; individual issues about damages did not predominate. And, even if individual issues did predominate, concerns around access to justice and judicial economy still suggested a class proceeding was preferable.

b. *Wet'suwet'en Treaty Office v. Society v. British Columbia (Environmental Assessment Office)*, 2021 BCSC 717

The Wet'suwet'en Treaty Office Society (the "OW") sought judicial review of a decision by the Executive Director of the Environmental Assessment Office ("EAO"). The decision granted a five-year extension to an environmental assessment certificate for the Coastal GasLink Pipeline Project (the "Project"), which passes through the Wet'suwet'en Nation's asserted traditional territory. At the time of the decision, B.C. Coastal GasLink Pipeline Ltd. ("CGL") was constructing the Project.

The original environmental assessment certificate required CGL to substantially start the Project by October 23, 2019. In April 2019, CGL applied for an extension. The OW objected. The EAO provided an evaluation report to the Executive Director that recommended granting the extension. The EAO considered the rationale for the extension, CGL's compliance record, and new or changed potential significant adverse effects that might require revisions to the certificate. The report also addressed OW's specific concerns. The Executive Director granted the extension without providing formal reasons.

At issue was whether the decision was procedurally unfair due to a lack of reasons, unreasonable in its treatment of CGL's compliance record, or unreasonable in its treatment of *Reclaiming Power and Place: the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (the "Inquiry Report").

The court concluded that the duty of procedural fairness required the Executive Director to provide an explanation for the decision with respect to the concerns raised; however, written reasons were not necessary. The court found the Executive Director adopted the evaluation report as the reasons for the decision. This fulfilled the duty of procedural fairness. In terms of reasonableness, the court rejected the OW's argument that the EAO may not have reviewed the inspection reports detailing prior non-compliance and the argument that the Executive Director failed to grapple with the issue of compliance.

The evaluation report makes clear that the EAO considered compliance history as a relevant factor. The report addressed the frequency and nature of the non-compliance. In terms of the Inquiry Report, the court held it was clear the EAO considered the report was a new or changed effect. The EAO's comments did not show a failure or refusal to consider the report. The decision was reasonable.

The court dismissed the petition for judicial review.

c. *O.K. Industries Ltd. v. District of Highlands*, 2021 BCSC 81

The petitioner, O.K. Industries Ltd. ("OKI"), purchased property located within the District of Highlands (the "District"). OKI plans to operate a quarry and submitted a notice of work application to the Ministry of Energy, Mines and Petroleum Resources. The District opposed the application, but a permit was ultimately issued under the *Mines Act*, R.S.B.C. 1996, c. 293.

OKI began cutting down trees to prepare the quarry. However, the District's bylaw compliance officer issued a cease work order on the basis that the activities were taking place without a valid tree-cutting permit from the District. The District contended that various municipal bylaws might apply to the project. OKI disagreed and filed a petition for orders declaring its project was not subject to the District's bylaw scheme. At the hearing of the petition, OKI sought an injunction to restrain the District from issuing further cease work orders under its bylaws.

Applying a correctness review to the compliance officer's decision, the court considered whether the bylaws were inapplicable to OKI's quarry activities on the basis that the province has exclusive jurisdiction over mines and mining activity. The court concluded the District's decision that the bylaws were applicable to OKI's activities was both unreasonable and incorrect. Relying on *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2016 BCCA 432, the court found that the Province has exclusive jurisdiction to regulate the operation of a quarry and other activities captured by the definitions of "mine" and "mining activity" under the *Mines Act*. The District could not use its bylaws or zoning powers to prevent OKI from doing that which it was entitled to do under the *Mines Act*.

The court granted OKI its sought-after relief, quashed the cease work order, and declared the District's bylaws inapplicable with respect to the activities authorized under the quarry permit, to the extent the activities fell within the definition of "mine" or "mining activity."

d. *Ward v. Cariboo Regional District*, 2021 BCSC 1495

A Cariboo Regional District ("CRD") sewer line overflowed, causing raw sewage to flood the plaintiffs' property in 2015 and 2020. The CRD took no steps to clean up the land. The plaintiffs sued the CRD in trespass, nuisance, negligence, and under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*EMA*"). The CRD admitted liability for the 2015 flood but argued the land had naturally decontaminated and so denied continuing nuisance and trespass. The CRD denied liability for the 2020 flood.

The court found the 2015 flood was a continuing trespass and nuisance that persisted to the date of trial. The CRD had taken no steps to clean up the sewage despite repeated requests. This failure clearly violated the CRD's policies on sewage spills. The court found the 2020 flood compounded the issue by adding more contaminants. The 2020 flood was also a continuing trespass and nuisance. The court also concluded the CRD was negligent with respect to both floods. Its negligence caused the continuing presence of sewage on the property and resulting damage. There were no policy reasons negating the CRD's *prima facie* duty of care to maintain and repair the sewer system and other fixtures on the property. The court found it was premature to find the CRD liable under the *EMA* because: (1) the plaintiffs had not commenced remediation; and (2) the plaintiffs had not incurred remediation costs. While the *EMA* empowers a court to determine if a site is or was a contaminated site, "independent remediation" must have been carried out.

The court ordered the CRD to remove the sewage and contamination. The court rejected the CRD's argument that because remediation costs exceeded the diminution in the property's value, the court had to consider the reasonableness of the plaintiff's desire to reinstate the property. It was clear the plaintiffs wished to live on the property for life. Damages were not adequate. The court also granted non-pecuniary damages to compensate for loss of use and enjoyment of the property

and for the impact the flooding had on one of the plaintiffs' mental health. Finally, the court awarded stigma damages because even after remediation, a prospective purchaser would have a reasonable concern that the property may be impacted by future floods.

e. *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2021 BCSC 605

Teal Cedar Products Ltd. ("Teal") applied for an interlocutory injunction prohibiting road blockades and other activities intended to obstruct Teal's logging activities. Teal's logging operations had been subject to organized protests since August 2020; in particular, the protesters focused on logging of old growth trees in the Fairy Creek watershed.

The test for injunctive relief requires that there be a serious issue to be tried, the applicant will suffer irreparable harm if the relief is not granted, and the balance of convenience favours granting the relief.

The respondents conceded there was a serious question to be tried.

The court found there was no doubt Teal would suffer irreparable harm. Teal's inability to log the area harmed its business. Teal risked having to shut down mills and lay off employees and stood to lose market share and suffer reputational damage. Interference with a business as a going concern amounts to irreparable harm. There was no prospect of recovering damages. Additionally, some of the protesters' activities had caused safety risks.

The balance of convenience favoured granting the injunction. The respondents' concerns about the environment and the climate crisis were questions for government, not the court. The protesters' real complaint was with the government's forestry decisions. The protestors were hoping to pressure the government by interfering with Teal's lawful operations; the court could not sanction this. Though the respondents relied on the public interest in the preservation of old growth forests, this was a question for government. The public interest supported upholding the rule of law and enjoining illegal behaviour. The court granted the injunction.

f. *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2021 BCSC 1903

Teal returned to court to extend the injunction later in the year. The court denied the application. While there was still a serious question to be tried and irreparable harm to Teal, the injunction was no longer just and equitable.

After the court granted the initial injunction, the RCMP arrested many protestors. However, the RCMP's methods of enforcement had led to serious and substantial infringements of civil liberties. The RCMP had engaged in excessive behaviour, created exclusion zones, and worn uniforms without identifying names or numbers. Use of this behaviour to enforce the court's order had depreciated the court's reputation. The public interest in protecting the court from further reputational harm tipped the balance of convenience in favour of declining to extend the injunction.

Teal appealed this decision. The Court of Appeal has stayed the decision not to extend the injunction pending the appeal: 2021 BCCA 387.

g. *Yahey v. British Columbia*, 2021 BCSC 1287

The Blueberry River First Nations ("Blueberry") brought an action alleging that the Province authorized industrial development without regard for Blueberry's Treaty 8 rights. Blueberry alleged the cumulative effects of industrial development significantly affected the meaningful exercise of their treaty rights, breached the treaty, and infringed their rights.

The court found that Treaty 8 protects Blueberry's way of life from forced interference and protects their rights to hunt, trap, and fish in their territory. While the Province has a power to take up lands under Treaty 8, this power is not infinite; the Province cannot exercise it in such a way that Blueberry can no longer meaningfully exercise their rights to hunt, fish, and trap in a manner consistent with their way of life. The court further found the Province's conduct over many years had breached Treaty 8. The Province allowed industrial development in Blueberry's territory on an extensive scale without assessing cumulative impacts. This development resulted in Blueberry not having sufficient lands in their territory to exercise their treaty rights meaningfully. This infringement of treaty rights was not justified.

Additionally, though the Province had notice of Blueberry's concerns for at least a decade, the Province had failed to respond in a manner that upheld the honour of the Crown and implemented Treaty 8's promises. The Province also breached its fiduciary duty by causing and permitting industrial development without protecting Blueberry's treaty rights.

The Province's decision-making processes did not adequately consider treaty rights or the cumulative effects of development. The court declared that the Province had breached its obligations under Treaty 8 and unjustifiably infringed Blueberry's treaty rights. The court also declared the Province could not continue to authorize activities that breach Treaty 8's promises, including the Province's honourable and fiduciary obligations under Treaty 8, or activities that unjustifiably infringe the exercise of Blueberry's treaty rights. The court suspended the declaration for six months to allow the parties to negotiate. The court also declared the parties must act with diligence to establish mechanisms to manage cumulative impacts.

h. *North Vancouver (District) v. Seaspan ULC*, 2021 BCSC 1345

Seaspan ULC ("Seaspan") builds and repairs ships at an industrial facility (the "Facility") in the District of North Vancouver (the "District"). Seaspan disputed its property assessments for the years 2013 through 2019. The Property Assessment Appeal Board (the "Board") ruled substantially in Seaspan's favour, reducing its property taxes.

The District and the Assessor of Area #08 (the "Assessor") appealed. The appeal centred on the value of the land occupied by the Facility. The Facility is located on contaminated property. Seaspan and the predecessor in title, Domtar Inc., were ordered to remediate the property in February 2020. They paid $50 million to remediate and they would continue to incur future costs, but it was unlikely the Facility would ever be fully decontaminated.

It was common ground that the contamination adversely affected the Facility's actual value; the parties disagreed about whether the remediation order neutralized this adverse effect. The Board held the remediation order did not affect the actual value of the land and so deducted the entire anticipated cost of remediation when determining actual value. The order only attached to the owner's interest and did not run with the land, and so it was legally irrelevant to determining the actual value of the Facility's lands.

The court disagreed with the Board's conclusion. The contaminated site provisions in the *Environmental Management Act*, S.B.C. 2003, c. 53, impose liability for contamination on purchasers of contaminated land. The remediation order was imposed through the exercise of governmental authority. Legal constraints on use of land imposed by governmental authority are taken into account in valuing land. Here, the order would mitigate the financial burden associated with an order to remediate by providing some assurance to any owner that Domtar and Seaspan would implement remediation efforts. Domtar and Seaspan's remediation requirements would survive a sale of the Facility to a third party. The court concluded the Board erred by holding the remediation order attached only to the owner's interests in the land. The order enhanced the value of the land itself by offsetting the burden imposed by the contamination.

4. B.C. Provincial Court Cases

a. *R. v. Teck Coal Limited*, 2021 BCPC 118

Teck Coal Limited ("Teck") pleaded guilty to contaminating waterways, contrary to the *Fisheries Act*, R.S.C. 1985, c. F-14, by permitting waste rock from its mines to leach selenium and calcite into a river and a settling pond in 2012. Both the river and pond contained Westslope Cutthroat trout. Testing by Environment and Climate Change Canada found selenium levels in the river and the settling pond far exceeded safe levels. A number of trout had selenium concentrations in the range associated with adverse effects.

Teck admitted that in 2012 it did not exercise all due diligence to prevent, or have in place a comprehensive plan to address, the deposit of deleterious substance in the waters. However, since 2012, Teck had taken significant steps and made many improvements. Teck had also paid $1 billion to bring selenium levels under control and planned to spend another $2.2 billion million over the next ten years.

The contamination had a community impact on the Ktunaxa Nation. The Nation provided a statement about the compromised water quality, their community concerns about quality and safety of the fish and of Ktunaxa consuming the fish, and the impairment of their historical fishing rights.

At the time the offence was committed, the maximum financial penalty was $1 million. However, the *Fisheries Act* provides that each day an offence is committed is a separate offence. Counsel jointly recommended a $60 million fine, which equated to around $80,000 per day for each day of 2012. The court acceded to this joint submission. The court considered the following factors: the violations were serious but not surreptitious; there was serious harm to the trout population and the Ktunaxa Nation; Teck pleaded guilty and accepted responsibility; Teck made significant efforts and lasting commitments; Teck had no prior conviction record and was cooperative; Teck was of a good corporate character; and the proposed fine was substantial and could meet sentencing considerations of deterrence and denunciation. The joint submission was not contrary to the public interest and did not bring the administration of justice into disrepute. This is the highest fine imposed to date under the *Fisheries Act*.

b. *R. v. Cermaq Canada Ltd.*, 2021 BCPC 283

This sentencing decision considered the appropriate fine for Cermaq Canada Ltd. ("Cermaq"). Cermaq allowed diesel fuel to escape into the ocean, contrary to s. 36(3) of the *Fisheries Act*, R.S.C. 1985, c. F-14. An employee caused the spill by using improper procedures to transfer fuel.

When the employees discovered the spill, they acted immediately to start clean-up efforts. Cermaq immediately hired a firm to lead the efforts. Clean up successfully recovered the vast majority of the diesel in 4 days.

After the incident, Cermaq reconfigured its fuelling system to eliminate fuel transfers. Cermaq also added spill kits and booms, hired consultants, and reviewed its fuel handling policies and practices. Cermaq fully cooperated with the investigation and paid for all costs incurred. Cermaq also posted an apology on its website and pleaded guilty at an early opportunity.

The parties agreed on general sentencing principles but disagreed on how to characterize Cermaq's culpability and the extent of the harm caused to fish.

Cermaq characterized its culpability as a "near miss" of due diligence. The Crown argued culpability was middling and that Cermaq should have reconfigured its fuelling system earlier. The court found Cermaq's culpability was low. While Cermaq's systems should have been better, Cermaq had never had another spill, held various certifications, had clean-up materials on site, responded immediately and effectively, and trained their employees. However, culpability was not a "near miss." In light of a prior incident, Cermaq should realized it needed to reconfigure its system earlier.

The court concluded potential for harm was minor. The expert evidence was inconclusive. However, no one observed dead fish. The harmful substances in organisms quickly dissipated. The closest fish to the spill dove deep to avoid the spill but were, in the long term, unaffected.

The court then recounted that Cermaq has no prior record, accepted responsibility by pleading guilty, acknowledged its failure of due diligence, and was sincerely remorseful. The court also considered deterrence, reviewed Cermaq's behaviour and concluded that Cermaq was sincerely regretful. The court imposed a $500,000 fine and ordered Cermaq publish the decision on its website for 90 days.

5. B.C. Environmental Appeal Board Decisions

a. *Legacy Ridge Developments Squamish Ltd. v. Water Manager*, EAB-WSA-19-A008

Legacy Ridge Developments Squamish Ltd. ("Legacy") appealed an order issued by the Water Manager under the *Water Sustainability Act*, S.B.C. 2014, c. 15. In the course of the appeal, the Water Manager applied to the Environmental Appeal Board ("EAB") for an order that Legacy produce documents. The Water Manager made multiple requests for production over the course of five letters. In response to the first letter, Legacy delivered a list of documents. However, Legacy contended that subsequent requests, which alleged that prior disclosure was inadequate, were vague and provided no details or rationale for the subsequent requests.

The EAB determined that Legacy should produce documents if they were relevant, admissible, and in Legacy's possession and control. The EAB noted that to determine if the sought-after documents were relevant, it had to identify what documents the Water Manager was requesting. Clear identification of the documents is an essential prerequisite.

The five request letters sought a wide array of documents over a period of two decades. The Water Manager did not clarify if the five requests were distinct or repeated requests. The requests were unclear in their language, vague as to scope, repetitive and expansive of earlier requests, and did not account for the fact that Legacy had listed some documents. Some of the letters did not even constitute actual requests for documents; rather, they were summaries of how the Water Manager viewed the parties' obligations and statements that Legacy had not met its obligation. In addition to not identifying which documents were outstanding, the Water Manager failed to explain the relevance of the documents. Some of the sought-after material was so broad that it would likely include irrelevant or inadmissible material. The EAB dismissed the application for disclosure.

b. *GFL Environmental Inc. v. District Director, Environmental Management Act*, 2018-EMA-G02

The District Director for the Metro Vancouver Regional District issued an air quality management permit to GFL Environmental Inc. ("GFL") in 2018, which authorized GFL to discharge air contaminants from its composting operation. GFL appealed various terms and conditions in the permit on the basis they were not advisable for the protection of the environment, were unduly restrictive, and exceeded the Director's authority. A group of concerned neighbouring citizens also appealed.

The EAB determined that the Director's failure to provide reasons for the permit's requirements created significant fairness concerns, in large part because some of the permit's requirements were unprecedented.

The EAB also directed changes to the permit's terms. It found the permit's use of odour units as an emission compliance limit was inappropriate because of uncertainty with their use and a lack of ability to test samples in odour units. The EAB also found the permit terms for a "sniff test" were unadvisable. The "sniff test" provisions regulated odour, not air contaminants; the Director could only regulate the latter. The science behind a "sniff test" was also questionable. The EAB also found some of the permit requirements were unduly prescriptive, unnecessary, and not advisable for the protection of the environment. These provisions regulated composting itself, rather than the discharge of air emissions, and were thus inappropriate.

The EAB also varied the effective period of the permit, extending it to 2026. GFL had injected significant capital into constructing a new facility to address odour. The extension would allow GFL time to address issues arising from the new facility and time to demonstrate if it could comply with the permit.

Finally, the EAB considered whether the permit provisions failed to strike a balance between GFL's interests in operating the composting facility and the protection of the environment. The neighbouring residents testified that the odour affected their use of their property and their general wellbeing. However, because they failed to provide evidence about actual health impacts, the EAB could not conclude the permit failed to protect their health, safety, and comfort.

6. Federal Court of Canada Cases

a. *Skibsted v. Canada (Environment and Climate Change)*, 2021 FC 301

The applicants sought an interlocutory injunction to prevent the intervener, Badlands Recreation Development Corp. ("Badlands"), from proceeding with its development of a private racetrack pending determination of the underlying application for judicial review. The applicants owned land along the Rosebud River and close to proposed racetrack.

The bank swallow was listed as a threatened species under the *Species at Risk Act*, S.C. 2002, c. 29 ("*SARA*"), in November 2017. There are bank swallow nesting sites along the Rosebud River. The underlying judicial review asked the court to direct the Minister of Environment and Climate Change to take steps to protect the bank swallow under *SARA* by preparing a recovery strategy and action plan and by identifying and/or designating critical habitat.

The court declined to answer the question of whether it had jurisdiction to issue an injunction against private landowner who was an intervener. Ruling on jurisdiction was unnecessary because the court was not satisfied that the applicants had met the test to obtain the interlocutory injunction.

Applying the test for an injunction, the court determined that the underlying application and the present motion raised a serious question to be tried.

However, the court found that the applicants had not demonstrated any irreparable harm to their interests as landowners. Harm to the birds did not equate harm to the applicants' interests. Additionally, they had not demonstrated any risk to the nesting sites in the short or long term, nor had they demonstrated that construction was about to begin.

Finally, the balance of convenience weighed in Badlands' favour. The Minister was working to designate critical habitat and finalize a recovery strategy. Harm to Badlands outweighed harm to the applicants; an injunction would halt Badlands' project. Additionally, the relief sought in the motion was not the relief sought in the underlying application for judicial review; it was not clear the judicial review would stop the project. The court dismissed the motion for an interlocutory injunction.

b. *Skibsted v. Canada (Environment and Climate Change)*, 2021 FC 416

In this related decision, the court dismissed the applicants' underlying application for judicial review.

Listing the bank swallow as a threatened species under *SARA* triggered statutory requirements for the Minister to develop a recovery strategy and action plan. These plans must identify the species' critical habitat. The Minister must publish the proposed recovery strategy within two years, but had missed this deadline. The court agreed that the Minister had a public legal duty to issue a recovery strategy and that the Minister had failed to meet the deadline. However, the court found that any further relief was premature because the Minister's duty to issue an action plan or protect critical habitat was triggered only after the final recovery strategy was posted.

The court also considered that the Minister did not owe the public legal duty to post the recovery strategy to the applicants. The applicants had neither private nor public standing. The Minister's failure did not directly affect them and they did not meet the test for public interest standing. Though the applicants raised a serious justiciable issue and the application was a reasonable and effective means to bring the issue before the court, the applicants had not demonstrated a genuine interest in the application. The court was unwilling to accept that the fact that the applicants owned land with bank swallow colonies and raised concerns about the impact of proposed development was sufficient to demonstrate a genuine interest. They had not demonstrated an ongoing dedication to the preservation of bank swallows or to wildlife causes more broadly.

The court considered other factors, including that the Minister's duty was not discretionary and that there was no other remedy available to ensure the proposed recovery strategy was developed and posted. There were also no equitable bars to relief. Neither party addressed whether the orders would be of practical value or effect, but the court concluded they would be. The court also concluded the balance of convenience favoured the applicants.

Having found that the applicants did not have standing with respect to the failure to post a proposed recovery strategy and that no prior demand was made, the court concluded that the applicants were not entitled to relief. Alternatively, if they were so entitled, the court would have ordered the Minister to post the strategy prior to June 30, 2021; this was responsive to the Minister's evidence that the strategy would be posted in June 2021.

c. *Manitoba v. Canada (Attorney General)*, 2021 FC 1115

Manitoba challenged the Governor in Council's ("GIC") decision to list it in Schedule 1 of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12. This had the effect of applying the Act's fuel charge scheme and output-based pricing system to Manitoba. Manitoba argued the decision was unreasonable and arbitrary because it: (1) imposed a fuel charge backstop in some provinces while allowing others to implement their own, less stringent, greenhouse gas pricing plan; and (2) imposed a fuel charge backstop in Manitoba without considering the stringency of Manitoba's proposed carbon pricing regime in terms of reducing greenhouse gas emissions.

Manitoba had previously proposed a carbon pricing scheme, but withdrew its plan in 2018 following statements by the Minister of Environment and Climate Change that Manitoba's plan did not meet the federal benchmark.

The court considered whether the GIC's decision was inconsistent with the statutory purpose. The GIC had not provided reasons for its decision to list Manitoba in Schedule 1. However, the court accepted that the GIC had interpreted "stringency" under the Act as meeting the standards of stringency set by the federal benchmark. Thus, the GIC's assessment that Manitoba's plan was not stringent enough was reasonable because Manitoba had withdrawn its plan and there was no plan to assess.

The court also considered whether the decision ran afoul of the federal power over peace, order, and good government ("POGG"). Manitoba argued that the GIC's uneven application of the Act to different provinces ran afoul of the POGG requirement for uniformity. The court disagreed, noting that the Act is uniform because it requires each province and territory to meet a minimum national standard. The fact that pricing schemes used to achieve the benchmark might vary did not undercut the uniformity requirement. In conclusion, the court dismissed Manitoba's challenge.

d. *Sagkeeng First Nation v. Canada (Attorney General)*, 2021 FC 344

Sagkeeng First Nation ("Sagkeeng") sought judicial review of the Minister of Environment and Climate Change's decision to not designate the Wanipigow Sand Extraction Project (the "Project") under the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19. Canadian Premium Sand Inc. had sought approval for the construction, operation, decommissioning, and abandonment of the Project. The proposed activities were not subject to an environmental assessment by default. However, the Minister had discretion to designate the Project. In 2018, the Canadian Environmental Assessment Agency undertook an analysis to advise the Minister on whether to do so. The Agency concluded that potential adverse effects could be managed through mitigation measures and Manitoba's environmental assessment and licensing process, and recommended the Minister not designate the Project. The Minister followed this recommendation.

Sagkeeng argued that Minister's decision was unreasonable as it failed to consider all relevant considerations and that the Minister unreasonably exercised her discretion by relying on unspecified or hypothetical mitigation processes, relying on Manitoba's regulatory scheme, and proceeding on the assumption that Manitoba would conduct the required consultation.

The court rejected Sagkeeng's argument that the Minister failed to adequately consider the impact on groundwater and the environment and cumulative effects. The Minister's reasons and the record indicated otherwise. The record also showed the Minister considered evidence on mitigation. Though Sagkeeng might agree with her decision, her decision was not unreasonable. Finally, the Minister did not unreasonably rely on Manitoba's regulatory scheme or consultation process. There was no evidence the Minister was aware that Manitoba had issued the license to the Project, a fact which Sagkeeng pointed to as evidence that the Minister knew or should have known that Manitoba's consultations were non-existent or inadequate. The Sagkeeng should address the issue of whether Manitoba's consultation was adequate by raising, in a separate challenge, whether Manitoba breached its duty to consult. The court concluded by finding that the Minister reasonably exercised her discretion and that her decision was reasonable.

e. *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, 2021 FC 758

Ermineskin Cree Nation ("Ermineskin") sought judicial review of a Designation Order issued by the Minister of Environment and Climate Change. The order designated the Vista Coal Underground Test Mine Project and the Vista Coal Mine Phase II Expansion Project (collectively the "Projects") pursuant to s. 9(1) of the *Impact Assessment Act*, S.C. 2019, c. 28. This designation delayed the Projects and could lead to a federal impact assessment. Ermineskin sought an order quashing the designation order.

Coalspur Mines (Operations) Ltd. ("Coalspur"), the proponent of the Projects, also sought to quash the order in a separate application. Coalspur's application was dismissed as moot since the court decided to quash the designation order in these proceedings: 2021 FC 759.

Ermineskin and Coalspur had entered into Impact Benefit Agreements in respect of the Projects to compensate Ermineskin for potential impacts on the exercise Aboriginal rights. Ermineskin argued that the Minister's decision to designate the Projects would adversely impact Aboriginal and treaty rights, including economic opportunities created by its contractual relationship with Coalspur. As such, the honour of the Crown required the Minister to consult with Ermineskin prior to making the designation order. The Minister contended any loss of economic, social, or community benefits was not an adverse impact on an Aboriginal or treaty right and did not relate to Aboriginal title; as such, there was no duty to consult.

The court agreed with Ermineskin. The duty to consult includes economic rights and benefits closely related to and derivative from Aboriginal rights. The Impact Benefit Agreements contained valuable economic rights and benefits closely related to and derived from Ermineskin's Aboriginal rights, giving rise to the duty to consult. The Minister did not engage in consultation or even give notice to Ermineskin. This contrasts with the fact that the Minister consulted with Ermineskin when the Minister made an earlier decision *not* to designate the Projects. Additionally, the Minister consulted with other Indigenous groups and First Nations as part of the subsequent decision to designate the Projects. The court found that Ermineskin was "frozen out" of this subsequent decision-making process. As such, the Minister breached the duty to consult. The court set aside the designation order and sent the matter back for reconsideration.

f. *Ecology Action Centre v. Canada (Environment and Climate Change)*, 2021 FC 1367

Pursuant to the *Impact Assessment Act*, S.C. 2019, c. 28, a committee prepared a Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador (the "Assessment"). Regional assessments are prepared to help understand the effects of physical activities assessable under the Act. After considering a regional assessment, the Minister of Environment and Climate Change Canada is empowered to make regulations excluding activities from the Act's impact assessment process. In this case, the Assessment constituted part of a Final Report provided to the Minister. The Minister then enacted a regulation excluding certain offshore exploratory drilling projects from the Act's process.

The applicants participated in the regional assessment process that led to the development of the Assessment and the Final Report. They sought judicial review of the Assessment and the regulation.

The court, relying on prior case law holding that reports prepared under the old *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19 ("*CEAA*") were not justiciable, concluded that the Final Report and the Regional Assessment are not justiciable. As with former *CEAA* reports, the Final Report was not a "decision." It was an advisory report given to the Minister to inform potential future decisions.

However, the Final Report's contents were relevant in considering the validity of the regulation. The court rejected the arguments that the regulation was unreasonable because it was based on an invalid Final Report. The committee responsible for the regional assessment process had considered all required factors. Though the committee had failed to strictly follow the process's timeline, there was no evidence this negatively impacted the Final Report. The court also rejected the procedural fairness claims. The applicants had an opportunity to participate. While there were some minor oversights, the applicants had not demonstrated any associated prejudicial effect. Finally, the court rejected the applicants' arguments that the regulation was unreasonable because it is inconsistent with the purpose of the Act. Regulations are presumed valid and it is not the role of the courts to assess the wisdom of a regulation. While the dominant purpose of the Act is environmental protection, the Act's other purpose is to create opportunities for sustainable economic development. The regulation achieves that purpose and does not permit projects to proceed with no oversight.

C. Legislative Developments

1. Regulations to the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36 (the "OGAA")

a. Processing Facilities

The British Columbia Oil and Gas Commission (the "Commission") enacted the *Oil and Gas Processing Facility Regulation*, B.C. Reg. 48/2021, effective March 4, 2021, which adds requirements for processing facilities under the *OGAA.*

Applicants for a processing facility permit must submit an application to the Commission that includes a detailed project description, construction schedule, and information about the engineering design. The Regulation includes a list of required reports and requires pre-engagement with local Indigenous communities. The Regulation also introduces requirements for the design and construction of a processing facility. These include the development of a management system to anticipate and manage hazards and more specific requirements for storage systems, modular units, and site management after construction. Finally, the Regulation establishes requirements for the operation of the processing facility. These include requirements for pre-operation testing, general operation, safety, notice, and for suspension of operations and decommissioning.

b. Emergency Notifications

Pursuant to B.C. Reg. 226/2021, the Commission amended the *Emergency Management Regulation,* B.C. Reg. 217/2017, effective September 1, 2021. The amendments added sections 4.1 to 4.4. These sections empower an official to require a permit holder to conduct a full-scale or table-top exercise. The Commission may publish information regarding a permit holder's conduct of such an exercise.

The amendments also changed the protocol for when an emergency occurs on site. A permit holder must notify the Commission within an hour of becoming aware of the incident and notify local Indigenous nations as soon as possible. Before this amendment, permit holders were required to notify the Commission as soon as the circumstances permitted. Further, this amendment provides that a permit holder must submit a written report to the Commission if a spillage that is reportable under s 91.2(1)(a) of the *Environmental Management Act* occurs.

c. B.C. Reg. 249/2015 (Provincial): *Greenhouse Gas Emission Reporting Regulation*

The *Greenhouse Gas Emission Reporting Regulation*, B.C. Reg. 249/2015, was amended on December 21, 2020, pursuant to Order in Council 658/2020.

The amendment clarified the requirements for site visits to reporting operations under the *Greenhouse Gas Industrial Reporting and Control Act*, S.B.C. 2014, c. 29. A site visit may be conducted in person or virtually. However, the amendment clarifies that a site visit may only be conducted virtually if prescribed conditions are met.

The amendment also adds requirements for verification statements of reporting facilities. A verification statement must include a statement that the emission statement is correct and prepared in accordance with this regulation, identify information that was not reported and comment on the materiality of any errors in the report.

3. B.C. Reg. 375/96 (Provincial), *Contaminated Sites Regulation*

The *Contaminated Sites Regulation*, B.C. Reg. 375/96, and the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*EMA*") were amended on February 1, 2021, pursuant to Order in Council 368/2020. The amendment brings new obligations for identifying and addressing contaminated sites.

The Regulation establishes a process for identifying potentially contaminated sites and ensuring that such sites are investigated and remediated as needed after they have been decommissioned, where operations have ceased, or before re-use or redevelopment.

A number of activities trigger the requirement that an owner or operator submit a Site Disclosure Statement (which replaces the previous Site Profile), including decommissioning a site or ceasing operations; applying for development or building permits; applying for subdivision or rezoning approvals; and applying for creditor or bankruptcy protection.

A vendor of real property must submit a Site Disclosure Statement to a prospective purchaser of the property. The Regulation ensures municipalities can no longer opt out of the Site Disclosure process.

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

a. Another process applies under the EMA and the Director has issued some type of determination. This exemption only applies in circumstances where, after making reasonable inquiries, there is no reason to believe there has been further contamination at the site;

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

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

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

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

The new legislation also contains a specific carve out for oil and gas sites.

4. B.C. Reg. 144/2004 (Provincial), *Spheres of Jurisdiction- Environment and Wildlife Regulation*

The Minister of Environment and Climate Change introduced an amendment to the *Spheres of Jurisdiction- Environment and Wildlife Regulation,* B.C. Reg. 144/2004. This Regulation was made pursuant to the *Community Charter*, S.B.C. 2003, c. 26, and was amended pursuant to Ministerial Order 309/2021, deposited on July 26, 2021.

The amendment added a part to the Regulation addressing plastic waste reduction. The amendment allows a municipality in British Columbia, by bylaw, to prohibit businesses from providing certain single-use items, to require businesses provide a recycled paper bag or reusable bag to customers only upon payment of a minimum charge, and to require businesses to provide a single use utensil or non-plastic straw only upon request.

These rules do not apply to single-use items that are sold as a product, ordinarily in sets of multiple items. The amendment also stipulates that municipalities must make exemptions for people with disabilities, medical issues, or financial hardship.

5. B.C. Reg. 253/2000 (Provincial), *Permit Regulation*

The *Permit Regulation*, B.C. Reg. 253/2000, was amended on January 28, 2021 pursuant to Order in Council 42/2021. The *Permit Regulation* is a regulation made pursuant to the *Wildlife Act*, R.S.B.C. 1996, c. 488.

This amendment added section 3.1 to the *Permit Regulation*, which introduces a permit for use of a conveyance. This permit allows a person to undertake one or more of the activities prohibited by section 27 of the *Wildlife Act*, such as hunting wildlife from an aircraft. The exception only applies if the activity to be undertaken serves a purpose prescribed by section 3.1(2), including scientific, educational, and public safety purposes. There are also exceptions for people hunting with a disability or for those who aim to protect or control wildlife populations.

The regional manager cannot issue a permit unless satisfied that the person undertaking the activity has sufficient skills to undertake that activity and that issuing a permit is necessary for the proper management of wildlife.

6. B.C. Reg. 11/2021 (Provincial), *Professional Governance Act*

On February 5, 2021, B.C. Reg. 11/2021 became effective pursuant to Order in Council 34/2021. The amendment brought various sections of the *Professional Governance Act*, S.B.C. 2018, c. 47, into force. Sections 150 and 151 amended the *Ministry of Environment Act*, R.S.B.C. 1996, c. 299.

Section 150 amends section 6.1 of the *Ministry of Environment Act* by adding a subsection permitting the Minister to publish online or by other means prescribed information or documents or any prescribed classes of information or other documents relating to the administration of a prescribed enactment. Section 151 adds section 6.2, permitting the Lieutenant Governor in Council to make regulations in respect of publishing information and documents.

7. Bill 23-2021 (Provincial), *Forest Statutes Amendment Act, 2021*

Bill 23, *Forest Statutes Amendment Act, 2021* received Royal Assent on November 25, 2021. It introduces broad changes to sections 30 to 110 of the *Forest Act*, R.S.B.C., 1996, c. 157.

Bill 23 adds forest landscape plans as an option for forest harvesters. This is part of a long-term plan to replace forest stewardship plans with forest landscape plans. Before establishing a forest landscape plan, the chief forester must consult and cooperate with Indigenous peoples and governing bodies whose rights will be affected. Bill 23 provides details on forest operations plans including the content of such plans and engagement on the review of the plans. Communities and the public will have more opportunities to view and comment on harvesting plans. Bill 23 also improves efforts to mitigate against climate change, for example, by allowing the chief forester to set stocking standards.

8. B.C. Reg. 133/2014 (Provincial), *Administrative Penalties (Environmental Management Act) Regulation*

The *Administrative Penalties (Environmental Management Act) Regulation*, B.C. Reg. 133/2014, was amended on February 1, 2021, pursuant to Order in Council 52/2021. This amendment adds administrative penalties under the *Environmental Management Act* for people who contravene prescribed sections of the *Spill Contingency Planning Regulation, the Spill Preparedness, Response and Recovery Regulation*, or the *Spill Reporting Regulation.*

9. Bill 4-2021 (Provincial), *Budget Measures Implementation Act, 2021*

Bill 4, *Budget Measures Implementation Act, 2021* (the "*Act*"), received Royal Assent on June 17, 2021. Section 9 of the *Act* repealed section 57(7) of the *Carbon Tax Act*, S.B.C. 2008, c. 40, which required leave from the British Columbia Court of Appeal to appeal a decision of the British Columbia Supreme Court. Sections 11 and 12 of the *Act* extend the application of existing tax rates for fuels and combustibles until March 31, 2022 and apply the next rate increase on April 1, 2022.

Bill 4 also amends section 19 the *Forest Act*, R.S.B.C. 1996, c. 157. It removes the requirement of leave from the British Columbia Court of Appeal to appeal a decision of the British Columbia Supreme Court.

10. Bill S-234, *An Act to amend the Canadian Environmental Protection Act, 1999 (final disposal of plastic waste)*

On December 16, 2021, Bill S-234, *An Act to amend the Canadian Environmental Protection Act, 1999 (final disposal of plastic waste)*, passed first reading in the Senate. Bill S-234 prohibits the export of plastic waste to foreign countries for final disposal. It also empowers the Governor in Council, on the recommendation of the Minister of Environment and Climate Change, to amend the list of plastic waste by adding or deleting any type of plastic.

11. S.O.R./2020-258 (Federal), *Off-road Compression-Ignition (Mobile and Stationary) and Large Spark Ignition Engine Emission Regulations*

On December 4, 2020, *Off-road Compression-Ignition (Mobile and Stationary) and Large Spark Ignition Engine Emission Regulations,* S.O.R./2020-258, was introduced. Most sections will come into force six months after the day they were registered, with some exceptions.

The Regulations were introduced to limit the emission of air pollutants that adversely affect the environment and human health. The Regulations introduce new emission standards and requirements in alignment with the United States Environmental Protection Agency's standard for large spark-ignition and stationary compression-ignition engines. These standards include limits for nitrogen oxides, hydrocarbons, carbon monoxide, and particulate matter from off-road engines. Further, the Regulations address the Standing Joint Committee for the Scrutiny of Regulations' concerns regarding clarity and inconsistency. They also introduce minor consequential amendments to other vehicle and engine emission regulations.

12. S.O.R./2020-277 (Federal), *Regulations Amending the Sulphur in Gasoline Regulations*

On December 16, 2020, the *Regulations Amending the Sulphur in Gasoline Regulations,* S.O.R./2020-277, came into force. The objective is to provide primary gasoline suppliers in Canada (i.e., regulated parties) with additional compliance flexibility while transitioning to lower sulphur gasoline.

The *Sulphur in Gasoline Regulations*, S.O.R./99-236, limit the sulphur content of gasoline produced, imported, or sold in Canada. The amendments re-enact, for 2020 to 2025, a temporary sulphur compliance unit ("SCU") trading system intended to provide gasoline refiners with compliance flexibility during the transition to lower sulphur concentrations in gasoline. This system is available to regulated parties who elect to participate in the annual pool average compliance option under the Regulations. The amendments enable regulated parties to transfer the surplus balances of SCUs that they generated or received in trade in the expired trading system and owned as of March 31, 2020, into the temporary trading system. The amendments provide regulated parties with the additional option to generate, trade or bank SCUs in the temporary trading system for use during the 2020 to 2025 period.

13. S.O.R./2021-25 (Federal), *Cross-border Movement of Hazardous Waste and Hazardous Recyclable Material Regulations*

On October 31, 2021, the *Cross-border Movement of Hazardous Recyclable Material Regulations*, S.O.R./2021-25, came into force. The Regulations repeal and replace the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*, the *Interprovincial Movement of Hazardous Waste Regulations*, and the *PCB Waste Export Regulations.* The Regulations maintain the core permitting and movement tracking requirements of the former regulations, but the changes ensure greater clarity and consistency of the requirements.

The Regulations provide flexibility for the electronic movement tracking of shipments. The previous provisions focused on the completion of a paper copy of the movement document passed between different persons, who are each required to fill in relevant information on paper. The new Regulations provide flexibility by no longer prescribing the specific form required for tracking shipments of hazardous waste and hazardous recyclable material.

Further, the amendments changed the definitions of hazardous waste and hazardous recyclable material to include interprovincial movements and to better align with other jurisdictions and international agreements. Additional waste and recyclable material are now considered hazardous when moving between provinces and territories. These amendments also clarified that all batteries are captured within the definition of hazardous waste (with one exception). The Regulations also removed the small quantity exclusion for mercury for most shipments of waste.

Further, the amendments clarified and simplified the definition of recycling operation R14 so that less recyclable material is captured under the Regulations. A new exclusion for waste or recyclable material generated by the normal operations of a ship was added.

These Regulations implement changes to permit requirements including increasing permit terms from twelve months to three years to align with international agreements, adding new notification requirements for any changes in information on a permit, and setting out conditions under which a permit may be refused, suspended, or revoked.

14. S.O.R./2020-261 (Federal), *Regulations Amending Part 1 of Schedule 1 and Schedule 2 to the Greenhouse Gas Pollution Pricing Act and the Fuel Charge Regulations*

On April 1, 2021, the *Regulations Amending Greenhouse Gas Pollution Pricing Act and the Fuel Charge Regulations,* S.O.R./2020-261, came into force. These Regulations were enacted on December 4, 2020 and amended the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12 (the "*GGPPA*").

The objective of the Regulations is to cease the application of the fuel charge in New Brunswick. The Regulations removed the references to New Brunswick from Part 1 of Schedule 1 and Schedule 2 to the *GGPPA* and the *Fuel Charge Regulations*.

15. Bill C-30 (Federal), *An Act to implement certain provisions of the budget tabled in Parliament on April 19, 2021 and other measures*

Bill C-30, the *Budget Implementation Act, 2021, No. 1*, received Royal Assent on June 29, 2021.

Sections 78 to 80 amend the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12 (the "*GGPPA*"), to allow the Minister to send notice electronically to a bank or credit union in addition to serving it personally or sending notice by a confirmed delivery service. Bill C-30 also amends the *GGPPA* to permit electronic service and provides that, if notice is sent electronically, an affidavit of an officer of the Canada Revenue Agency is evidence of the sending and receipt of the notice.

D. Policy Developments

1. Climate Preparedness and Adaptation Strategy for 2021-2022

The Government of British Columbia released its draft Climate Preparedness and Adaptation Strategy in June 2021. The Strategy builds on the 2019 Strategic Climate Risk Assessment. The Strategy sets out actions the government is taking in 2021 and proposed steps it will undertake between 2022 and 2025 to combat climate change. It emphasizes flood risk reduction projects, interactions and cooperation with Indigenous nations, and improving wildfire responses. The proposed actions for 2022 to 2025 suggest that climate change will be a serious consideration moving forward and will likely factor into project proposals.

2. CleanBC: Roadmap to 2030

On October 25, 2021, the Government of British Columbia announced the "CleanBC: Roadmap to 2030" plan, which accelerates measures in British Columbia's climate plan that have proven effective. The plan also introduces new ideas to help British Columbia achieve the Paris emissions reduction targets for 2030 and reach net zero by 2050.

The specific policy goals of the plan include making polluting more expensive and improving the affordability of moving from fossil fuels to clean alternatives. The government pledged to work with large industry partners to implement sector-specific plans that reduce climate pollution and ensure the province meets its targets.

3. Regulating Soil Relocations

The British Columbia Ministry of Environment and Climate Change Strategy released a Regulating Soil Relocation Intentions Paper on January 15, 2021 and sought comments from stakeholders by March 15, 2021. The government amended the *Environmental Management Act* to enable a new process for soil relocation that meets the land use standards of the receiving site. The Ministry is planning to amend the *Contaminated Sites Regulations* and other associated regulations governing soil relocation. The proposed regulatory changes will establish a new process for uncontaminated soil relocation, whereby the person removing the soil will be required to analyse it to determine its quality. If the substances in the soil meet the relevant land use standards of the receiving site, other *Contaminated Sites Regulations* requirements will apply.

Many stakeholders responded, including companies, interested individuals, Indigenous groups, community members, and government and regulatory agencies. Many expressed concern that the proposed notification process for relocation of uncontaminated soil would pose additional costs and delay development projects. Respondents were also critical of the fact that the Ministry was proposing to get rid of the Contaminated Soil Relocation Agreement only to replace it with a similarly complicated and more labour intensive process.

4. Greenhouse Gas Offset Protocol: Methane from Waste

The Government of British Columbia released its draft Methane Management Offset Protocol and invited public comment between June 3, 2021 and August 3, 2021. The government intended to release the final draft protocol in late 2021. It had not been released at the time of publication.

The purpose of the protocol is to quantify the emission reductions associated with the collection and destruction of methane from facilities in British Columbia. It supports the increased production of biomethane and/or renewable natural gas in British Columbia. Once implemented, this protocol will form part of the legislative framework established to meet the province's greenhouse gas ("GHG") targets.

The protocol provides instructions for quantifying GHG emission reductions from projects that capture and destroy methane from organic waste. The protocol also sets out eligibility criteria for projects and project facilities for each project type covered under the protocol; the parameters for data monitoring plans; and details on the information that must be contained in each Project Plan. The project proponent must ensure that the Project Plan meets the requirements of the protocol and the *Gas Emission Control Regulation* under the *Greenhouse Gas Industrial Reporting and Control Act*, S.B.C. 2014, c. 29, and that the required forms are complete. Project Plans that do not meet these requirements will not be approved.

5. UN Conference on Climate Action: COP26 in Glasgow

The Government of Canada participated in the 26th United Nations Climate Change Conference of the Parties (COP26) from October 31 to November 12, 2021. Canada supported successful and ambitious outcomes that were in line with the Paris Agreement temperature goal to limit the increase in global temperature and tackle the climate change emergency.

At the conference, Canada co-led the Climate Finance Delivery Plan with Germany. The plan provides clarity on when and how developed countries will meet the $100 billion annual climate finance goal through to 2025. It helps maintain momentum and facilitates important conversations ensuring that individual countries collectively deliver on the goals of the Paris Agreement. It sets out an estimated trajectory of climate finance until 2025, taking into account new climate finance pledges from developed nations and multilateral development banks, as well as collective qualitative actions to improve the delivery of climate finance.

BLG's Vancouver Environmental Law Group

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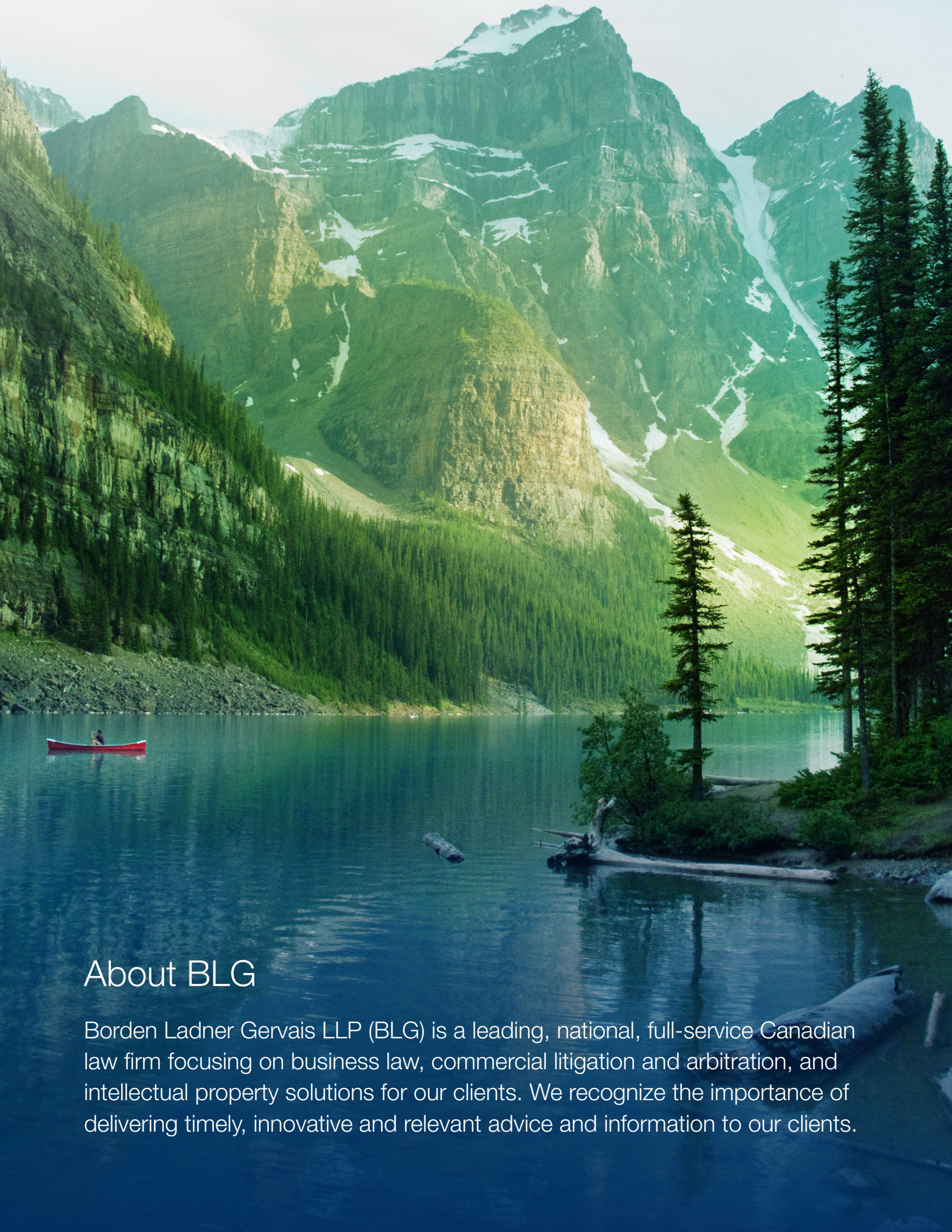

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Borden Ladner Gervais LLP (BLG) is a leading, national, full-service Canadian law firm focusing on business law, commercial litigation and arbitration, and intellectual property solutions for our clients. We recognize the importance of delivering timely,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

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