
NEWS RELEASE

For Immediate Release
2018PREM0019-000742
April 26, 2018

Office of the Premier
Ministry of Attorney General
Ministry of Environment and Climate Change Strategy

Province submits court reference to protect B.C.'s coast

VICTORIA – The Government of British Columbia has submitted a reference question to the B.C. Court of Appeal today to affirm its right to protect B.C. from the threat of a diluted bitumen spill.

The reference question concerns provincial autonomy, particularly the rights of British Columbia to regulate the environmental and economic impacts of heavy oils, like diluted bitumen, transported through the province. It was filed today in the B.C. Court of Appeal.

“We have asked the courts to confirm B.C.’s powers within our jurisdiction to defend B.C.’s interests, so that there is clarity for today and for the generations to come,” said Premier John Horgan. “Our government will continue to stand up for the right to protect B.C.’s environment, economy and coast.”

On March 12, 2018, the government announced it had retained expert legal counsel to prepare and present a reference case related to B.C.’s right to protect the province’s land, coast and waters.

For its reference, the B.C. government is asking the court to review proposed amendments to the Environmental Management Act that would give the Province authority to regulate impacts of heavy oils, like diluted bitumen, which, when released into the environment, would endanger human health, the environment and communities.

“We have been clear from the outset that the appropriate way to resolve disagreements over jurisdiction is through the courts, not through threats or unlawful measures to target citizens of another province,” said David Eby, Attorney General. “This reference question seeks to confirm the scope and extent of provincial powers to regulate environmental and economic risks related to heavy oils like diluted bitumen.”

The Province has been engaged with Indigenous groups, industry, environmental organizations and local governments to improve spill response in British Columbia.

“Our government is working to protect our economy, environment and communities by making sure we have effective spills prevention, response and recovery in place,” said George Heyman, Minister of Environment and Climate Change Strategy. “A single spill of diluted bitumen would put at risk tens of thousands of jobs across B.C. We have a responsibility to ensure that every measure to reduce risks is in place, and that those responsible for spills are held accountable for fixing any environmental damage they cause.”

In January 2018, B.C. proposed a second phase of regulations to improve preparedness,

response and recovery from potential spills. The regulations would apply to pipelines transporting any quantity of liquid petroleum products, as well as rail or truck operations transporting more than 10,000 litres of liquid petroleum products.

The proposed regulations would ensure geographically appropriate response plans, improve response times, ensure compensation for loss of public use of land and maximize the application of regulations to marine transport.

This work builds on the first phase of new spill regulations, approved in October 2017, under the Environmental Management Act, which established a standard of preparedness, response and recovery necessary to protect B.C.'s environment.

Quick Facts:

- A legal reference is an advisory opinion on a point of law. The B.C. Court of Appeal is the highest court to which the Province can send a reference question.
- British Columbia's reference seeks to clarify provincial jurisdiction with regard to regulating the potential impacts of heavy oils, like bitumen, that would endanger human health, the environment and communities.
- B.C. has had two recent references: One regarding the constitutionality of polygamy, and one related to third-party advertising in elections.

Learn More:

Constitution Question Act: <https://bit.ly/2Hh9yoE>

British Columbia Court of Appeal: http://www.courts.gov.bc.ca/Court_of_Appeal/

Three backgrounders follow.

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BACKGROUND 1

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Order-in-council and Reference Question

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the questions set out below be referred to the British Columbia Court of Appeal for hearing and consideration under the *Constitutional Question Act*:

- 1 Is it within the legislative authority of the Legislature of British Columbia to enact legislation substantially in the form set out in the attached Appendix?
- 2 If the answer to question 1 is yes, would the attached legislation be applicable to hazardous substances brought into British Columbia by means of interprovincial undertakings?
- 3 If the answers to questions 1 and 2 are yes, would existing federal legislation render all or part of the attached legislation inoperative?

APPENDIX

Environmental Management Act

1 The following Part is added to the Environmental Management Act, S.B.C. 2003, c. 53:

PART 2.1 – HAZARDOUS SUBSTANCE PERMITS

Purposes

22.1 The purposes of this Part are

- (a) to protect, from the adverse effects of releases of hazardous substances,
 - (i) British Columbia’s environment, including the terrestrial, freshwater, marine and atmospheric environment,
 - (ii) human health and well-being in British Columbia, and
 - (iii) the economic, social and cultural vitality of communities in British Columbia, and
- (b) to implement the polluter pays principle.

Interpretation

22.2 The definition of “permit” in section 1 (1) does not apply to this Part.

Requirement for hazardous substance permits

22.3 (1) In the course of operating an industry, trade or business, a person must not, during a calendar year, have possession, charge or control of a substance listed in Column 1 of the Schedule, and defined in Column 2 of the Schedule, in a total amount equal to or greater than

the minimum amount set out in Column 3 of the Schedule unless a director has issued a hazardous substance permit to the person to do so.

(2) Subsection (1) does not apply to a person who has possession, charge or control of a substance on a ship.

Issuance of hazardous substance permits

22.4 (1) Subject to subsection (2), on application by a person, a director may issue to the applicant a hazardous substance permit referred to in section 22.3 (1).

(2) Before issuing the hazardous substance permit, the director may require the applicant to do one or more of the following:

(a) provide information documenting, to the satisfaction of the director,

(i) the risks to human health or the environment that are posed by a release of the substance, and

(ii) the types of impacts that may be caused by a release of the substance and an estimate of the monetary value of those impacts;

(b) demonstrate to the satisfaction of the director that the applicant

(i) has appropriate measures in place to prevent a release of the substance,

(ii) has appropriate measures in place to ensure that any release of the substance can be minimized in gravity and magnitude, through early detection and early response, and

(iii) has sufficient capacity, including dedicated equipment and personnel, to be able to respond effectively to a release of the substance in the manner and within the time specified by the director;

(c) post security to the satisfaction of the director, or demonstrate to the satisfaction of the director that the applicant has access to financial resources including insurance, in order to ensure that the applicant has the capacity

(i) to respond to or mitigate any adverse environmental or health effects resulting from a release of the substance, and

(ii) to provide compensation that may be required by a condition attached to the permit under section 22.5 (b) (ii);

(d) establish a fund for, or make payments to, a local government or a first nation government in order to ensure that the local government or the first nation government has the capacity to respond to a release of the substance;

(e) agree to compensate any person, the government, a local government or a First Nations government for damages resulting from a release of the substance, including damages for any costs incurred in responding to the release, any costs related to ecological recovery and restoration, any economic loss and any loss of non-use value.

Conditions attached to hazardous substance permits

22.5 A director may, at any time, attach one or more of the following conditions to a hazardous substance permit:

(a) conditions respecting the protection of human health or the environment, including conditions requiring the holder of the permit

(i) to implement and maintain appropriate measures to prevent a release of the substance,

(ii) to implement and maintain appropriate measures to ensure that any release of the substance can be minimized in gravity and magnitude, through early detection and early response, and

(iii) to maintain sufficient capacity, including dedicated equipment and personnel, to be able to

respond effectively to a release of the substance in the manner and within the time specified by the director;

(b) conditions respecting the impacts of a release of the substance, including conditions requiring the holder of the permit

(i) to respond to a release of a substance in the manner and within the time specified by the director, and

(ii) to compensate, without proof of fault or negligence, any person, the government, a local government or a First Nations government for damages referred to in section 22.4 (2) (e).

Suspension or cancellation of hazardous substance permits

22.6 (1) Subject to this section, a director, by notice served on the holder of a hazardous substance permit, may suspend the permit for any period or cancel the permit.

(2) A notice served under subsection (1) must state the time at which the suspension or cancellation takes effect.

(3) A director may exercise the authority under subsection (1) if a holder of a hazardous substance permit fails to comply with the conditions attached to the permit.

Restraining orders

22.7 (1) If a person, by carrying on an activity or operation, contravenes section 22.3 (1), the activity or operation may be restrained in a proceeding brought by the minister in the Supreme Court.

(2) The making of an order by the court under subsection (1) in relation to a matter does not interfere with the imposition of a penalty in respect of an offence in relation to the same contravention.

Offence and penalty

22.8 A person who contravenes section 22.3 (1) commits an offence and is liable on conviction to a fine not exceeding \$400 000 or imprisonment for not more than 6 months, or both.

Power to amend Schedule

22.9 The Lieutenant Governor in Council may, by regulation, add substances, their definitions and their minimum amounts to the Schedule and delete substances, their definitions and their minimum amounts from the Schedule.

2 The following Schedule is added:

SCHEDULE [section 22.3 (1)]

Substance: Heavy Oil

Definition of Substance:

a) a crude petroleum product that has an American Petroleum Institute gravity of 22 or less, or
(b) a crude petroleum product blend containing at least one component that constitutes 30% or more of the volume of the blend and that has either or both of the following:

(i) an American Petroleum Institute gravity of 10 or less,

(ii) a dynamic viscosity at reservoir conditions of at least 10 000 centipoise.

Minimum Amount of Substance:

The largest annual amount of the annual amounts of the substance that the person had possession, charge or control of during each of 2013 to 2017.

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BACKGROUND 2

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What is a legal reference?

A reference is a process where government can refer a legal question or questions to a court for determination. The answer of the court in a reference process is treated as a decision of that court.

The Government of British Columbia can refer any matter to the Court of Appeal or to the B.C. Supreme Court under the Constitutional Question Act. The question is approved by cabinet, and set out in an order-in-council, which will be available on the B.C. Laws website.

If a matter is referred to the B.C. Supreme Court, the decision can be appealed to the Court of Appeal. References heard by the Court of Appeal avoid the delay and expense of going through two levels of court.

After a reference is filed, notice must be given to the Attorney General of Canada.

In addition, the court may direct other interested parties be notified of the hearing. These interested parties are entitled to be heard. The court will set a date for hearing the reference question.

After the hearing date, the B.C. Court of Appeal will deliberate, then release its decision. The court will determine when it releases its decision, which is treated as a decision of that court, and can be appealed.

Proposed legislation referred to a court for its advice may not necessarily be enacted. To be validly binding, the proposed legislation would need to go through the ordinary process, including being passed by the British Columbia legislature.

What is British Columbia's reference?

British Columbia's reference to the B.C. Court of Appeal is about the relationship between the Province's authority (jurisdiction) to prevent and manage releases into the environment of substances, like diluted bitumen, that would endanger human health, the environment or communities and the federal government's authority (jurisdiction) over federal undertakings, such as interprovincial pipelines or railways.

The courts have repeatedly affirmed that provinces may make laws and regulations within their legal authority, even in areas of shared authority that overlap with areas federal responsibility. In the 2016 case of *Coastal First Nations v. British Columbia*, the B.C. Supreme Court affirmed the ability of provinces to regulate impacts of projects, even if they are federal undertakings, writing:

“To disallow any provincial regulation over the project because it engages a federal undertaking would significantly limit the province’s ability to protect social, cultural and economic interests in its lands and waters. It would go against the current trend in the jurisprudence favouring, where possible, co-operative federalism.”

For its reference, the B.C. government is asking the B.C. Court of Appeal to review proposed amendments to the Environmental Management Act. The amendments would give the Province authority to regulate impacts of heavy oils like bitumen whose release into the environment would endanger human health, the environment or communities.

Specifically, these amendments would require that a person in possession of such substances, above certain minimum levels, would need to obtain a permit from the provincial director of waste management. Under the proposed amendments, the director could impose certain conditions on the permits.

In considering these proposed amendments, the Province asks the court to answer three questions that raise specific constitutional jurisdictional doctrines of “validity”, “interjurisdictional immunity”, and “paramountcy”:

- Is the draft legislation within provincial jurisdiction to enact? (Validity)
- Would the draft legislation be applicable to hazardous substances brought into British Columbia by means of an interprovincial undertaking? (Interjurisdictional immunity)
- Is there any federal legislation that is inconsistent with the proposed amendments that would render the proposed amendments inoperative? (Paramountcy)

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BACKGROUND 3

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Protecting British Columbia's lands, water courses and coast

The provincial government is working to ensure the best possible protections are in place to defend B.C. lands, waters and coast, and the tens of thousands of jobs that rely on B.C.'s clean environment.

B.C. has over 19,000 tourism businesses, employing 133,000 people, throughout the province. Fisheries and seafood contribute more than \$660 million each year to the province's gross domestic product, employ 14,000 people and pay nearly \$400 million in wages. B.C.'s film industry supports more than 60,000 direct and indirect jobs.

The provincial government has been working to improve spill response throughout British Columbia. Legislation to establish new requirements to prevent, respond to and recover from spills was passed in 2016. The first set of new regulations to enable this legislation was passed in October 2017.

These regulations, developed with input from industry, Indigenous groups and local communities, as well as other federal and provincial agencies, apply to anyone transporting liquid petroleum products by pipeline, and anyone transporting more than 10,000 litres by rail or truck. The regulations contain provisions that:

- Require the development and implementation of spill contingency plans.
- Define requirements for drills and exercises.
- Mandate record-keeping for spill preparedness and response.
- Require enhanced reporting, and set additional cost-recovery mechanisms.
- Enable government to require plans for recovery in the event of a spill.

In February 2018, public consultations began on a second phase of proposed regulations, pursuant to the Environmental Management Act, to improve overall spill readiness. These include:

- Response times to ensure timely responses following a spill.
- Geographic response plans to ensure resources are available to support an immediate response, which consider the unique characteristics of a given sensitive area.
- Compensation for loss of public use from spills, including economic, cultural and recreational impacts.
- Maximizing application of regulations to marine spills.

The initial public engagement on proposed Phase 2 regulations will close April 30, 2018. Based on the results of this engagement, along with direct engagement with Indigenous groups, industry, environmental organizations and local governments, an intentions paper, outlining

what final regulations might look like, will be posted for public comment later in 2018. Final regulations are expected to be in place in early 2019.

The Province will also create an independent scientific advisory panel to help address the scientific uncertainties around the behavior of bitumen when spilled in water, outlined in the report, *The Royal Society of Canada Expert Panel: The Behaviour and Environmental Impacts of Crude Oil Released into Aqueous Environments*.

British Columbia continues to work with the federal government to further enhance marine and terrestrial spill prevention, response and recovery measures.

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