

# Spill preparedness, response, reporting and recovery:

## Statutory Obligations, Risks and What's Next

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### Agenda



- **British Columbia Legislation**
  - *Environmental Management Act*
    - *Spill Preparedness, Response and Recovery Regulation*
    - *Spill Contingency Planning Regulation*
    - *Spill Reporting Regulation*
  - What's Next? Phase 2 Regulations
  - Case Study
- **Federal Legislation**
  - *Canadian Environmental Protection Act*
    - *Environmental Emergency Regulations, 2019*
  - *Fisheries Act*
  - Case Study



Source: Reader's Digest Canada

## British Columbia Former Legislation

BLG

- **Spills of contaminants were formerly governed by:**
  - *Environmental Management Act* (“EMA”), s. 79
  - *Spill Reporting Regulation* [now repealed]
  - *Spill Cost Recovery Regulation* [now repealed]
  
- ***Environmental Management Act*, s. 79 (“EMA”)**
  - Minister had authority to order investigations, contingency planning, construction of works, or any other measure considered necessary to prevent or contain a spill
  - Person in control of substance when it was spilled was required to immediately provide a Spill Report to the Provincial Emergency Program

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## British Columbia Former Legislation

BLG

- ***Spill Reporting Regulation* [repealed]**
  - Only verbal report in cases where spill was above threshold amount
  - Had no automatic requirements related to:
    - *Written reports*
    - *Impact assessments*
  - Required action be taken to stop, contain, and minimize effects of spill
  
- ***Spill Cost Recovery Regulation* [repealed]**



JOEDATOR  
+ YACCARINO

*“The five-second rule doesn’t apply to soup.”*

Photo: The New Yorker - Condé Nast

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## British Columbia Current Legislation

BLG

- **The former legislation was repealed and replaced in 2016-2017**
  - Intentions Paper: April 2016
  - Bill 21: *Environmental Management Amendment Act*
  - Passed May 10, 2016
  - Came into force by regulation in October 2017
- **Phase 1 Changes:**
  - *EMA, Part 7, Division 2.1*
  - *Spill Reporting Regulation*
  - *Spill Preparedness, Response and Recovery Regulation*
  - *Spill Contingency Planning Regulation*



Photo: Business in Vancouver

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## British Columbia Current Legislation

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- **Amendments to the EMA and Phase 1 Regulations set a foundation for strengthening spill preparedness, response and recovery**
  - Increased preparedness requirements for transporters of liquid petroleum products
  - Expanded triggers for response and recovery efforts (“imminent risk of occurring”)
  - Enhanced cost recovery for government



Photo: Business in Vancouver

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## British Columbia EMA, Part 7, Division 2.1

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### o What is a “spill” under the EMA?

- Introduction of a substance or thing to the environment that has the potential to cause “adverse effects” to the environment, human health or infrastructure
  - Includes adverse effects on flora, fauna, and animal, fish and plant habitats
- Has not been authorized under EMA
- May occur unintentionally or intentionally

### o What is spill response?

- Activities that address the direct effects of a spill and are designed to limit personal injury as well as property and environmental damage
- Begins immediately after a spill has occurred or is at imminent risk of occurring
- Ends when all reasonable efforts have been made to remove spilled material and assess the short-term impacts of the spill

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## British Columbia EMA, Part 7, Division 2.1

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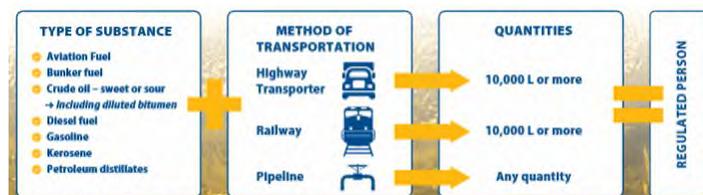
### o Two new categories of “persons”:

#### “Responsible Person”

has possession, charge or control of a substance (or thing) when a spill of the substance (or thing) occurs or is at imminent risk of occurring

#### “Regulated Person”

has, in the course of conducting an industry trade or business, possession, charge or control of a prescribed substance in prescribed quantities



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Photo: Ministry of Environment and Climate Change

## British Columbia EMA, Part 7, Division 2.1

BLG

### o What is required of a “responsible person”?

- If a spill has occurred:
  - Report the spill in accordance with the Spill Reporting Regulation
  - Provide any requested information about response activities
  - Ensure skilled, experienced persons with the necessary resources and equipment arrive on site and respond to the spill, and implement an incident command system
- If a spill has occurred or is at imminent risk of occurring:
  - Ensure actions necessary to address the threat or hazard caused by the spill are taken, which may include actions to:
    - Assess, monitor and prevent the threat
    - Stabilize, contain, remove and clean up the spill
    - Identify and evaluate the immediate risks to protect human health, the environment and infrastructure
    - Identify and evaluate long-term effects of the spill
  - Take steps to resolve or mitigate long-term impacts.



Photo: B.C. Environmental Emergency Program

## British Columbia EMA, Part 7, Division 2.1

BLG

### o What else *may* be required of a “responsible person”?

- Ministry reviews information on all spills to determine its response
- As a result of this review, a “responsible person” may be required to:
  - Provide any information regarding a spill that is requested by an officer
  - Take any additional actions beyond what is prescribed in the regulations if ordered by a director
  - Develop and implement a recovery plan if ordered by a director



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Photo: Creative Safety Supply

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## British Columbia

### EMA, Part 7, Division 2.1

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- **What is required of a “regulated person”?**
  - Carry out risk assessments (for spills of prescribed substances)
  - Prepare a spill contingency plan that complies with the *Spill Contingency Planning Regulation*
  - Ensure employees receive prescribed training, and test the spill contingency plan through drills and exercises
  - Make spill contingency plan available to employees
  - Prepare prescribed reports
  - If a spill occurs, implement the spill contingency plan
  - Keep records related to preparedness
  - Provide information to the ministry if requested by a director
    - *Operations*
    - *Activities*
    - *Any substance being used, stored, treated, produced or transported*



Photo: Getty Images/iStockphoto

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## British Columbia

### EMA, Part 7, Division 2.1

BLG

- **The amended EMA provides for enhanced cost recovery**
  - Government (and any person directed by the government) may enter private property for this purpose
  - Ministry may carry out spill response actions if necessary, such as:
    - *There is no responsible person in relation to the spill*
    - *Ministry has reasonable grounds to believe that government action is necessary to address the consequences of a spill*
    - *Responsible person requests assistance with response and recovery actions*
  - Ministry actions can also include:
    - *identifying and evaluating risks to the environment, human health, and infrastructure,*
    - *measures to recover and restore the environment*
    - *steps to resolve or mitigate long term impact*

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British Columbia  
EMA, Part 7, Division 2.1



o The amended EMA provides for enhanced cost recovery

- Government can recover costs from responsible person AND owner of the substance or thing spilled
- Costs are a debt due to the government, jointly and separately
- Recoverable costs are costs that the Ministry has deemed to be reasonable and may include:
  - use of government employees or contractors in the response (including hourly rates and expenses)
  - use of government vehicles (including mileage)
  - use of external consulting or other professional services
  - use, maintenance, and/or repair of government equipment
  - research and analytic services related to environmental recovery
  - any other costs related to mitigating the effects of the spill on the public
- 25% administrative fee and interest will also apply



Photo: Government of Newfoundland

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British Columbia  
EMA, Part 7, Division 2.1



o Fines and penalties

- It is the responsibility of regulated persons, responsible persons and the owners of substances or things to understand and comply with the EMA and its regulations
- Failure to be in compliance can result in convictions of fines and imprisonment

<b>“Responsible Person”</b>	Fine not exceeding \$300,000, imprisonment for not more than 6 months, or both
<b>“Regulated Person”</b>	Fine not exceeding \$400,000, imprisonment for not more than 6 months, or both

- If a corporation commits an offence under the EMA, an employee, officer, director or agent of the corporation who authorized, permitted or acquiesced in the offence commits the offence whether or not the corporation is convicted
- Intentional environmental damage or loss, and wanton or reckless disregard for the lives or safety of others or causing a risk of death or harm is an additional offence under the EMA

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## British Columbia

### Spill Preparedness, Response and Recovery Regulation



- **“Responsible persons” may be ordered to prepare and implement a recovery plan**
  - What is a “recovery plan”?
    - Documented process or set of procedures that outline how a responsible person intends to resolve or mitigate the impacts of a spill
    - Identify environmental impacts
    - Outline actions to be taken to return the natural environment to its pre-spill condition
    - Addresses materials that could not be cleaned up, impacts on the environment caused by response actions (e.g., digging scars, tire ruts, eroded work areas) and habitat restoration
  - When might this requirement apply?
    - If the director believes there are steps that must be taken to eliminate, mitigate and/or compensate for the damage caused by the spill
    - Ex: large volume spills, a significant release of a hazardous substance to a fish-bearing waterbody, a spill that has impacted a public drinking water source

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## British Columbia

### Spill Preparedness, Response and Recovery Regulation



- **“Responsible persons” may be ordered to prepare and implement a recovery plan**
  - What must be included in a recovery plan?
    - Summary of the spill, including what was spilled and its relevant properties that could have potential adverse effects on the environment, human health and infrastructure
    - How much was spilled
    - Response actions carried out in relation to the spill
    - Description of the environment prior to the spill
    - Assessment of the spill’s potential and actual impacts
    - summary of proposed recovery actions, which identifies and weighs alternatives
    - Quantifiable targets and timelines for recovery actions
    - Description of what the post-recovery environment
    - Summary of engagement and consultation with First Nations government, local government, residents, businesses and non-profit stakeholders impacted by the spill or with knowledge of the area

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## British Columbia

### Spill Preparedness, Response and Recovery Regulation

BLG

#### o “Responsible persons” may be ordered to prepare and implement a recovery plan

- Plan must be approved by the Director
- Responsible person is then required to carry out the plan
  - *Polluter-pays principle*
- At the end of the recovery process, in accordance with the regulations, a report is prepared and submitted to the Director
- Director may (or may not) issue a Certificate of Recovery
- What happens if restoration is not reasonably achievable?
  - *Off-site mitigation*
  - *In-lieu payment*

#### APPROVAL PROCESS

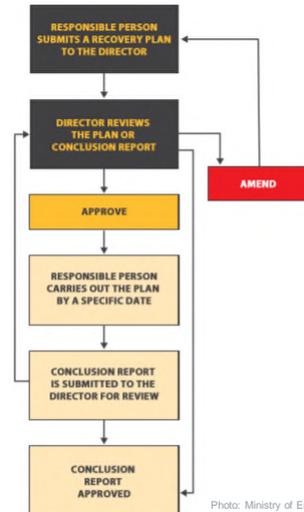


Photo: Ministry of Environment and Climate Change

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## British Columbia

### Spill Preparedness, Response and Recovery Regulation

BLG

#### o “Regulated persons” were required to create a contingency spill plan by the following dates:

- April 30, 2018 – pipeline and railway transporters
- October 30, 2018 – highway transporters



cuddlesandrage.com

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## British Columbia *Spill Reporting Regulation*

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- **Any release of substances must be reported immediately if:**
  - Releases of a substance may cause, is causing or has caused an adverse effect to the water, environment, human health or safety, or property,
  - If the spill amount is equal to or greater than the minimum quantity set by the *Spill Reporting Regulation*
  - Spills of any size that occur near or on water
- **Responsible person must provide three types of reports:**
  - Initial verbal report to Provincial Emergency Program of both actual and potential spills
  - Updates to minister report (Every 30 days until end of spill)
  - End-of-spill report
- **Directory may also order responsible person to submit a post-incident lessons-learned report**

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## British Columbia *Spill Contingency Planning Regulation*

BLG

- **“Regulated persons” must provide a contingency spill plan**
- **Contingency spill plans must include:**
  - Hazard assessment
  - Spill response planning map
  - Equipment, personnel, and other resources
  - Incident Command System
  - Human health and safety
  - Communications
  - Waste management
  - Wildlife
  - Spill response
  - Training
- **Reviewed annually; tested every 3 years; record retention for 5 years**



Photo: Getty Images/Stockphoto

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# British Columbia What's Next?



o Phase two regulations are now being considered

<b>February 28, 2018</b>	Policy Intentions Paper for Engagement: Phase two enhancements to spill management in B.C.
<b>February 28 – April 30, 2018</b>	Engagement with public, Indigenous peoples, other governments, industry and associations, environmental organizations and interested stakeholders
<b>Summer 2019</b>	Engagement feedback reports released

o New requirements may include:

- Timely responses following a spill
- Development of Geographic Response Plans (GRPs) to consider the unique characteristics of an area
- Addressing loss of public and cultural use from spills
- Maximizing marine application of *EMA* and its regulations

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# British Columbia Case Study



## MSP Transport Ltd.

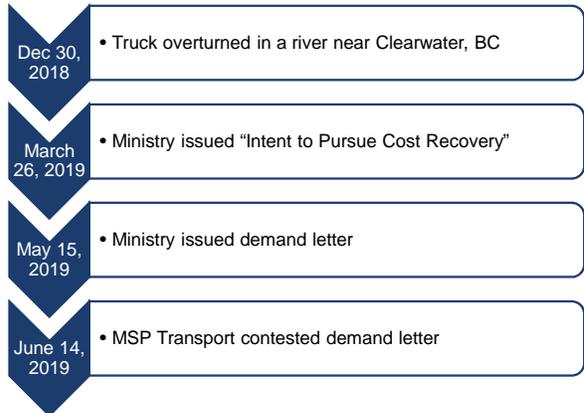


Photo: ourbc.com/CBC

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## British Columbia Case Study

BLG

### *MSP Transport Ltd.*

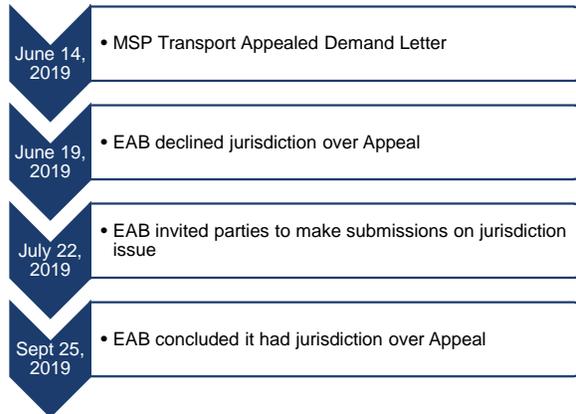


Photo: ourbc.com/CBC

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## British Columbia Case Study

BLG

### *MSP Transport Ltd.*

- **Definition of “decision” – EMA, s. 99**
  - (a) making an order,
  - (b) imposing a requirement,
  - (c) exercising a power except a power of delegation, [...]
  - (f) determining to impose an administrative penalty, ...
- **Appeals to Environmental Appeal Board – EMA, s. 100**
  - (1) A person aggrieved by a **decision of a director** or a district director may appeal the decision to the appeal board in accordance with this Division....



Photo: ourbc.com/CBC

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## British Columbia Case Study

BLG

### *MSP Transport Ltd.*

- EAB found it had jurisdiction to hear appeal from demand letter
- The demand letter was a “certificate” for the purposes of sections 91.4(6) and (7) of the *EMA*
- The demand letter contains a substantive decision of a director
- Independent review of the appropriateness of spill response costs necessary



Photo: ourbc.com/CBC

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## Federal Overall Legislative Scheme

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- **A number of federal laws apply to spills, industrial accidents and other environmental emergencies:**
  - *Canadian Environmental Protection Act, 1999 (“CEPA”)*
  - *Fisheries Act*
  - *Transportation of Dangerous Goods Act*
  - *Canada Shipping Act*
  - *Marine Liability Act*
  - *Migratory Birds Convention Act*
  - *Canada Oil & Gas Operations Act*

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## Federal

### Canadian Environmental Protection Act, 1999

BLG

- **Minister may require any person (or class) to prepare and implement an environmental emergency plan respecting the environmental emergency prevention, preparedness, response or recovery in respect of:**
  - a substance or group of substances on the List of Toxic Substances in Schedule 1; or
  - a substance or group of substances that the Ministers have recommended or ordered be added to the List.
  
- **Any person who owns or has the charge, management or control of a substance immediately before an environmental emergency, or causes or contributes to an environmental emergency, must:**
  - Provide notification and written report
  - Take all reasonable emergency measures consistent with the protection of the environment and public safety to:
    - *prevent the environmental emergency, or*
    - *repair, reduce or mitigate any negative effects on the environment or human life or health that result from the environmental emergency or that may reasonably be expected to result from it; and*
    - *make a reasonable effort to notify any member of the public who may be adversely affected by the environmental emergency.*

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## Federal

### Canadian Environmental Protection Act, 1999

BLG

- **Where any person fails to take any required measures, an enforcement officer may take those measures, cause them to be taken or direct any person to take them**
  
- **Federal government may recover costs and expenses reasonably incurred during cleanup or environmental remediation**
  - Applies to same groups of people subject to spill reporting & response
  
- **Provides for the establishment of a national system for notification and reporting of environmental emergencies**
  
- **Person who owns or is in charge of a spilled substance is liable for restoring any part of the environment damaged by the emergency and/or for costs and expenses incurred by a public body or agency in respect of measures taken to prevent and cleanup the spill**

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## Federal

### Environmental Emergency Regulations, 2019



- **Adds new definitions of:**
  - “Responsible person” - any person who owns or has the charge, management or control of a substance that is located at a facility
  - “Substance” – prescribed substances and solutions, in prescribed concentrations
  - “Facility” – a property on which one or more fixed onshore installations are located and where a substance is present
  - “Container system” – any receptacle or network of receptacles that is used to contain a substance (including connected pipelines or piping)
    - *Exception: any part of that network that is automatically or remotely segregated from the rest of the network by shut-off valves, or other mechanisms, in the event of any environmental emergency*
  
- **A “responsible person” responsible for a regulated substance at or above certain quantities must notify Environment and Climate Change Canada**

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## Federal

### Environmental Emergency Regulations, 2019



- **For higher-risk facilities, an environmental emergency plan must also be prepared, brought into effect and exercised**
  
- **Schedule 1 of the Regulations includes 249 substances that pose an acute hazard to the environment or to human health should an accidental release occur**
  - aquatically toxic
  - combustible
  - explosion hazard
  - pool fire hazard
  - inhalation hazard
  - oxidizer that may explode

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## Federal

### Environmental Emergency Regulations, 2019

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#### HOW DO I COMPLY WITH THE ENVIRONMENTAL EMERGENCY REGULATIONS, 2019?

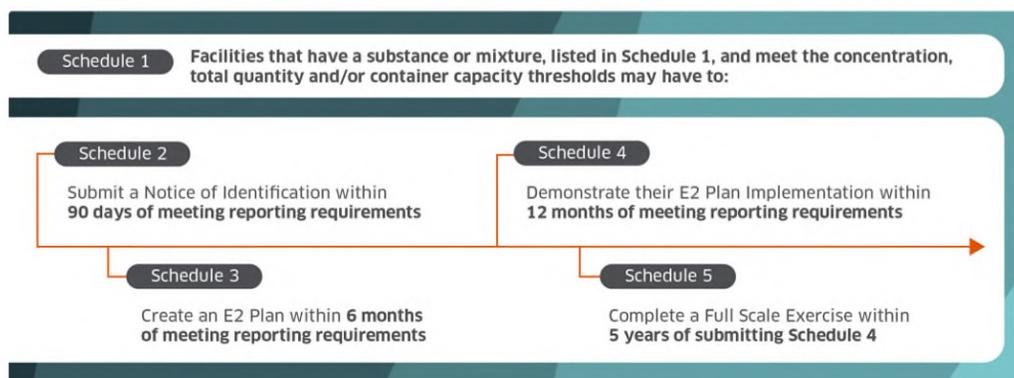


Photo: Government of Canada

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## Federal

### Fisheries Act

BLG

- Prohibits a “**deposit**” of a “**deleterious substances**” in:
  - waters frequented by fish, or
  - any place and under any conditions where it (or a resulting deleterious substance) may enter any such water
  - **Exception:** deposits authorized by regulation
- **What is a deleterious substance?**
  - Any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or
  - Any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,
  - Includes prescribed substances, classes of substances, water that contains any substance or class of substances in a quantity or concentration that is equal to or greater than a prescribed quantity or concentration, and water subject to a prescribed treatment, process or change

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## Federal *Fisheries Act*

BLG

- **What is a “deposit”?**
  - Any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing
- **If an unauthorized deposit occurs, what is required?**
  - Duty to notify
  - Duty to take corrective measures
- **Offence under the *Fisheries Act*, and fines and penalties may be imposed (summary conviction or conviction on indictment)**
- **Government may take immediate corrective measures on behalf of responsible persons, and may recover costs**



Photo: Michel Roggo / WWF

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## Federal *Case Study*

BLG

### *R. v University of British Columbia*

- September 12, 2014 – Environment and Climate Change Canada was contacted regarding an ammonia odour at an outfall ditch connected to Booming Ground Creek in Pacific Spirit Regional Park
- Source was identified as a refrigeration plant at Thunderbird Arena at the University of British Columbia
- CIMCO Refrigeration and UBC had been completing repairs of the refrigeration system
- A mixture of water and ammonia was discharged into a storm drain at the arena



Photo: Kasian Architecture

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## Federal Case Study

BLG

### *R. v University of British Columbia*

- Substance flowed to the outfall, through a ditch, and into Booming Ground Creek (a tributary of the Fraser River)
- Officers and park rangers found approximately 70 dead fish in Booming Ground Creek in the two days following the discharge
- Level of ammonia deposited in the water in the storm drain and ditch was analyzed and found to be harmful to fish



Photo: Kasian Architecture

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## Federal Case Study

BLG

### *R. v University of British Columbia*

- During the trial, CIMCO Refrigeration pled guilty to depositing or permitting the deposit of a deleterious substance into an area that may enter water frequented by fish.
- In November 2018, UBC was convicted of the following offences:
  - depositing or permitting the deposit of a deleterious substance into water frequented by fish (Booming Ground Creek)
  - depositing or permitting the deposit of a deleterious substance into places that may enter waters frequented by fish (in this case, a storm sewer and a ditch connected to Booming Ground Creek)
  - failing to report the incident in a timely manner



Photo: Kasian Architecture

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## Federal Case Study

BLG

### *R. v University of British Columbia*

- In June 2019, the Court sentenced the parties to the following fines:
  - CIMCO Refrigeration – \$800,000
  - UBC – \$1.2 million
  
- UBC was also ordered to conduct five years of electronic monitoring of storm-water quality at the outfall where the release occurred



Photo: Kasian Architecture

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## Federal 4. Case Law Example

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

- UBC appealed:
  - its conviction under the *Fisheries Act*
  - the sentence imposed
  - dismissal of its application to stay the charges based on delay
  
- Court declined the appeal of the decision to deny a stay due to delay
  - Application of SCC's judgment in *R. v. Jordan*



Photo: Kasian Architecture

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## Federal Case Study

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

#### o Court upheld the conviction

- UBC agreed that ammonia had in a deleterious concentration had been found in the ditch, and had been deposited in the drain
- UBC argued that *actus reus* was not established, as trial judge had inferred that ammonia had entered the creek
- Court held that the trial judge's conclusion that a deleterious substance made its way from the ditch into the creek was unassailable
- No requirement to prove the presence of a substance in a concentration that is deleterious to fish



Photo: Kasian Architecture

#### o Court upheld the sentence

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# Thank You

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