

VANCOUVER
APR 26 2018
COURT OF APPEAL
REGISTRY

Court of Appeal File No. _____

CA 45253

Vancouver Registry

COURT OF APPEAL

IN THE MATTER OF:

The *Constitutional Question Act*, RSBC 1996, c. 68

AND IN THE MATTER OF:

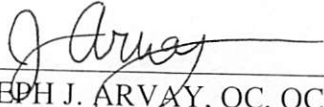
A Reference by the Lieutenant Governor in Council set out in Order in Council No. 211/18 dated April 25, 2018 concerning the constitutionality of amendments to provisions in the *Environmental Management Act*, RSBC 2003, c. 53 regarding the impacts of releases of certain hazardous substances

REQUISITION

Filed by: The Attorney General of British Columbia

REQUIRED: Initiate a proceeding in the nature of a Reference regarding the constitutionality of amendments to provisions in the *Environmental Management Act*, RSBC 2003, c. 53 regarding the impacts of releases of certain hazardous substances, pursuant to the attached Order in Council No. 211/18.

DATE: 26 April 2018



JOSEPH J. ARVAY, OC, QC
Counsel for the Attorney General
of British Columbia

JOSEPH J. ARVAY, OC, QC
Counsel for the Attorney General of British Columbia
Arvay Finlay LLP
1710 – 401 West Georgia Street
Vancouver, BC V6B 5A1
Tel (604) 696-9828
Fax 1 (888) 575-3281

Attachment.

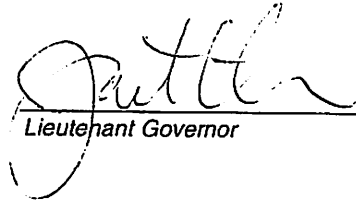
On Notice To:

Counsel for the Attorney General of Canada
Justice Canada
840 Howe Street, Suite 900
Vancouver, BC V6Z 2S9
Fax: (604) 775-7557

PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

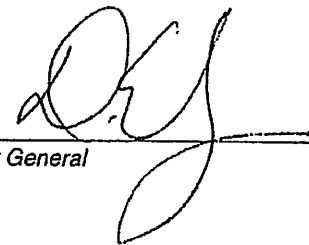
Order in Council No. 211 , Approved and Ordered April 25, 2018

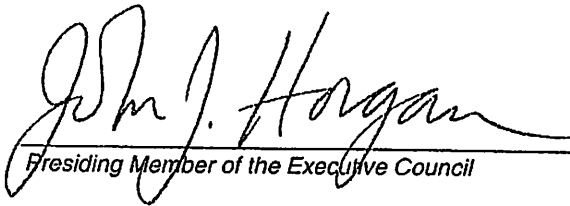

Lieutenant Governor

Executive Council Chambers, Victoria

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?


Attorney General


Presiding Member of the Executive Council

(This part is for administrative purposes only and is not part of the Order.)

Authority under which Order is made:

Act and section: Constitutional Question Act, R.S.B.C. 1996, c. 68, s. 1

Other: _____

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 nation 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 nation 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)]

Column 1 Substance	Column 2 Definition of Substance	Column 3 Minimum Amount of Substance
Heavy oil	(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.	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.