CASE LAW UPDATE

2017 IN REVIEW

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Borden Ladner Gervais

Outline

- **Supreme Court of Canada Cases:**
  - *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40
  - *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41
  - *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations),* 2017 SCC 54

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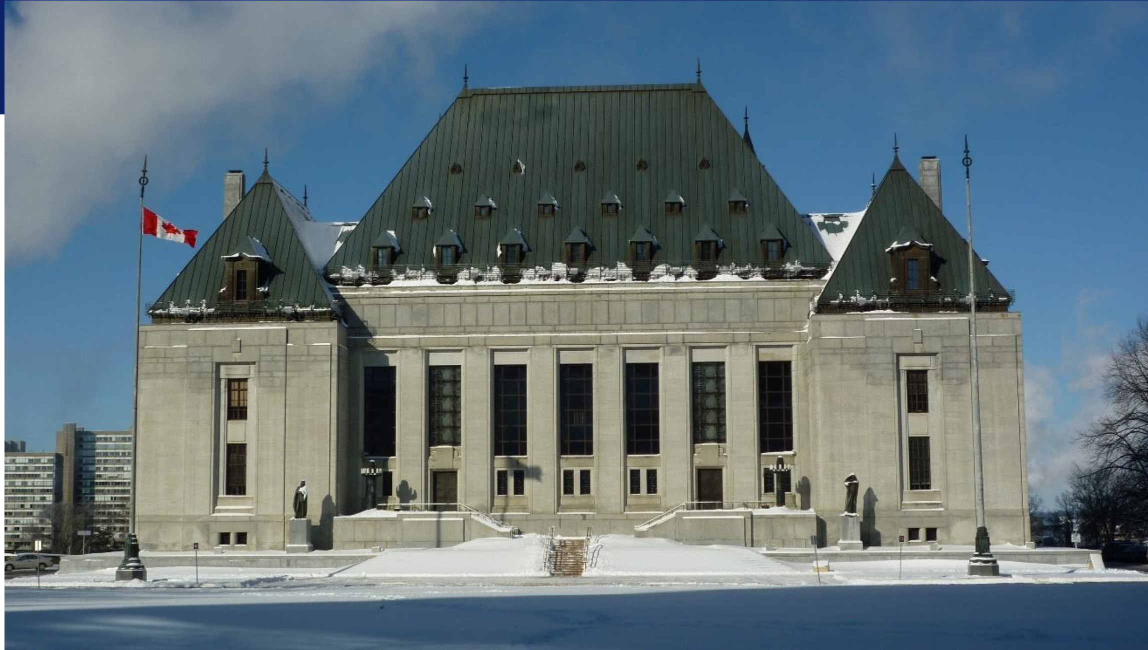
Outline

- **British Columbia Cases:**
  - *Kirk v. Executive Flight Centre Fuel Services*, 2017 BCSC 726
  - *Assn. for the Protection of Fur-Bearing Animals v. British Columbia,* 2017 BCSC 2296
  - *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2017 BCSC 2397
  - *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856, upheld on appeal in 2017 BCCA 401



SUPREME COURT OF CANADA CASES

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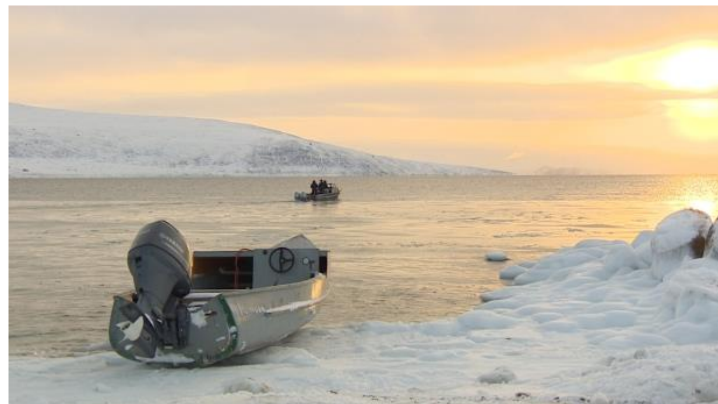
Clyde River (Hamlet) v. Petroleum Geo-Services Inc., 2017 SCC 40

- Petroleum Geo-Services Inc. applied to the NEB for authorization to conduct offshore seismic testing for oil and gas in Nunavut
- The Inuit of Clyde River opposed the seismic testing, alleging that the duty to consult had not been fulfilled in relation to it
- The NEB granted the requested authorization, concluding that:
    - PGS made sufficient efforts to consult with Aboriginal groups
    - Aboriginal groups had adequate opportunity to participate in the NEB's process
    - The testing was unlikely to cause significant adverse environmental effects

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

- The Inuit petitioned for judicial review of the NEB's decision
- The Federal Court of Appeal found that while the duty to consult had been triggered, the Crown was entitled to rely on the NEB to undertake such consultation, and the Crown's duty to consult had been satisfied in this case by the NEB's process
- The Inuit appealed to the SCC, which allowed the appeal and quashed the NEB's authorization



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

- The SCC held that:
  - The NEB's approval process constituted "Crown action" which triggered the duty to consult with Aboriginal groups potentially impacted by its decision.
  - As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation was adequate if the concern is raised before it.
  - Where the Crown's duty to consult remains unfulfilled, the NEB must withhold project approval. Where the NEB fails to do so, its approval decision should be quashed on judicial review.

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

- The process undertaken by the NEB in this case was not sufficient to satisfy the Crown's duty to consult:
  - No consideration was given in the NEB's environmental assessment to the source of the Inuit's treaty rights or to the impact of the proposed testing on those rights
  - The Crown did not make it clear that it was relying on the NEB's processes to fulfill its duty to consult
  - The Inuit had limited opportunity to participate and consult (there were no oral hearings and there was no participant funding)
  - PGS eventually responded to questions raised during the environmental assessment process in the form of a practically inaccessible document months after the questions were asked

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

- Enbridge Pipelines Inc. applied to the NEB for approval to modify a pipeline to reverse the flow of part of the pipeline, increase its capacity, and enable it to carry heavy crude
- The NEB issued notice to Indigenous groups, including the Chippewas of the Thames First Nation, informing them of the project, the NEB's role and the NEB's hearing process
- The Chippewas were granted funding to participate in the process, filed evidence and delivered oral argument
- The NEB approved the project, finding that the potential project impacts on the rights and interests of Aboriginal groups would likely be minimal and would be appropriately mitigated

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

- The Chippewas petitioned for judicial review of the NEB's decision
- The Federal Court of Appeal dismissed the petition and the Chippewas appealed to the SCC. The SCC dismissed the appeal finding that:
  - The process undertaken by the NEB in this case was sufficient to satisfy the Crown's duty to consult
  - The NEB provided the Chippewas with an adequate opportunity to participate in the decision-making process
  - The NEB sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated
  - The NEB provided appropriate accommodation through the imposition of conditions on Enbridge

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

- Glacier Resorts sought government approval to build a year-round ski resort in Qat'muk
- The Ktunaxa First Nation was consulted and raised concerns about the impact of the project
- Late in the process, the Ktunaxa adopted the position that accommodation was impossible because the project would drive Grizzly Bear Spirit from Qat'muk and therefore irrevocably infringe their s.2(a) *Charter* right to freedom of religion
- After efforts to continue consultation failed, the respondent Minister declared that reasonable consultation had occurred and approved the project

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

- The Ktunaxa petitioned for judicial review of the decision
- The chambers judge dismissed the petition and the B.C. Court of Appeal confirmed that decision. The Ktunaxa appealed that decision to the SCC.
- A majority of the SCC dismissed the appeal, finding that:
  - the Minister's decision to approve the project did not infringe the Ktunaxa's s.2(a) Charter right to freedom of religion
  - the Minister's decision that the Crown had met its duty to consult and accommodate under s. 35 of the Constitution Act, 1982 was reasonable

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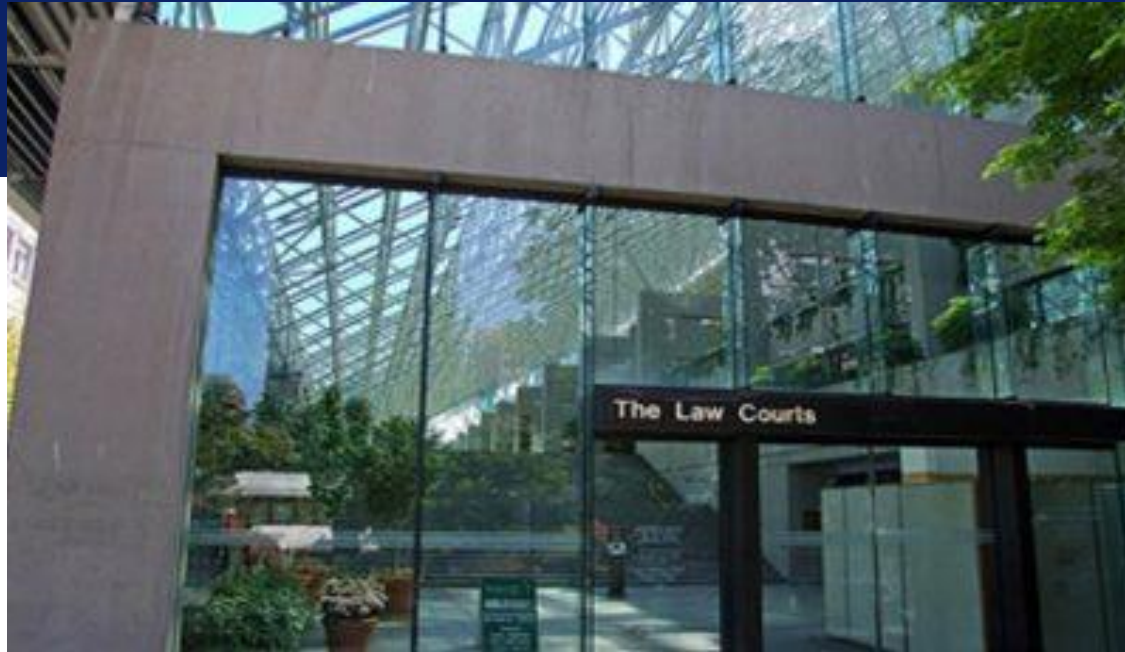
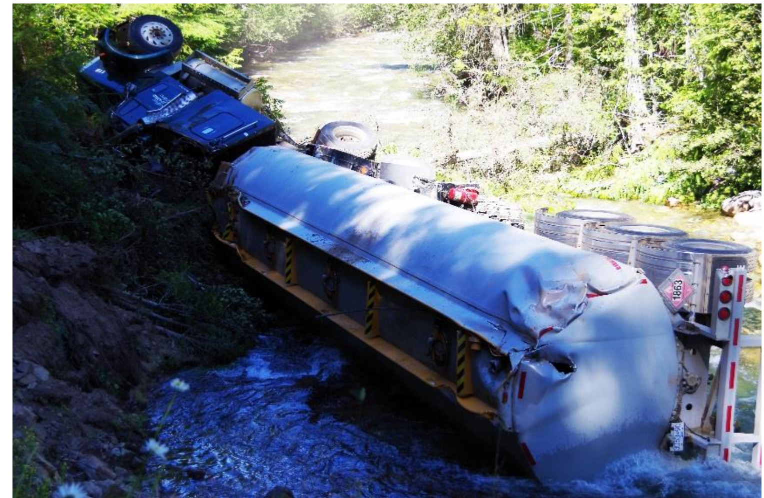


BRITISH COLUMBIA CASES

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

- The plaintiff sought certification of a class action brought on behalf of all parties affected by a jet fuel spill in the West Kootenay region of British Columbia
- The spill occurred as a result of a forty-foot fuel tanker truck overturning into the watercourse
- The spill led to an evacuation order and a "do not use water" order being issued by the Interior Health Authority



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

- The representative plaintiff sought certification of a class action brought on behalf of “[a]ll persons who owned, leased, rented, or occupied real property on July 26, 2013, within the Evacuation Zone.”
- The defendants included the owner of the fuel tanker and the Province of British Columbia
- The plaintiffs classified the spill as a “single incident mass tort” and sought damages against all of the defendants in negligence, nuisance and the rule in *Rylands v. Fletcher,* specifically:
  - Joint and several damages for loss of use and enjoyment of property and diminution in property value
  - Exemplary and/or punitive damages in relation to the defendants’ negligent acts and omissions leading up to the spill and the exacerbation of harm

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

- After considering each of the mandatory factors in Section 1 of the British Columbia *Class Proceedings Act*, the Court certified the class action. In particular, the Court made the following findings:
  - The pleadings disclosed causes of action against each of the defendants. It was not “plain and obvious” that the claims would fail.
  - There was an identifiable class. Although the definition of the “Evacuation Zone” was imprecise, it could be further refined leading up to trial.
  - The pleadings raised common issues, including liability for all alleged causes of action, apportionment of liability amongst the co-defendants, and punitive damages. The plaintiff did not seek to certify general damages as a common issue.

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

- The Court further found that:
  - Mr. Kirk was a suitable representative plaintiff. He was a retired resident of Winlaw, B.C. who owned and lived on a 51-acre rural property bordering one kilometre of the east side of the affected Slocan River.
  - A class action was the preferable means of resolving the common issues.
- This decision may have implications for future defendants facing claims in respect of spills or other environmental emergencies, in that it is possible for single-incident claims to be certified as class proceedings
- The defendants have appealed the decision

Assn. for the Protection of Fur-Bearing Animals v. British Columbia, 2017 BCSC 2296

- This decision dealt with the issue of whether the B.C. *Wildlife Act* grants a conservation officer authority to kill a wild animal that is neither in distress nor posing a threat to persons, property, wildlife or wildlife habitat

- The petitioner came into possession of an orphaned black bear cub, arranged for a licenced wildlife centre to take care of the cub and reported the situation to the authorities

- The Conservation Office Service dispatched an officer who took possession of the bear and proceeded to euthanize it, despite being made aware of the offer of a home at the wildlife centre

Assn. for the Protection of Fur-Bearing Animals v. British Columbia, 2017 BCSC 2296

- The Association for the Protection of Fur-Bearing Animals subsequently filed a complaint with the Conservation Officer Service regarding the incident, asserting that the conservation officer had acted outside the scope of his legislative authority under the *Wildlife Act* in euthanizing the bear
- The COS dismissed the complaint and the Association petitioned the Court for a declaration that killing the bear cub was unlawful
- The Association argued that the *Wildlife Act* only permits a conservation officer to kill a wild animal that is at large and is likely to harm persons, property, wildlife or wildlife habitat (s.79)
- The Court rejected this argument, finding that the management of wildlife resources by conservation officers, as contemplated by the *Wildlife Act,* includes the authority to kill wildlife in circumstances broader than those set out in s. 79

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

- Remediation cost claims were filed against the plaintiffs for damages arising out of contaminants alleged to have migrated from property owned and used by them, to adjacent lands
- The plaintiffs filed a notice of civil claim against their insurers, Economical Mutual Insurance Company and Intact Insurance Company, alleging that the insurers were required to defend the remediation cost claims
- The insurers argued that they were not required to defend the remediation cost claims because the claims fell within exclusion clauses set out in their insurance policies

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

- The Court found that:
  - The plaintiffs were able to establish that pleadings underlying the remediation costs action against them fell within the initial grant of insurance coverage
  - The insurers were not able to establish that their insurance policies "clearly and unambiguously" excluded coverage of all of the remediation cost claims filed against the plaintiffs
  - As a result, the insurers were required to defend the remediation cost claims filed against the plaintiffs

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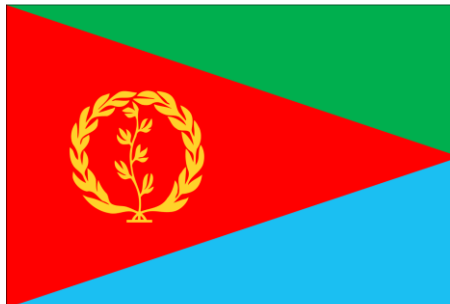
Araya v. Nevsun Resources Ltd., 2016 BCSC 1856, upheld on appeal in 2017 BCCA 401

- Plaintiffs were Eritrean workers who asserted that they were forced to work at a gold mine in Eritrea in inhumane conditions under the constant threat of punishment, torture and imprisonment
- The gold mine is partially owned by foreign subsidiaries of B.C. mining company Nevsun Resources (as to 60%) and partially owned by Eritrean state companies (as to 40%)
- The Eritrean workers eventually eventually fled to Canada as refugees and commenced an action in 2014 against Nevsun on the basis that Nevsun violated customary international law by aiding or permitting the use of forced labour, slavery, torture and other crimes against humanity



Araya v. Nevsun Resources Ltd., 2016 BCSC 1856, upheld on appeal in 2017 BCCA 401

- In 2016, Nevsun brought a number applications seeking to prevent the action from proceeding to trial on the grounds that:
  - Eritrea was the more appropriate forum for a trial.
  - The Court was precluded from adjudicating the legality of a foreign state's conduct.
  - Breaching customary international law was not an actionable wrong.

Araya v. Nevsun Resources Ltd., 2016 BCSC 1856, upheld on appeal in 2017 BCCA 401

- The Court of Appeal upheld all three decisions
- This decision could have significant ramifications for companies engaging in resource projects in foreign jurisdictions, particularly in developing countries
- Companies may find themselves in a B.C. courtroom having to answer for events that occurred half a world way in which they did not directly participate and which were legal in the country in question
- However, the Court has only permitted the action to proceed to trial, and has not made any determination on the merits of the claim

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QUESTIONS?

THANK YOU!

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