Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. *Distribution List*
☐
☐
☐
☐

THE PROSECUTION AND DEFENCE OF ENVIRONMENTAL OFFENCES

Stanley D. Berger

Release No. 4, December 2024

What's New in this Update:

This release adds case citations and additional valuable commentary to Chapters 1 (Constitutional and Administrative Law Considerations); 2 (Environmental Regulation); 3 (Hot Calls); 4 (Procedure and Evidence); 5 (The Defence of Due Diligence in Environmental Offences), 6 (Corporate and Personal Liability); and 7 (Sentencing Principles). Appendix WP (Words and Phrases) has also been updated.

THOMSON REUTERS®

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
E-mail CustomerSupport.LegalTaxCanada@TR.com

Highlights

- The Ontario Court of Appeal's decision in *Halton (Regional Municipality) v. Canadian National Railway Company*, 2024 ONCA 174 (Ont. C.A.), leave to appeal refused 2024 CarswellOnt 10266 (S.C.C.), recognizing the jurisdictional immunity of the proposed railway hub in the Region of Halton from provincial and municipal permits, licences and by- laws has been effectively upheld by the Supreme Court of Canada which, on July 11, 2024, dismissed the Region's leave to appeal.
- Intention was the significant factor in the B.C. Court of Appeal's decision to deny a claim to minerals asserted by the record holder to a mining claim in a lake area in *Skeena Resources Ltd. v. Mill*, 2024 CarswellBC 1905, 2024 BCCA 249 (B.C. C.A.). The record holder argued that the minerals at the bottom of the lake had been abandoned as waste. An operator's mine produced considerably more waste rock and tailings (materials) than expected and in order for the operator to minimize risks to the environment and public safety posed by the materials the operator entered a surface lease with the province for exclusive use of the lake and the surrounding area "for waste rock disposal site purposes". The surface lease made no other mention of ownership of the materials on land or under the lake. The materials were likely to generate acid if exposed to air and the solution arrived at with government authorities was to deposit the materials in the lake. The record holder of the lake applied to the Chief Gold Commissioner (CGC) for an order that its mineral claim included materials deposited at the bottom of the lake. The B.C. Court of Appeal reversed the Commissioner and lower court and held that the materials at the bottom of the lake were not abandoned as waste. The matter was referred back to the Commissioner for reconsideration. The Court of Appeal reasoned that there was no overt act of abandonment or intention on the operator's part to abandon the materials. The appellant did not relinquish the materials. The province did not grant the record holder ownership rights in the materials. The Surface lease did not purport to transfer anything to the province or deprive the operator of its ownership.
- With advanced technology it has become easier for regulators to verify the source of information provided to them. In *R. v. Follett*, 2024 CarswellOnt 8199 (Ont. C.J.), a Provincial Officer's Order required the occupier of a site to remove waste and to provide documents proving the waste had been disposed of properly by a licenced waste hauler. Bills of ladings from a licensed waste hauler were provided by the oc-

cupier of the site to the Ministry but it was subsequently determined that the bill of ladings were forged and the licensed hauler on the bills of ladings had no involvement with removing the waste. The occupier of the site claimed he had no knowledge of the forgery and pointed to the Follett, the engineer assisting him with the matter, as the source of the bills of lading. The engineer denied sending the bills of lading to the occupier of the site. The occupier of the site was charged with providing false information, but then provided further information to investigators that the engineer had provided the bills of lading using an email address other than his own. Using a sworn video statement from the occupier of the site and the email address used for the transfer of the bills of lading to the occupier of the site, a court order was obtained and served on Google LLC for information pertaining to this email address. Google LLC complied with the court order and expert analysis of the data provided by Google LLC provided proof that this email address was owned and used by the engineer. Follett pleaded guilty to giving or submitting false information and was fined $12,000.

- In *Canadian National Railway Company v. British Columbia*, 2024 BCCA 309 (B.C. C.A.), the Court of Appeal upheld a broader award of costs against CN rejecting the argument that fire control measures subject to compensation should be limited to those activities which objectively controlled a fire. The court interprets s. 27 (1)b of B.C.'s *Wildfire Act* (at para. 96): "It reveals a legislative intention to define fire control by looking at the purpose of the action, as opposed to looking at the outcome of the action. That is, the legislative intent was to capture more than simply the "effect" of fire control measures." "Fire control" has been added to Appendix WP Words and Phrases.
- In *25555 Ontario Inc. v. Ontario (Environment, Conservation and Parks)*, 2024 ONSC 4499 (Ont. S.C.J.), the Ontario Superior Court denied concurrent applications brought under s. 140 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, to quash the decision of the trial judge to delay ruling on an abuse of process motion before rejecting an application for a stay of proceedings for unreasonable delay. The applicant had argued that the delay was egregious and an abuse of process affecting the applicant's right to make full answer and defence. The applicant was charged under the *Endangered Species Act, 2007*, S.O. 2007, c. 6, with threatening and endangering listed species at risk while performing unlicensed work in clearing a subdivision for multiple dwelling units. The unreasonable delay extended well beyond the Supreme Court of Canada's 18-month ceiling to over 60 months and was precipitated by a dilatory request for disclosure as well as the COVID pandemic. The disclosure request was for

materials from the Parry Sound District Office of the Ministry of Natural Resources and Forestry related to other land development projects that involved at risk or endangered species. The prosecution was brought by the Ministry of Environment, Conservation and Parks. In dismissing the applicant's argument that the abuse of process allegation should have been determined before the application for unreasonable delay was dealt with, the court said (at para. 41):

> This application will necessarily require the presiding Justice of the Peace to consider the impact of this late disclosure on the applicants' ability to make full answer and defence at trial. It is reasonable, and not an excess of jurisdiction, for the Justice of the Peace to consider this application after hearing the trial itself.

With respect to the motion for a stay for unreasonable delay that too was dismissed. The Justice of the Peace held that: (a) the materials initially sought by the applicants were very broad; (b) the applicants had not been diligent in pursuing disclosure by way of a timely pre-trial application once the Crown position was known; (c) the materials were third party disclosure (the Ministry of Natural Resources and Forestry) and the applicants had not followed the proper procedure to notify and secure the attendance of the record holders; and (d) it was unreasonable for the applicants to delay setting a trial date in this matter pending receipt of the materials sought.

- In *ArcelorMittal Canada inc. c. R.*, 2023 QCCA 1564 (C.A. Que.), leave to appeal refused 2024 CarswellQue 10819 (S.C.C.), the Quebec Court of Appeal relying on the line of case law following the Supreme Court of Canada's decision in *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154 (S.C.C.), (see Chapter 3, paras. 3.16 and following) held that it was essential that toxicity and/or emission results be admissible in a regulatory regime reliant on self-reporting for that regime to effective. As to the reliability of the test results the Court of Appeal pointed to the trial judge's close consideration of the probative value to be attached to the results obtained (see par. 29 of its reasons). A further issue in *AcelorMittalCanada* concerned whether margins of error in lab analysis needed to be considered in the determination of whether the Crown had made its case. The Court of Appeal decided that unless there is a requirement in a licence, approval or regulation to take into account margins of error in the testing results, the results stand on their own and a margin of error needn't be applied to the results. Finally, one of the charged mining partners, a holding company claimed that they were not in control of the operations and therefore bore no liability for the *Fisheries Act* charges. This too was rejected by the Court. Article 2215, paragraph 1 of the *Civil Code of Québec*, provides that "[i]f there is no stipulation on the method of management, the partners are deemed to have given each other the power to

manage the affairs of the partnership". The court stated the following (at para. 74):

> This is a presumption that could not be rebutted by the testimony of Mr. Lavoie. A written agreement demonstrating that such an agreement existed between the appellants had to be filed as evidence to overturn it. In the absence of such evidence, the judge was right to conclude that 7623704 Canada Inc. was criminally liable.

- Following the trial on its merits, the City of Sudbury was successful in marshalling a due diligence defence to charges under Ontario's *Occupational Health and Safety Act* after a pedestrian was fatally injured while crossing the street. The court was persuaded that the City had maintained sufficient control over its contractor to meet the due diligence standard without assuming the role of the constructor. The City effectively monitored and supervised the contractor/constructor's work by attending progress meetings, performing site inspections, receiving public complaints and following up with the contractor on identified deficiencies in signage, insufficient crosswalks and fencing concerns. At the same time, the City recognized that it did not have the expertise of the contractor to comply with all regulations and paid a premium to the contractor to be hands on. The City could suspend work at the site and could fire workers but had not exercised these powers: *R. v. Greater Sudbury (City)*, 2024 CarswellOnt 13375, 2024 ONSC 3959 (Ont. S.C.J.). Had the City done so they likely would have been characterized as a constructor thereby increasing their legal responsibilities under the province's occupational health and safety laws.
- The Ontario Court of Appeal in *R. v. Foreshaw*, 2024 ONCA 177 (Ont. C.A.), rejected the appellant's argument that the trial judge failed to apply the *Mayuran* rule with respect to out of court confessions. In *R. c. Mayuran*, [2012] 2 S.C.R. 162, [2012] S.C.J. No. 31, 2012 SCC 31 (S.C.C.) at paras. 39-43, Abella J. said that considering the evidence as a whole, if the trier of fact believed the appellant's denial of his confession or was left with a reasonable doubt that he had made the alleged confession, the trier of fact must reject it and not rely on the alleged statement: The Ontario Court of Appeal in *Foreshaw* limited the *Mayuran* rule to cases where the out of court statement was critical to the outcome of the case and there was no other evidence of the defendant's guilt.
- In *Toronto and Region Conservation Authority v. Pickering Developments (Squires) Inc.*, 2024 ONCJ 317 (Ont. C.J.), the court rejected the prosecution's argument that maps, which formed part of O. Reg. 166/06, were the equivalent of an administrative order establishing the jurisdiction of the Conservation Authority and could not be collaterally challenged at trial .The court further rejected the prosecution's submis-

sion that the fact that the defendants' consultants had used the word "wetlands" 384 times in withdrawn permit applications to describe the land and an essential element of the charge against them, relieved the prosecution of the burden of proving that the property in question was wetland. Finally, the court stayed the charge on the basis that from the initial laying of the charge to the final scheduled day of trial 21 1/2 months attributed to the Crown had run in exceedance of the 18-month threshold in the Jordan decision for completing the trial. The defence was responsible for an additional three months of delay as a result of requests for additional time for judicial pre-trial and expert review of disclosure. The court determined that the exception to the 18-month threshold for trial delay on account of complexity was not met by the need to prove that the property was a wetland. The volume of material disclosure, some 1,800 pages also did not qualify for the complexity exception as half the pages were photos and this was only 10% of the pages in *R. v. Robert*, [2018] O.J. No. 732 (QL), another case where the court refused to find complexity. The court was concerned with the overall complacency in setting the trial dates and lack of judicial resources. The court commented as follows (at para. 29):

> Frustratingly, the remaining nineteen days of trial were scheduled to be heard intermittently over the following six months. Scheduling trials in such piecemeal, sporadic fashion is rather unsatisfactory. Significant gaps in time between hearing dates make it difficult to present, respond to, and digest evidence.

- In *0793663 B.C. LTD. v. Government of British Columbia*, 2024 BCFAC 9 (B.C. Forest Appeals Comm.), the B.C. Forest Appeals Commission considered that the principle of fairness should prevail regardless of whether the *Kienapple* principle of duplicative convictions applied to reduce total administrative monetary penalties from $110,000 to $60,000. The charges included s. 37 of the *Forest Planning and Practices Regulation*, B.C. Reg. 14/2004 (FPPR) - carrying out a primary forest activity in such a way that causes a landslide that has a material adverse effect on forest resources; s. 39 of the FPPR - failing to maintain natural surface drainage pattern during and after construction; s. 46 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69 - carrying out a forest practice that results in damage to the environment); and s. 79 of the FPPR - maintenance requirements general. The Commission concluded that "the only activity at issue in this appeal is the Appellant's failure to adequately maintain or winterize the Road" (at para. 31). Section 39 had an additional element to s. 79 - that drainage be impacted by the failure to adequately maintain a road. The Commission concluded that "where one action results both in a more general noncompliance and a more particular noncompliance, penalties should not be awarded for both unless there is evidence of legislative

intent to that effect" (at para. 34.) Consequently, the lesser penalty imposed of $10,000 for failing to maintain the road was subsumed in the greater penalty of $40,000 for the failure to maintain the road which resulted in an impact to natural drainage patterns. The Commission, further recognizing different elements under s. 39 (drainage) and s. 37 (landslide causing damage to forest resources) proceeded to subsume these offences and their penalties under the $60,000 penalty under s. 46 of the Act (forest practices causing damage to the environment).

- The B.C. Environmental Appeal Board in *KMS Tools and Equipment Ltd. v. Director, Environmental Management Act*, 2024 BCEAB 12 (B.C. Environmental App. Bd.), considered an administrative penalty for non-compliance with Recycling Regulation, B.C. Reg. 449/2004, which required producers of packaging and printed paper products to have an approved extended producer responsibility plan (the "EPR Plan"), or to appoint an agency to carry out extended producer responsibility ("EPR") duties on its behalf. The appellant argued that it was never told why 99.75% of B.C. businesses were exempt from the regulation but it was not provided with an exception. It submitted that its competitors had an unfair advantage over them. The Board rejected this argument stating (at para. 58):

  > The questions of how many businesses in BC are captured by the Regulation and whether the Stewardship List accurately reflects all businesses in BC that should be captured by the Regulation are not, however, before me. The issues before me for decision are whether the Appellant is captured by the Regulation and, if so, has it contravened the Regulation. The evidence in this appeal demonstrates the Appellant is a business that is captured by the Regulation. Indeed, the Appellant does not dispute this.

  The Board upheld the $19,000 administrative penalty.

- As already indicated in *Skeena Resources Ltd. v. Mill*, 2024 CarswellBC 1905, 2024 BCCA 249 (B.C. C.A.), the record holder of a lake applied to the Chief Gold Commissioner (CGC) for an order that its mineral claim included materials deposited at the bottom of the lake. The B.C. Court of Appeal reversed the Commissioner and lower court and held that the materials at the bottom of the lake were not abandoned as waste. In Appendix WP Words and Phrases, the definition of abandonment is reviewed.

- In MKY Holdings Ltd. v. Administrator, Integrated Pest Management Act, 2024 BCEAB 26 (B.C. Environmental App. Bd.), the B.C. Environmental Appeal Board determined that a common laundry detergent was not a pesticide as defined in the Integrated Pest Management Act, S.B.C. 2003, c. 58 ("IPMA"). The case is reviewed under Words and Phrases for the interpretation of the words "Pesticide" and "Pest":

  > [32] I am not persuaded by the Respondent's submission that how a substance or material is used, not its intended use or the purpose for

which it was manufactured and sold, brings it into the regulation of the IPMA on the basis that it might have some properties capable of dealing with a pest: in this case, moss.

. . .

The legislation requires that these materials or substances also pose an unreasonable risk to human health or the environment for the legislative scheme to be enacted.