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BUSINESS GUIDE TO ENVIRONMENTAL LAW

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Business Guide to Environmental Law addresses business liability regarding Canadian environmental law. It is designed to aid legal counsel as well as senior executives in dealing with legal situations regarding the environment. The topically organized presentation of issues includes environmental issues in real estate transactions, directors' and officers' liabilities, transportation of dangerous goods, extended producer liability, labelling, advertising, patents and trademarks.

Release Highlights

This release features updates to the case law and commentary in Chapters 2 (Environmental Liabilities of Corporate Directors and Officers), 4 (Proactive Environmental Management: More Than Staying Out of Jail) and 8 (Transportation of Dangerous Goods).

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Case Law Highlights

- **Environmental Liabilities of Corporate Directors and Officers—“Environmental Crimes”: Directors’ And Officers’ Liabilities To Pay Fines Or Serve Jail Terms—Sentencing—Ontario—Ontario Sentencing Considerations Since 200—Ontario Sentencing Cases**—In *R. v. Collingwood Prime Realty Holding Corp.*, the Ontario courts dealt with the issue of imposing a jail term in relation to offences committed under the *Canadian Environmental Protection Act*. A corporation and its sole director, Issa El-Hinn, were charged with failing to dispose of equipment containing polychlorinated biphenyls (PCBs) and with a failure to comply with an Environmental Protection Compliance Order. The equipment was not removed until four years after the initial inspection. The Crown elected to prosecute the charges as summary conviction offences rather than as indictable offences. The accused pleaded guilty. The sentencing Justice of the Peace imposed a \$200,000 fine on the corporation, and a \$220,000 fine and 45-day intermittent jail sentence on the director. The two guilty parties appealed the sentence. On appeal, the Ontario Superior Court of Justice found that the Justice of the Peace erred in principle in his application of the principle of parity, finding that *R. v. Sinclair* (2009), 45 C.E.L.R. (3d) 222, 2009 CarswellOnt 4894 (Ont. C.J.) was distinguishable from the circumstances of the case. Unlike *Sinclair*, the appellants in this case had a lower degree of culpability in that Sinclair was “knowingly and intentionally polluting the environment” and operating under a profit motive at the expense of the environment while the environmental harm in this case arose from delay or negligence in an attempt to avoid clean-up costs. Though there were “unconscionable delays” in compliance, the appellant pleaded guilty and was remorseful. In sentencing the defendant on a *de novo* basis, the appeal judge declined to exercise his discretion to impose a jail sentence. The summary conviction appeal judge considered factors including the availability of a conditional sentence for two of the charges and the existence of the COVID-19 crisis, which posed a threat to an individual in jail. The summary conviction appeal judge also reduced the fines imposed by the Justice of the Peace by imposing concurrent fines for similar offences. The Crown appealed the judgment of the summary conviction appeal court for restoration of the original sentence as to fines and jail term. The Ontario Court of Appeal reversed in part the decision of the Ontario Court of Justice by restoring the original fines, noting that “[i]t was not an error for the sentencing judge to impose separate fines for each count. Concurrent sentences apply only to incarceration.” However, the Court of Appeal upheld the non-imposition of a jail term, finding that incarceration was not proportional to the offence, which involved negligence rather than “deliberate actions to harm the environment” as in *Sinclair*; *R. v. Collingwood Prime Realty Holdings Corp.* (2021), 47 C.E.L.R. (4th) 1, 2021 CarswellOnt 13503 (Ont. C.A.), additional reasons (2021), 2021 CarswellOnt 13785 (Ont. C.A.), reversing in part 2020 CarswellOnt 6642 (Ont. S.C.J.), varying sentence imposed by Justice of Peace M. Duggal dated August 21, 2018 and September 12, 2018.
- **Proactive Environmental Management: More Than Staying Out Of Jail—Legal Due Diligence: What Standard Of Care Do Courts**

And Tribunals Expect Management To Meet?—What Constitutes Due Diligence?—Due Diligence and Sentencing—In *R. v. Gibson Energy ULC*, Gibson Energy ULC was ordered to pay a fine of \$1.5 million after being convicted of two charges under the *Fisheries Act*, even though potentially significant environmental harm was fortuitously avoided. The trial convictions and subsequent sentencing decision in the matter illustrate the serious consequences of a failure by those owning or operating facilities that have the potential to contaminate the environment to put in place, maintain and keep updated a professionally prepared, substantive and detailed due diligence plan. Such a plan should include methods and equipment for carrying out due diligence measures appropriate to the environmental risks that are foreseeable from operation of the facility; the sensitivity of the surrounding environment; and adequate training of all employees to appreciate the environmental risks that could arise and to be ready to implement contingency and emergency measures set out in the plan forthwith after incidents occur. The failures of the accused company in this case to prepare an adequate due diligence plan in advance, and to maintain equipment and ensure adequate training of key personnel central to due diligence mitigation measures being carried out when the foreseeable risk occurred, were not only responsible for its conviction but also had a major influence on the fine and sentencing order imposed. In *Gibson*, the court found lack of due diligence in that Gibson was unable to shut off the water due to serious design flaws and maintenance issues with respect to their fire suppression system, which included paving over a key valve connecting Gibson’s fire suppression system to the County’s water main; reliance on the County to shut off necessary valves to isolate leaks in the system; lack of any policies or adequate emergency response plans in place to address any adverse effects of chlorinated water; and “complete lack of knowledge about the toxicity of chlorinated water” to fish: *R. v. Gibson Energy ULC* (2019), 2019 CarswellAlta 1831, 2019 ABPC 191 (Alta. Prov. Ct.) (trial decision); *R. v. Gibson Energy ULC* (2021), 2021 CarswellAlta 1155, 2021 ABPC 124 (Alta. Prov. Ct.) (sentencing decision).

- **Transportation of Dangerous Goods—The Scope of Regulation—Applicability of Federal and Provincial Legislation—**In *R. v. Alex Goerk and Carling Propane*, a propane company and its owner appealed fines imposed after they pleaded guilty in the Ontario Court of Justice on three charges under the federal *Transportation of Dangerous Goods Act, 1992* (TDGA). One of the arguments raised on appeal was that the trial judge erred in considering general deterrence in sentencing since this was a “test case” due to what was described as “industry-wide confusion as to which governing body had jurisdiction over the hoses.” The appellants argued that “the propane industry at large believed that the rules of the [Ontario] Technical Standards and Safety Authority (TSSA) and not Transport Canada governed the hoses attached to the storage tanks.” The Crown argued that trial counsel had not raised the test case issue earlier; the Crown had not indicated any interest in clarifying a question of law; and that general deterrence was the paramount sentencing consideration under public welfare statutes. The Ontario Superior Court of Justice upheld the fines, finding that despite the brevity of the trial judge’s reasons, it was clear that the trial judge had “concluded the convictions were ‘contraventions of a public welfare

and safety statute’, and that the overriding sentencing consideration was specific and general deterrence.” Moreover, it was clear that the sentencing judge had taken into account the defence position that “a modest fine was appropriate because of the suggestion that the Act had uncertainty requiring judicial consideration”: *R. v. Alex Goerk and Carling Propane* (March 17, 2021), Doc. CV-19-002755-00AP, 2021 CarswellOnt 3586, 2021 ONSC 2014 (Ont. S.C.J.).

ProView Developments

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