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**REGULATORY AND  
CORPORATE LIABILITY**

**Archibald • Jull • Roach**

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This publication provides an important perspective on the liability of organizations in regulatory and criminal contexts, and deals with issues that are relevant to many areas of the law including occupational health and safety, the environment, competition and securities. Expert guidance and insightful analysis is provided on the basis for regulatory and criminal liability, how regulations apply to organizations and individuals, how the principles of sentencing will impact upon a given scenario, and navigating the regulatory and criminal liability systems in Canada.

This release features updates to Appendix B - Due Diligence Table.

- **Due Diligence Table - Offences Against Environment - Offences under Federal Legislation - Depositing Deleterious Substances in Water** - On the defence of due diligence, the reasons given by the Summary

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Conviction Appeal Court judge were somewhat confusing on the essential matter of whether she was saying that the trial judge made an error in law or that the decision was unreasonable or could not be supported by the evidence. She would not have been saying both. It would have been better to say which assessment she was making. She said that the trial judge made an error in interpretation and application of the due diligence defence. Then she critiqued the judge's work by saying: (1) that a perfunctory inquiry is not sufficient; (2) that the evidence before the trial judge was scant to say the least; and then (3) what the evidence was. She found (4) that Brookfield did not establish that they took all care which a reasonable person might have been expected to take in the circumstances; and (5) that the trial judge ignored evidence by Brookfield as to how they took precautions when using their other properties. She then found that Brookfield did not establish due diligence "on the balance of probabilities". She found that the trial judge erred in applying the standard of due diligence and in her opinion thus erred at law. She then found that the trial judge's verdict was unsupported by the evidence and was therefore an unreasonable verdict in the circumstances. This seems to merge two assessments – for error of law under s-s.(ii) of s. 686(1)(a) and for unreasonable verdict or not supported by the evidence under s. 686(1)(a)(i) of the *Criminal Code*. However, from reading the whole section of the reasons on due diligence, the Court of Appeal was satisfied the Summary Conviction Appeal Court judge was assessing whether the verdict was reasonable: *R. v. Brookfield Gardens Inc.* (2018), 144 W.C.B. (2d) 345, 2018 PECA 2, 2018 CarswellPEI 4 (P.E.I. C.A.).

- **Due Diligence Table - Occupational Health and Safety Offences - Failing as an Employer to ensure that the prescribed measures and procedures carried out in a workplace** - The judge agreed with Trisan's interpretation of Ontario *Occupational Health and Safety Act* s. 106(1) which would permit an employee to assume duties in addition to those of a signaller during a period of work, so long as the employee acted exclusively as a signaller when signalling is required. This interpretation, it was suggested, adequately addresses worker's safety while at the same time permitting employers to avoid substantial periods when signallers would otherwise necessarily be idle. Clearly, there is a need for a sharp division between engaging in work as a signaller and that same person carrying out any other employment responsibilities. However, that division could be and, with the exception of September 10, 2012, was maintained under Trisan's system. Employees properly trained to act as signallers are not lacking in an understanding of the hazards of the role for

themselves, their fellow workers and the persons being signalled, nor of the necessities of focus and visibility, regardless of whether they have been assigned only the job of signaller. Trisan's admitted failure to implement a procedure in its yard on September 10, 2012 whereby the worker, as designated signaller, was prohibited from carrying out any other duties did not preclude proof by Trisan of its due diligence. The issue was whether Trisan was duly diligent in its effort to ensure that, at the "precise and critical moment", there was present a signaller possessing all s. 106(1) characteristics: *Ontario (Ministry of Labour) v. 614128 Ontario Ltd. (Trisan Construction)* (2018), 147 W.C.B. (2d) 49, 2018 ONCJ 168, 2018 CarswellOnt 3863 (Ont. C.J.).

