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ANNOTATED GUIDE TO THE CANADIAN ENVIRONMENTAL PROTECTION ACT

Joseph F. Castrilli

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Publisher's Special Release Note 2021

The pages in this work were reissued in June 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the June 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred.

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This work unravels the complications of the Canadian Environmental Protection Act, offering a practical explanation of how each of the Act's more than 356 sections operate and relate to one another. This information is crucial for those charged with implementing the Act and for those who need to know how it can affect one's clients or business. The only annotated resource on the subject, it includes:

- A section-by-section explanation of the entire *Act*
- An analysis of key reported case law
- A consolidation of the *Act's* six schedules
- Annotations to the List of Toxic Substances
- The text of key regulations, with commentary

What's New in this Update:

- Commentary in has been updated in the Introduction and annotations to the *Canadian Environmental Protection Act, 1999*. Additionally, Appendix D20 (Notice with Respect to Reporting of Greenhouse Gases (GHGs) for 2021) has been updated.

Highlights:

Canadian Environmental Protection Act, 1999—Controlling Toxic Substances—Interpretation—Toxic Substances—Commentary—In *Responsible Plastic Use Coalition v. Canada (Environment and Climate Change)*, 2022 FC 377, the Federal Court on a motion brought by the respondent Canada struck all of one expert affidavit and part of another (with leave to amend in both cases) filed in support of the applicants' application for judicial review. The Federal Court noted that the judicial review application related to three decisions by the federal ministers of health and environment under Part 5 of *CEPA, 1999*, which Part is "intended to protect the environment and human health by preventing and managing risks posed by toxic or harmful substances". The three decisions resulted in the addition of all "Plastic Manufactured Items" ("PMIs") to the List of Toxic Substances under Schedule 1 of *CEPA, 1999*. The judicial review application questioned whether a "rigorous, scientific, risk-based assessment" was conducted on the toxicity of PMIs in accordance with s. 64 of *CEPA, 1999*. The basis for the Federal Court decision on the motion in part was that the affidavits purported to give opinion evidence on domestic law, particularly s. 64, and thereby usurped the role of the Court. The Federal Court found that the first expert affidavit did not review the

requirements of s. 64, or the decision-making process behind the order listing plastic manufactured items in Schedule 1 of the Act, in a neutral and uncontroversial way but impermissibly engaged in “spin and advocacy”. Accordingly, such evidence could not be considered background information (an exception to the rule prohibiting on a judicial review application the admission of evidence not before the decision-maker). By opining on the requirements of s. 64 of the Act, and whether they were met, the first expert affidavit also usurped the role of the decision-makers as fact-finders and merits-deciders. Thus, the first expert affidavit was struck in its entirety by the Federal Court because: (1) it sought to interpret the normative content of s. 64 by opining on what requirements must be met for a substance to be considered “toxic”; and (2) examined whether the purported requirements of s. 64 were met in the case at bar. Because these inadmissible objectives were so interwoven into the affidavit as a whole the first expert affidavit was struck in its entirety. The second expert affidavit suffered from many of the same problems as the first one, including: (1) providing opinions on domestic law; (2) providing new evidence; or (3) attacking the correctness of the decision. Portions of the second expert affidavit were saved because they commented on the merits of prior risk assessments under *CEPA, 1999*, which the Federal Court found might be useful background for the panel hearing the merits and they provided some context for the historical operation of the Act.

ProView Developments

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