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THE PROSECUTION AND DEFENCE OF ENVIRONMENTAL OFFENCES Stanley D. Berger Release No. 2022-2, April 2022

Publisher's Special Release Note 2021

The pages in this work were reissued in August 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 August 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. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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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); 4 (Procedure and Evidence); 6 (Corporate and Personal Liability), and 7 (Sentencing Principles). The Sentencing Tables in Appendix A have been updated to include environmental legislation from the Provinces of British Columbia, Alberta and Québec. Words and Phrases and the Index have also been updated.

Highlights

- The B.C. Superior Court in *British Columbia (Environmental Management Act) v. Canadian National Railway Company*, 2022 BCSC 135 (B.C. S.C.) concluded that the Environmental Appeal Board decision (*Canadian National Railway and British Columbia (Delegate of the Director, Environmental Management Act), Re*, 2020 CarswellBC 1398 (B.C. Environmental App. Bd.)), application for judicial review allowed *British Columbia (Environmental Management Act) v. Canadian National Railway Company*, 2022 BCSC 135 (B.C. S.C.)) shielding CNR from orders of the provincial Director of the Environmental Emergency Program on grounds of interjurisdictional immunity was incorrect. The orders required disclosure of the number of railcars used to transport crude oil by rail within the province per route, per week, the volume of crude oil transported, the location where the shipments entered and exited the province, the location of shipping or receiving facilities and the volumes shipped and received at the facilities. The court summarized its lengthy analysis with the following (at para. 395):
 - . . . there is long standing authority that permits provincial regulation of interprovincial railways and federal undertakings for the purposes of protecting the environment for the general public, beyond the specific operations of federal undertakings such as interprovincial railroads. As stated in [*Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367 (J.C.P.C.)], the Railways do not cease to be part of the provinces in which they are situated. In my view, the impugned legislation does not trench on a core of the federal undertaking of interprovincial railways.
- On December 21, 2021, the Government of Canada brought in draft Single Use Plastics Regulations (see Canada Gazette, Part I, Volume 155, Number 52), which would prohibit the manufacture, import, and sale of six categories of single use

plastics (i.e., checkout bags, cutlery, foodservice ware made from or containing problematic plastics, ring carriers, stir sticks, and certain non-flexible straws). The prohibitions aside from record keeping and record retention do not apply in respect of single use plastic manufactured items that are manufactured, imported or sold for the purposes of export. The proposed Regulations would be made under the *Canadian Environmental Protection Act*, so enforcement officers would, when verifying compliance with the proposed Regulations, act in accordance with the Compliance and Enforcement Policy for *CEPA*, 1999 (see Chapter 7, § 7.80). The commentary period on the proposed regulations expires at the end of February 2022. The prohibitions on manufacture and import of all six single-use items as well as the prohibition on the sale of straws would come into force one year after the proposed Regulations are registered. The prohibition on the sale for all other single-use items would come into force two years after the proposed Regulations are registered.

- Chapter 2, under designated waste exemptions, now includes a new section on contaminated property and more specifically a key trigger for excavating and transporting contaminated soil, i.e., changing the use of land from commercial or industrial to residential or agricultural. Failure to follow the detailed legal framework contained in Part XV.1 Ontario's EPA and the Record of Site Condition regulation could result in significant offences and penalties. Similarly, reference is made to s. 120(17) of British Columbia's *Environmental Management Act*, S.B.C. 2003, c. 53, which imposes significant fines and jail terms for a vendor of land who must provide a site disclosure statement to the purchaser and either misleads authorities, fails to submit the appropriate paperwork or fails to follow-up with remedial measures when the vendor knows or reasonably should know that the real property has been used for a specified industrial or commercial use (s. 40(6)).
- While environmental protection legislation and insurance policies define a "pollutant" in terms of the subject matter (see, e.g., s. 91(1) of the Ontario E.P.A.'s spills section, i.e., "*a contaminant*" with some exceptions), it is the risk of harm to the outside environment which is critical to the qualification as a pollutant. Exclusion from coverage for "pollution" in a commercial general Liability (CGL) insurance policy will depend on whether the work for which the policy was obtained involves the risk of harm to the outside environment. In *Hemlow Estate v. Co-operators General Insurance Company*, 2021 ONCA 908 (Ont. C.A.), the estate of a deceased contractor sought indemnity under the contractor's CGL policy from claims of negligence, nuisance and breach of contract for property damage, business loss and out-of-pocket expenses. The

contractor had opened a valve releasing pressurized ammonia killing him and causing property damage. The insurer unsuccessfully argued that because the property damage was caused by a “pollutant” the exclusion clause applied. The Ontario Court of Appeal distinguished *Hemlow* from its previous reasons in *ING Insurance Co. of Canada v. Miracle*, 2011 ONCA 321 (Ont. C.A.) (“*ING*”), focussing on the nature of the claim rather than the substance that caused the claim. In *ING* the damages sought in the Statement of Claim were to cover the loss in value of the plaintiff’s adjacent property, the costs of conducting an environmental assessment, and the costs of remediating the property — all because of gas that leaked onto the plaintiff’s property. These claims fitted comfortably within the historical purpose of the pollution exclusion. By contrast, in *Hemlow*, it was alleged that the deceased contractor’s negligence “was precisely the type of claim for which parties obtain CGL policies. It was the type of risk that Mr. Hemlow sought coverage for. The fact that the damage causing substance was a pollutant did not change the nature of the claim” (at para. 23).

- In Alberta, the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6, regulates oil and gas resources and more particularly safe practices for the production, storage and disposal of substances and the suspension and abandonment of wells. Section 106 (1) gives the Alberta Energy Regulator broad authority to declare a contravention and naming those directors and officers who in the Regulator’s opinion are in control at the time of the contravention. No prosecution can be initiated without the written consent of the Regulator (s. 107(2)). Directive 88, Licensee Life-Cycle Management, issued on December 1, 2021 (at <https://www.aer.ca/regulating-development/rules-and-directives/directives/directive-088>), introduces a Licensee Management Program, which determines how licensees will be managed throughout the energy development life cycle. As part of that Program the licensee capability assessment (LCA) assesses the capabilities of licensees to meet their regulatory and liability obligations across the energy development life cycle. The results from the LCA informs regulatory decisions regarding the licensees and could be critical to assessing director’s and officer’s liability. The Act does provide a due diligence defence.
- The Sentencing Tables, which provide ranges of fines and jail terms, has been expanded in this release to include not just the Ontario and Federal environmental laws, but the main environmental legislation from the Provinces of British Columbia, Alberta and Québec. The intent is to further expand the service in future release to include sentencing tables for the other provinces and territories. The administrative monetary penalty regimes in British Columbia, Alberta and

Québec have also been expanded so that their basic structure is now described, and range of penalties are provided.

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